NORTH CAROLINA REPORTS

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SUPREME COURT OF NORTH CAROLINA

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THE SUPREME COURT
OF
NORTH CAROLINA

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RICHARD D. DIETZ
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ALLISON J. RIGGS

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SARAH PARKER
MARK D. MARTIN
CHERI BEASLEY

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G. K. BUTTERFIELD JR.
ROBERT F. ORR
GEORGE L. WAINWRIGHT JR.
EDWARD THOMAS BRADY
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TRIAL JUDGES OF THE GENERAL COURT OF JUSTICE

SUPERIOR COURT DIVISION

DISTRICT	JUDGES	ADDRESS
	First Division	
1	Jerry R. Tillett[1]	Manteo
	R. Andrew Womble[2]	Manteo
	Eula Reid[3]	Elizabeth City
2	Wayland Sermons	Washington
3	Jeffery B. Foster[4]	Greenville
	Marvin K. Blount III	Greenville
7A	Brenda Branch	Halifax
7B	Cy A. Grant Sr.	Ahoskie
8A	Timothy W. Wilson	Rocky Mount
8B	Lamont Wiggins	Rocky Mount
8C	William D. Wolfe	Wilson
11	John Dunlow	Oxford
	Cindy Sturges	Louisburg
16	Michael O'Foghludha	Durham
	Josephine Kerr Davis	Durham
	Brian K. Wilks	Durham
	Shamieka L. Rhinehart	Durham
	Second Division	
4	Joshua W. Wiley[5]	New Bern
	Clinton D. Rowe[6]	New Bern
	Bob R. Cherry[7]	New Bern
	Augustus D. Willis IV[8]	New Bern
5	Henry L. Stevens	Wallace
	Robert C. Roupe	Jacksonville
6	R. Kent Harrell	Burgaw
	Frank Jones	Wilmington
	Richardo Jensen[9]	Wilmington
9A	Imelda J. Pate	Kinston
9B	William W. Bland[10]	Goldsboro
	Billy J. Strickland II[11]	Goldsboro
15A	C. Ashley Gore	Whiteville
15B	Jason C. Disbrow	Southport
20	James Gregory Bell	Lumberton
	Tiffany P. Powers	Lumberton
	Third Division	
10	Paul C. Ridgeway	Raleigh
	G. Bryan Collins Jr.	Raleigh
	A. Graham Shirley[12]	Raleigh

DISTRICT	JUDGES	ADDRESS
	Rebecca W. Holt[13]	Raleigh
	Vinston M. Rozier	Raleigh
	Keith O. Gregory	Raleigh
	Jennifer H. Bedford[14]	Apex
	Sean A. Cole[15]	Raleigh
12	C. Winston Gilchrist	Lillington
13	Thomas H. Lock	Smithfield
	Paul A. Holcombe	Smithfield
14	James F. Ammons Jr.	Fayetteville
	Claire Hill[16]	Fayetteville
	Gale M. Adams	Fayetteville
	George R. Hicks	Fayetteville
	Stephen C. Stokes[17]	Fayetteville
17	D. Thomas Lambeth[18]	Burlington
	Andy Hanford[19]	Graham
	C. Douglas Green[20]	Graham
21	Stephan R. Futrell	Rockingham
	Dawn Layton	Rockingham
28	Kevin M. Bridges[21]	Oakboro
	Patrick Nadolski	Mount Gilead
	Adam M. Elkins[22]	Albemarle
29	Michael A. Stone	Laurinburg
	Regina M. Joe[23]	Raeford
	Warren McSweeney[24]	West End
30	Jonathan Perry	Monroe
	Matthew B. Smith	Monroe
37	James P. Hill	Asheboro
	W. Taylor Browne	Asheboro
	Fourth Division	
18	R. Allen Baddour	Chapel Hill
	Alyson A. Grine	Chapel Hill
22	Stanley L. Allen[25]	Sandy Ridge
	John M. Morris[26]	Reidsville
	Jason E. Ramey[27]	Wentworth
23	Angela B. Puckett	Westfield
24	R. Stuart Albright	Greensboro
	William Wood	Greensboro
	Lora C. Cubbage[28]	Greensboro
	Stephanie L. Reese	High Point
	Tonia A. Cutchin	Greensboro
	Lisa Y. Johnson-Tonkins[29]	Greensboro
25	Martin B. McGee	Concord
27	Michael S. Adkins	Salisbury
31	David L. Hall[30]	Winston-Salem
	L. Todd Burke	Winston-Salem
	Eric C. Morgan	Kernersville
	Richard S. Gottlieb	Winston-Salem
	Aaron Berlin	Winston-Salem
32	Joseph Crosswhite	Statesville
	William Long	Statesville
33	Lori Hamilton	Mocksville

DISTRICT	JUDGES	ADDRESS
	Robert A. Broadie	Lexington
34	Michael Duncan	Wilkesboro
	Fifth Division	
19	Nathaniel J. Poovey	Newton
	Gregory R. Hayes[31]	Hickory
	Sherri W. Elliott[32]	Newton
26	Carla Archie	Charlotte
	Karen Eady-Williams	Charlotte
	Louis A. Trosch	Charlotte
	George Bell	Charlotte
	Reggie McKnight	Charlotte
	Matthew J. Osman	Charlotte
	Donald R. Cureton	Charlotte
	David H. Strickland	Charlotte
35	Ted W. McEntire[33]	Spruce Pine
	Gary Gavenus	Burnsville
	R. Gregory Horne[34]	Boone
36	Robert C. Ervin[35]	Morganton
	Daniel A. Kuehnert[36]	Morganton
38	David Phillips	Gastonia
	Justin N. Davis	Gastonia
39	W. Todd Pomeroy	Lincolnton
	Sally Kirby-Turner	Shelby
40	Alan Z. Thornburg	Asheville
41	J. Thomas Davis	Forest City
42	Peter B. Knight	Hendersonville
43A	William H. Coward[37]	Highlands
	Tessa S. Sellers[38]	Hayesville
43B	Bradley B. Letts[39]	Hazelwood
	Roy Wijewickrama[40]	Waynesville

SPECIAL JUDGES

Louis A. Bledsoe III[41]	Charlotte
Anthony Todd Brown[42]	Charlotte
Timothy Pennell Broyhill[43]	Winston-Salem
Adam M. Conrad	Charlotte
Craig Croom	Raleigh
Samuel Thomas Currin II[44]	Raleigh
Mark A. Davis	Raleigh
Julianna T. Earp	Greensboro
Elizabeth Freshwater-Smith[45]	Wilson
Matthew T. Houston[46]	Raleigh
Jessica Locklear[47]	Lumberton
Quintin McGee	Leland
Michael L. Robinson	Winston-Salem
A. Graham Shirley[48]	Raleigh
Clifton H. Smith[49]	Hickory
Clayton D. Somers[50]	Durham
Troy J. Stafford[51]	Statesville

JUDGES	ADDRESS
William T. Stetzer[52]	Gastonia
Hoyt G. Tessener[53]	Raleigh
Steven R. Warren	Asheville
Edwin Graves Wilson Jr.	Hillsborough

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Benjamin G. Alford	New Bern
Sharon T. Barrett	Asheville
Michael E. Beale	Rockingham
Lisa C. Bell	Columbus
W. Robert Bell	Charlotte
Christopher W. Bragg	Monroe
Susan E. Bray	Greensboro
Forrest Donald Bridges	Shelby
Allen Cobb	Wilmington
John O. Craig III	High Point
Julia Lynn Gullett[54]	Statesville
Nathan Hunt Gwyn	Monroe
James E. Hardin Jr.	Hillsborough
Gregory R. Hayes[55]	Hickory
Henry W. Hight Jr.	Henderson
Claire Hill[56]	Fayetteville
Alma Hinton	Roanoke Rapids
Jeffrey P. Hunt	Brevard
Robert F. Johnson	Burlington
Timothy S. Kincaid[57]	Newton
Hugh Lewis	Charlotte
Vance Bradford Long	Asheboro
A. Moses Massey	Mount Airy
Jerry Cash Martin	Pilot Mountain
James W. Morgan	Shelby
Calvin Murphy	Charlotte
J. Richard Parker[58]	Manteo
William R. Pittman	Raleigh
Mark Powell	Hendersonville
Eula Reid[59]	Elizabeth City
Ronald E. Spivey	Winston-Salem
Tanya T. Wallace[60]	Rockingham

RETIRED/RECALLED JUDGES

W. Douglas Albright	Greensboro
Anthony M. Brannon	Durham
Stafford G. Bullock[61]	Raleigh
Jesse B. Caldwell III	Gastonia
J. Carlton Cole	Hertford
H. William Constangy	Charlotte
C. Preston Cornelius	Mooresville

JUDGES	ADDRESS
Lindsay R. Davis	Greensboro
Richard L. Doughton	Sparta
B. Craig Ellis	Laurinburg
Larry G. Ford	Salisbury
James L. Gale[62]	Greensboro
Beecher R. Gray	Durham
Zoro J. Guice Jr.	Hendersonville
Thomas D. Haigwood	Greenville
Charles H. Henry	Jacksonville
Howard E. Manning Jr.	Raleigh
John E. Nobles Jr.	Morehead City
Marvin P. Pope	Asheville
John W. Smith	Raleigh
James C. Spencer	Burlington
Quentin T. Sumner[63]	Rocky Mount
Mary Ann Tally	Fayetteville
Anna Mills Wagoner	Salisbury
Ralph A. Walker Jr.	Raleigh
William Z. Wood Jr.	Lewisville

[1]Retired 30 April 2025. [2]Became Senior Resident Judge 1 May 2025. [3]Sworn in 30 May 2025. [4]Became Senior Resident Judge 27 March 2025. [5]Retired 29 February 2024. [6]Became Senior Resident Judge 1 March 2024. [7]Sworn in 1 January 2023. [8]Sworn in 26 April 2024. [9]Sworn in 21 February 2024. [10]Retired 31 December 2024. [11]Sworn in 1 January 2025. [12]Resigned 31 December 2024. [13]Retired 31 December 2024. [14]Sworn in 1 January 2025. [15]Sworn in 1 January 2025. [16]Retired 31 December 2024. [17]Sworn in 28 March 2025. [18]Retired 1 October 2024. [19]Became Senior Resident Judge 1 October 2024. [20]Sworn in 1 January 2025. [21]Retired 31 December 2024. [22]Sworn in 1 January 2025. [23]Sworn in 8 December 2023. Retired 31 December 2024. [24]Sworn in 1 January 2025. [25]Died 27 December 2023. [26]Became Senior Resident Judge 28 December 2023. [27]Became Senior Resident Judge 1 January 2025. [28]Resigned 18 March 2025. [29]Sworn in 15 May 2025. [30]Became Senior Resident Judge 1 January 2025. [31]Retired 1 September 2024. [32]Sworn in 18 December 2024. [33]Became Senior Resident Judge 5 June 2025. [34]Retired 31 December 2024. [35]Retired 31 August 2025. [36]Became Senior Resident Judge 1 September 2025. [37]Retired 1 February 2024. [38]Sworn in 1 May 2024. [39]Retired 20 September 2024. [40]Sworn in 2 December 2024. [41]Retired 31 December 2024. [42]Sworn in 20 December 2024. [43]Sworn in 20 September 2024. [44]Sworn in 6 January 2025. [45]Sworn in 1 January 2024. [46]Sworn in 1 January 2024. [47]Sworn in 1 January 2024. [48]Sworn in 27 February 2025. [49]Sworn in 1 January 2024. [50]Sworn in 1 January 2024. [51]Sworn in 16 August 2024. [52]Sworn in 1 January 2024. [53]Sworn in 1 January 2024. [54]Resigned 1 July 2024. [55]Sworn in 14 January 2025. [56]Sworn in 10 July 2025. [57]Resigned 2024. [58]Resigned 2023. [59]Resigned 29 May 2025. [60]Resigned 2024. [61]Died 13 April 2024. [62]Resigned 5 March 2025. [63]Resigned 4 June 2025.

DISTRICT COURT DIVISION

DISTRICT	JUDGES	ADDRESS
1	Edgar L. Barnes (Chief)[1]	Manteo
	Robert P. Trivette (Chief)[2]	Kitty Hawk
	Amber Malarney	Wanchese
	Meader W. Harriss III	Edenton
	Jeff Moreland	Elizabeth City
	Jennifer Wells[3]	Elizabeth City
2	Regina Rogers Parker (Chief)	Williamston
	Darrell B. Cayton Jr.	Washington
	Keith B. Mason	Washington
	Michael Jason Williams[4]	Washington
	Jonathan Jones[5]	Washington
3	G. Galen Braddy (Chief)	Grimesland
	Brian DeSoto	Greenville
	Lee F. Teague	Greenville
	Wendy S. Hazelton	Greenville
	Daniel H. Entzminger	Greenville
	Mario Perez	Greenville
4	L. Walter Mills (Chief)	New Bern
	W. David McFadyen III	New Bern
	Paul J. Delamar	Bayboro
	Andrew Wigmore	Beaufort
	Debra L. Massie	New Bern
	James A. Pully	New Bern
5	James L. Moore (Chief)	Jacksonville
	William B. Sutton	Clinton
	Michael C. Surles	Jacksonville
	Christopher J. Welch	Jacksonville
	Mario M. White	Clinton
	William Shanahan	Jacksonville
	Robert H. Gilmore	Clinton
	James Walter Bateman III	Jacksonville
	Morgan H. Swinson	Jacksonville
	Melissa B. Stevens[6]	Kenansville
6	J. H. Corpening II (Chief)	Wilmington
	James H. Faison III	Wilmington
	Sandra A. Ray	Wilmington
	Richard Russell Davis[7]	Wilmington
	Melinda Haynie Crouch	Wrightsville Beach
	Jeffrey Evan Noecker	Wilmington
	Chad Hogston	Wilmington
	Robin W. Robinson	Wilmington
	Lindsey L. McKee	Wilmington
	Richard F. Kern[8]	Wilmington
7	Teresa R. Freeman (Chief)	Roanoke Rapids
	Vershenia Johnson[9]	Windsor
	W. Rob Lewis II	Halifax
	Takiya Lewis Blalock[10]	Ahoskie
	Jamal Summey[11]	Scotland Neck
8	William Charles Farris (Chief)[12]	Wilson

DISTRICT	JUDGES	ADDRESS
	Wayne S. Boyette (Chief)[13]	Tarboro
	Pell C. Cooper	Rocky Mount
	Anthony W. Brown[14]	Spring Hope
	Wayne S. Boyette	Tarboro
	Joseph E. Brown III	Wilson
	William R. Solomon	Rocky Mount
	Alicia Slaughter	Nashville
	Tia H. Taylor[15]	Rocky Mount
9	Elizabeth A. Heath (Chief)[16]	Kinston
	W. Curtis Stackhouse (Chief)[17]	Goldsboro
	Annette W. Turik	Kinston
	Jonathon Sargeant	Kinston
	Justin L. Minshew	Goldsboro
	Christopher A. Rogerson	Goldsboro
	Sonya Davis[18]	Kinston
10	Margaret Eagles (Chief)	Raleigh
	Debra Ann Smith Sasser[19]	Raleigh
	Christine M. Walczyk	Raleigh
	Eric Craig Chasse	Raleigh
	Anna Elena Worley[20]	Raleigh
	Louis B. Meyer III	Raleigh
	Vartan A. Davidian	Raleigh
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	Ashleigh Parker	Raleigh
	J. Brian Ratledge	Raleigh
	David K. Baker Sr.	Raleigh
	Mark L. Stevens	Raleigh
	Julie L. Bell	Knightdale
	James R. Black	Raleigh
	Rashad Hauter	Raleigh
	Damion McCullers	Raleigh
	Jennifer Bedford[21]	Raleigh
	Rhonda G. Young	Raleigh
	Cynthia Baddour Kenney	Raleigh
	Kevin Boxberger	Raleigh
	Renee Jordan[22]	Raleigh
	Blair Williams[23]	Raleigh
	Crystal Grimes[24]	Holly Springs
	Christopher Brooks[25]	Apex
11	John W. Davis (Chief)	Louisburg
	Amanda Stevenson	Oxford
	Adam S. Keith	Louisburg
	Caroline S. Burnette	Henderson
	John H. Stultz III	Roxboro
	Benjamin S. Hunter	Louisburg
	Sarah K. Burnette	Oxford
12	Jerry F. Wood (Chief)	Selma
	Jimmy L. Love Jr.	Sanford
	Resson O. Faircloth II[26]	Erwin
	Mary H. Wells	Smithfield
	Joy A. Jones	Smithfield

DISTRICT	JUDGES	ADDRESS
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	Terry F. Rose	Smithfield
	Craig James	Smithfield
	Travis N. Wheeler	Smithfield
	Jason P. Kimble	Lillington
	Jillian Pope[27]	Lillington
	Brian E. Lewis[28]	Smithfield
14	Toni S. King (Chief)	Fayetteville
	David H. Hasty	Fayetteville
	Lou Oliveria	Fayetteville
	Cheri Siler-Mack	Fayetteville
	Stephen C. Stokes[29]	Fayetteville
	Tiffany M. Whitfield	Fayetteville
	Caitlin Evans	Fayetteville
	Frances M. Britt	Fayetteville
	Cull Jordan III	Fayetteville
	Rosalyn Hood	Fayetteville
	Tracey Henderson[30]	Fayetteville
15	Scott Ussery (Chief)	Elizabethtown
	Pauline Hankins	Tabor City
	J. Calvin Chandler	Shallotte
	Willie M. Callihan Jr.	Whiteville
	Bryan Wilson	Bolivia
	Sarah McPherson	Bolivia
	T. Heath Nance	Whiteville
16	Clayton Jones (Chief)	Durham
	Doretta Walker	Durham
	Amanda L. Maris	Durham
	Dave Hall	Durham
	Dorothy H. Mitchell	Durham
	Kevin Jones	Durham
	Kendra A. Montgomery-Blinn	Durham
17	Kathryn W. Overby (Chief)	Burlington
	Larry D. Brown	Graham
	C. Douglas Green[31]	Alamance
	Robert Bryan Norris[32]	Burlington
	Bryan Ray[33]	Graham
	Meredith T. Edwards[34]	Graham
18	Samantha Cabe (Chief)	Chapel Hill
	Sherri T. Murrell	Chapel Hill
	Hathaway S. Pendergrass	Chapel Hill
	Christopher T. Roper	Siler City
	Joal H. Broun	Hillsborough
20	Angelica C. McIntyre (Chief)	Lumberton
	William J. Moore[35]	Maxton
	Gregory Bullard	Lumberton
	Diane D. Greene[36]	Lumberton
	Leah B. Lanier	Lumberton
	Krystale F. Melvin	Lumberton
	Daniel Locklear[37]	Pembroke
21	Amanda L. Wilson (Chief)	Rockingham
	Christopher W. Rhue	Laurinburg

DISTRICT	JUDGES	ADDRESS
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	Chevonne R. Wallace	Rockingham
22	James A. Grogan (Chief)	Reidsville
	Chris Freeman[38]	Wentworth
	Christine F. Strader	Reidsville
	Erica S. Brandon	Wentworth
	Scott Skidmore[39]	Wentworth
23	William F. Southern III (Chief)	King
	Marion M. Boone	Dobson
	Thomas B. Langan	King
	Gretchen H. Kirkman	Dobson
24	Theresa H. Vincent (Chief)[40]	Summerfield
	Kimberly Michelle Fletcher (Chief)[41]	Greensboro
	Angela C. Foster	Greensboro
	Angela B. Fox	Greensboro
	Tabatha Holliday	Greensboro
	William B. Davis	Greensboro
	Larry L. Archie	Greensboro
	Brian K. Tomlin	Greensboro
	Marc R. Tyrey	High Point
	Kevin D. Smith	Greensboro
	Ashley L. Watlington-Simms	Greensboro
	Caroline Tomlinson-Pemberton	Greensboro
	Walter W. Baker III	Greensboro
	Joel N. Oakley[42]	Greensboro
	Tomakio S. Gause[43]	Greensboro
25	Christy E. Wilhelm (Chief)	Concord
	Brent Cloninger	Mount Pleasant
	Nathaniel E. Knust	Concord
	Michael G. Knox	Concord
	Sarah E. Street	Concord
	Juanita Boger-Allen[44]	Concord
	Kimberly Herrick[45]	Concord
26	Roy H. Wiggins (Chief)	Charlotte
	Christy Townley Mann	Charlotte
	Paige B. McThenia	Charlotte
	Jena P. Culler	Charlotte
	Elizabeth Thornton Trosch	Charlotte
	Tyyawdi M. Hands	Charlotte
	Gary Henderson	Charlotte
	Aretha V. Blake	Charlotte
	Faith Fickling-Alvarez	Charlotte
	Karen D. McCallum	Charlotte
	Jonathon R. Marvel	Charlotte
	C. Renee Little	Charlotte
	Shante' Burke-Hayer	Charlotte
	Cecilia Oseguera	Charlotte
	Rhonda Patterson	Charlotte
	Alyssa Levine	Charlotte
	Samantha Mobley	Charlotte
	Jennifer Fleet	Charlotte
	Matt Newton	Charlotte

DISTRICT	JUDGES	ADDRESS
	Roderick Davis	Charlotte
	Keith Smith	Charlotte
27	Beth Spencer Dixon (Chief)	Salisbury
	James Randolph	Salisbury
	Cynthia Dry	Salisbury
	Chris Sease	Salisbury
	Barbara Andrews[46]	Salisbury
28	John R. Nance (Chief)	Albemarle
	Thai Vang	Montgomery
	Phillip Cornett	Norwood
29	Donald W. Creed Jr. (Chief)	Asheboro
	Warren McSweeney[47]	Carthage
	Steve Bibey	Carthage
	Beth Tanner	Carthage
	Yohan Namkung	Carthage
	Tron Ross[48]	Carthage
30	Erin S. Hucks (Chief)	Monroe
	Stephen V. Higdon	Monroe
	Anna Goodwin	Monroe
	Christopher Gray	Monroe
	Megean C. Simpson	Monroe
31	Victoria Lane Roemer (Chief)[49]	Winston-Salem
	David Sipprell (Chief)[50]	Winston-Salem
	Lawrence J. Fine[51]	Clemmons
	Camille D. Banks-Payne	Winston-Salem
	Theodore Kazakos	Winston-Salem
	Carrie F. Vickery	Winston-Salem
	George M. Cleland	Winston-Salem
	Whit Davis	Winston-Salem
	Valene K. McMasters	Winston-Salem
	Frederick B. Adams II	Winston-Salem
	Kristen Kelly Broyles	Winston-Salem
	Artrese Ziglar[52]	Winston-Salem
	Shonna R. Alexander[53]	Winston-Salem
32	L. Dale Graham (Chief)[54]	Taylorsville
	Edward L. Hedrick IV (Chief)[55]	Taylorsville
	Christine Underwood	Olin
	Carole A. Hicks	Statesville
	Bryan A. Corbett[56]	Statesville
	Thomas R. Young	Statesville
	Courtney Marlowe[57]	Taylorsville
	Jessie Conley[58]	Statesville
33	Carlton Terry (Chief)	Advance
	Mary Covington	Thomasville
	Carlos Jané	Lexington
	Jon Wade Myers	Lexington
	Jon W. Welborn	Lexington
	David S. Doherty	Lexington
34	Robert Crumpton (Chief)	Wilkesboro
	William Finley Brooks[59]	Wilkesboro
	Donna L. Shumate	Sparta
	Laura B. Luffman	Wilkesboro

DISTRICT	JUDGES	ADDRESS
	Adam E. Anderson[60]	Wilkesboro
35	Theodore Wright McEntire (Chief)[61]	Spruce Pine
	Rebecca E. Eggers-Gryder (Chief)[62]	Boone
	Hal Gene Harrison[63]	Spruce Pine
	Matthew J. Rupp	Boone
	Alexandria E. Leake	Mars Hill
	Milton Fletcher[64]	Bakersville
36	Sherri Wilson Elliott (Chief)[65]	Newton
	Robert A. Mullinax Jr. (Chief)[66]	Newton
	Amy Sigmon Walker	Newton
	Mark L. Killian	Hickory
	David W. Aycock	Hickory
	Wesley W. Barkley	Newton
	Richard S. Holloway	Lenoir
	Andrea C. Plyler	Hudson
	Scott D. Conrad	Newton
	Scott M. Lippert[67]	Morganton
	Matthew Cabe[68]	Morganton
37	Scott C. Etheridge (Chief)	Asheboro
	Robert M. Wilkins	Asheboro
	Sarah N. Lanier	Asheboro
	Barron Thompson	Asheboro
	Darren C. Allen	Asheboro
38	Angela G. Hoyle (Chief)	Belmont
	Pennie M. Thrower[69]	Gastonia
	Craig R. Collins[70]	Gastonia
	Donald Rice	Cramerton
	Edgar F. Bogle	Gastonia
	William A. Anthony III	Gastonia
	Holden Clark	Gastonia
	Megan Shepard[71]	Gastonia
39	Jeanette R. Reeves (Chief)	Shelby
	Justin K. Brackett	Shelby
	Micah J. Sanderson	Denver
	Brad Champion	Lincolnton
	Jamie Hodges	Lincolnton
	Angela Y. Woods[72]	Kings Mountain
	Brittany W. Padgett[73]	Shelby
40	J. Calvin Hill (Chief)[74]	Asheville
	Ward D. Scott (Chief)[75]	Asheville
	Patricia Kaufmann Young	Asheville
	Julie M. Kepple	Asheville
	Andrea Dray[76]	Asheville
	Edwin D. Clontz	Candler
	Susan Marie Dotson-Smith	Asheville
	Meredith P. Stone[77]	Asheville
	Robin L. Merrell[78]	Asheville
41	Robert K. Martelle (Chief)	Rutherfordton
	Ellen Shelley	Marion
	Michelle McEntire	Graham
	Corey J. MacKinnon	Marion
42	Kimberly Gasperson-Justice (Chief)	Hendersonville

DISTRICT	JUDGES	ADDRESS
	Gene B. Johnson	Hendersonville
	D. Abe Hudson	Hendersonville
	James Marshall	Hendersonville
	Lora T. Baker[79]	Tryon
	Monica Jean Gillett[80]	Hendersonville
43	Roy T. Wijewickrama (Chief)[81]	Waynesville
	Donna Forga (Chief)[82]	Clyde
	Monica Hayes Leslie	Waynesville
	Kaleb Wingate	Waynesville
	Justin B. Greene	Bryson City
	Kristy L. Parton	Bryson City
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	William Jones[84]	Waynesville

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Samuel G. Grimes	Washington

[1]Retired 31 December 2024. [2]Became Chief District Court Judge 1 January 2025. [3]Sworn in 4 April 2025. [4]Resigned 31 December 2024. [5]Sworn in 1 January 2025. [6]Sworn in 1 January 2025. [7]Retired 31 December 2024. [8]Sworn in 1 January 2025. [9]Retired 31 December 2024. [10]Sworn in 1 January 2025. [11]Sworn in 1 January 2025. [12]Retired 31 May 2025. [13]Became Chief District Court Judge 1 June 2025. [14]Retired 31 August 2024. [15]Sworn in 20 April 2025. [16]Retired 31 December 2024. [17]Became Chief District Court Judge 1 January 2025. [18]Sworn in 22 May 2025. [19]Retired 31 December 2024. [20]Retired 31 December 2024. [21]Resigned 31 December 2024. [22]Sworn in 1 January 2025. [23]Sworn in 1 January 2025. [24]Sworn in 1 January 2025. [25]Sworn in 14 March 2025. [26]Retired 31 December 2025. [27]Sworn in 1 January 2025. [28]Sworn in 1 January 2025. [29]Resigned 27 March 2025. [30]Sworn in 23 May 2025. [31]Resigned 31 December 2024. [32]Resigned 31 December 2024. [33]Sworn in 2 January 2025. [34]Sworn in 1 January 2025. [35]Resigned 31 December 2024. [36]Formerly Diane Surgeon. [37]Sworn in 1 January 2025. [38]Resigned 31 December 2024. [39]Sworn in 3 April 2025. [40]Retired 31 December 2024. [41]Became Chief District Court Judge 1 January 2025. [42]Resigned 31 December 2024. [43]Sworn in 1 January 2025. [44]Resigned 31 December 2024. [45]Sworn in 1 January 2025. [46]Sworn in 15 August 2024. [47]Resigned 31 December 2024. [48]Sworn in 8 April 2025. [49]Retired 31 December 2024. [50]Became Chief District Court Judge 1 January 2025. [51]Retired 31 December 2024. [52]Sworn in 1 January 2025. [53]Sworn in 1 January 2025. [54]Retired 31 December 2024. [55]Became Chief District Court Judge 1 January 2025. [56]Resigned 8 March 2025. [57]Sworn in 1 January 2025. [58]Sworn in 1 January 2025. [59]Retired 30 June 2025. [60]Sworn in 1 January 2025. [61]Resigned 31 December 2024. [62]Became Chief District Court Judge 1 January 2025. [63]Retired 31 July 2024. [64]Sworn in 1 January 2025. [65]Resigned on 6 December 2024. [66]Became Chief District Court Judge 19 December 2024. [67]Sworn in 1 January 2025. [68]Sworn in 8 May 2025. [69]Retired 31 December 2024. [70]Resigned 31 December 2024. [71]Sworn in 1 January 2025. [72]Resigned 31 December 2025. [73]Sworn in 1 January 2025. [74]Retired 31 December 2024. [75]Became Chief District Court Judge 1 January 2025. [76]Retired 31 December 2024. [77]Sworn in 2 January 2025. [78]Sworn in 1 January 2025. [79]Resigned 31 December 2024. [80]Sworn in 1 January 2025. [81]Resigned 1 December 2024. [82]Became Chief District Court Judge 4 December 2024. [83]Sworn in 1 January 2025. [84]Sworn in 3 March 2025. [85]Sworn in 9 April 2025. [86]Sworn in 28 May 2024. [87]Sworn in 4 April 2025. [88]Sworn in 6 April 2025. [89]Sworn in 18 September 2024. [90]Sworn in 16 July 2024. [91]Sworn in 7 April 2025. [92]Sworn in 25 October 2024. [93]Retired 1 April 2025. [94]Sworn in 10 June 2025. [95]Sworn in 9 April 2025.

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[96]Retired 5 November 2024. [97]Recalled 23 June 2025. [98]Retired 10 May 2025. [99]Recalled 1 September 2024. [100]Died 1 July 2025.
[101]Recalled 27 February 2025. [102]Recalled 23 June 2025.

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CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

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

No. 403PA21

Filed 23 May 2024

Elections—protest—defamation claim—absolute privilege—broad scope—attaches to the proceeding

The defense of absolute privilege applies broadly to protect from civil defamation liability everyone involved in the preparation or filing of an election protest, since the privilege attaches to the proceeding in which the statements are published, and is not restricted only to those who directly participate in election-protest hearings as a party, counsel, or witness as erroneously concluded by the Court of Appeals. Therefore, plaintiffs' libel suit against defendants for preparing and filing election protests alleging that plaintiffs engaged in illegal double-voting was absolutely barred, since the challenged statements were made in the due course of a quasi-judicial proceeding and were both relevant and pertinent to its subject matter.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 279 N.C. App. 528, 865 S.E.2d 732 (2021), affirming in part and reversing in part an order entered on 14 January 2020 by Judge R. Allen Baddour Jr. in Superior Court, Guilford County, granting plaintiffs' motion for summary judgment as

to defendants' affirmative defenses and denying defendants' motion for summary judgment, and remanding the case. Heard in the Supreme Court on 11 April 2024.

Dowling PLLC, by Craig D. Schauer, for defendant-appellants Holtzman Vogel Josefiak Torchinsky PLLC, Steve Roberts, Erin Clark, Gabriela Fallon, and Steven Saxe; and Blanchard, Miller, Lewis & Isley, P.A., by Philip R. Isley, and Higgins Benjamin, PLLC, by Robert N. Hunter Jr., for defendant-appellant Pat McCrory Committee Legal Defense Fund.

Womble Bond Dickinson (US) LLP, by Pressly M. Millen and Ripley Rand, and Southern Coalition for Social Justice, by Jeffrey Loperfido, for plaintiff-appellees.

Jeanette K. Doran for North Carolina Institute for Constitutional Law, amicus curiae.

NEWBY, Chief Justice.

In this case we decide the breadth of protections afforded to individuals engaged in the pursuit of an election protest. Applying long-settled, bedrock principles, we hold that the absolute privilege broadly protects all individuals involved in any aspect of election protests from defamation claims. This includes, but is not limited to, those who research, assess, strategize, approve, facilitate, direct, prepare, file, or prosecute election protests. In so doing, we reiterate what this Court has long held: the absolute privilege attaches by virtue of the proceeding in which the statement is published. We therefore reject plaintiffs' baseless attempt to constrict the absolute privilege's protections. Accordingly, plaintiff's lawsuit, which seeks to impose civil defamation liability for statements contained in election protests, thereby discouraging citizens from guarding the integrity of their elections, is absolutely barred. The Court of Appeals' decision as to the issue before this Court is therefore reversed, and the matter is remanded to the Court of Appeals with instructions to further remand to the trial court to dismiss the matter with prejudice.

The opening text of Article I of our state constitution "declare[s]" our rights so that "the great, general, and essential principles of liberty and free government may be recognized and established." N.C. Const. art. I. The text acknowledges that "[a]ll political power is vested in and derived from the people" and that the people "have the inherent,

sole, and exclusive right of regulating the internal government." *Id.* art. I, §§ 2–3. The people exercise this "exclusive right" through one of our most fundamental political processes—elections. Indeed, North Carolinians elect hundreds of state and local officials in all three branches of government.[1]

Since 1776 the state constitution has recognized the importance of elections and their integrity in the Declaration of Rights. *See id.* art. I, §§ 9 (Frequent Elections), 10 (Free Elections); N.C. Const. of 1868, art. I, §§ 10 (Free Elections), 28 (Frequent Elections); N.C. Const. of 1776, Declaration of Rights, §§ 6 (Free Elections), 20 (Frequent Elections). Notably, the Free Elections Clause declares that "[a]ll elections shall be free," N.C. Const. art. I, § 10, and guarantees "that voters are free to vote according to their consciences without interference or intimidation," *Harper v. Hall*, 384 N.C. 292, 363–64, 886 S.E.2d 393, 439 (2023). An election is "free" when (1) each voter is able to vote according to his or her judgment, and (2) the votes are *accurately* counted. *Id.* at 363, 886 S.E.2d at 439. Inherently, votes are not accurately counted if ineligible voters' ballots are included in the election results.

Similarly, the state constitution has always protected the people's right to petition the government. N.C. Const. art. I, § 12; N.C. Const. of 1868, art. I, § 25; N.C. Const. of 1776, Declaration of Rights, § 18. Article I, Section 12, guarantees that "[t]he people have a right to assemble together to consult for their common good, to instruct their representatives, and to apply to the General Assembly for redress of grievances." N.C. Const. art. I, § 12. The United States Constitution likewise recognizes the people's right to petition the government. U.S. Const. amend. I. This fundamental right is directly "connect[ed] to the mechanics of popular sovereignty," John V. Orth & Paul Martin Newby, *The North Carolina State Constitution* 58 (2d ed. 2013), because it protects the right to "express[] one's views to government officials" and to "influence the[ir] actions . . . whether in the legislative, executive, or judicial branch," *Cheryl Lloyd Humphrey Inv. Co., LLC v. Resco Prods., Inc.*, 377 N.C. 384, 384, 388, 858 S.E.2d 795, 797, 799 (2021).

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1. *E.g.*, N.C. Const. art. II, §§ 2, 4 (election of state senators and representatives); *id.* art. III, §§ 2(1) (election of the Governor and Lieutenant Governor), 7 (election of the secretary of state, auditor, treasurer, superintendent of public instruction, attorney general, commissioner of agriculture, commissioner of labor, and commissioner of insurance); *id.* art. IV, §§ 16 (election of Supreme Court justices, Court of Appeals judges, and superior court judges), 18 (election of district attorneys); *id.* art. VII, § 2 (election of sheriffs); N.C.G.S. § 7A-140 (2023) (election of district court judges); *id.* § 153A-34 (election of county commissioners); *id.* § 160A-66 (election of mayors and city council members).

The General Assembly has recognized that free elections and the right to petition are vital to maintaining the public's trust and confidence in our system of self-government. Specifically concerning elections, the General Assembly has established various statutory processes by which North Carolina citizens may alert county boards of elections to perceived problems in elections. *See*, *e.g.*, N.C.G.S. §§ 163-84 to -90.3 (2023) (voter challenges); -91 (Help America Vote Act of 2002 complaints); -127.1 to -127.6 (challenges to candidacy). One of these processes—known as "election protests"—seeks to balance the public's interest in achieving accurate election results with the need to finalize those results in a short period of time. *See generally id.* §§ 163-182.9 to -182.12,-182.14 (2023).

Election protests enable North Carolina citizens to freely raise concerns about the election process and give the county boards of elections a chance to address those concerns before vote counts are finalized. The process is simple so that everyone, not just lawyers, can use it. *See id.* § 163-182.9(a). Consequently, any candidate or registered, eligible voter may file an election protest. *Id.*

Election protests are meant "to assure that an election is determined without taint of fraud or corruption and without irregularities that may have changed the result of an election." *Id.* § 163-182.12. To this end, an election protest may address any "irregularity" or "misconduct" in the election process, *id.* §§ 163-182.9(b), -182.10, including the counting and tabulation of ballots cast by ineligible voters, *see id.* §§ 163-182.9(b)(2), (4), -182.10(d)(2)e, -182.12, -182.13(a)(1). Voters may be ineligible for many reasons, including when they have already voted in the election.[2] *Id.* § 163-87(2).

Once a citizen files a protest, the county board of elections determines whether the alleged irregularity actually occurred, and if so, what remedy is necessary. *See id.* § 163-182.10. Where the irregularity affects the accuracy of the election results, the county board of elections may order the ineligible ballots excluded from the vote total, and in some instances, may order a full recount. *Id.* § 163-182.10(d)(2)e. County boards of elections must resolve all election protests very quickly because they must authenticate and certify the election results

2. Certain categories of individuals are also categorically ineligible to vote, such as minors, noncitizens, nonresidents, convicted felons, and deceased individuals. N.C. Const. art. VI, §§ 1-2; N.C.G.S. §§ 163-55(a), -85(c), -87 (2023). Additionally, a voter is generally ineligible to vote in a political party's primary election if he or she is not a registered member of that party. *See* N.C.G.S. § 163-59 (2023). Even if a prospective voter meets all eligibility requirements, he or she must also be "legally registered" to vote. *Id.* § 163-54; *see also id.* § 163-82.1(a).

within a few weeks of election day. *See id.* §§ 163-182.5 to -182.6, -182.10(a)(2)–(3), -182.15(a)–(b). Election protests become even more significant in very close elections because they could affect the outcome. *See id.* § 163-182.10(d)(2)d–e, -182.13(a).

In 2016, North Carolina experienced a very close election between gubernatorial candidates Roy Cooper and Pat McCrory. After election day, McCrory trailed Cooper by approximately 5,000 votes—a vote margin that likely could have entitled McCrory to a recount. *See id.* § 163-182.7(c)(2). On 10 November 2016, the Pat McCrory Committee established defendant Pat McCrory Committee Legal Defense Fund (the Defense Fund) in anticipation of postelection activities relating to the gubernatorial election. The Defense Fund was tasked with obtaining and funding election consultants and overseeing their efforts to assess potential irregularities in the election.

The Defense Fund retained Jason Torchinsky and four associate attorneys of defendant Holtzman Vogel Josefiak Torchinsky PLLC (Holtzman Vogel) to assist the Defense Fund in any postelection activities.[3] These attorneys received voting data and information from the Republican National Committee and the North Carolina Grand Old Party that identified potentially ineligible voters. With this information, the Defense Fund instructed the associate attorneys to work with local citizens to submit election protests. Relevant to this case, the associate attorneys submitted election protests in Brunswick County and Guilford County to challenge votes cast by individuals who may have voted more than once.

Defendant William Clark Porter IV, a citizen of Guilford County, talked with one of the associate attorneys about submitting an election protest in Guilford County. On 17 November 2016, Porter authorized that associate attorney to sign and submit the election protest on his behalf to the Guilford County Board of Elections. The Guilford County

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3. The only defendants in the present appeal are Holtzman Vogel, the associate attorneys (collectively, with Holtzman Vogel, law-firm defendants), and the Defense Fund. We refer to them collectively as defendants. Torchinsky was not named as a defendant in the case. Although William Clark Porter IV was originally named as a defendant, he did not appeal from the favorable decision of the Court of Appeals, which held the absolute privilege barred plaintiffs' claims against him, and he is not a party before this Court.

The record indicates that the associate attorneys were not licensed or authorized to practice law in North Carolina at the time of the events of this case. They insist, however, that they did not need to be because their conduct in this case did not amount to the practice of law. Because their status as attorneys is irrelevant to the consideration of this matter, we do not resolve this question.

protest alleged "that nine . . . individuals cast ballots in both North Carolina and another state" and that "th[o]se ballots were erroneously counted and tabulated by the G[uilford] County Board of Elections." Specifically, the Guilford County protest accused plaintiffs Karen Andrea Niehans, Samuel R. Niehans, and Louis Maurice Bouvier Jr., among others, of having voted in another state. The Guilford County protest alleged that the supposed misconduct "affected or cast doubt upon the results of the protested election."

Similarly, Joseph Agovino, a citizen of Brunswick County, discussed submitting an election protest with one of the associate attorneys. On 17 November 2016, Agovino signed the protest and authorized the associate attorney to submit the protest on his behalf to the Brunswick County Board of Elections. The Brunswick County protest alleged that plaintiff Joseph Daniel Golden "cast [a] ballot[ ] in both North Carolina and another state" and that his ballot was "erroneously counted and tabulated by the B[runswick] County Board of Elections." The Brunswick County protest alleged that the purported misconduct "affected or cast doubt upon the results of the protested election."

The Guilford and Brunswick County Boards of Elections each preliminarily determined that the respective protests established probable cause to believe that a violation of election law (or some other irregularity or misconduct) had occurred. The Guilford and Brunswick County Boards of Elections then scheduled full hearings to adjudicate the election protests.

The Guilford County Board of Elections held its hearing on 21 November 2016. None of the associate attorneys attended. On 29 November 2016, the Guilford County Board of Elections dismissed the Guilford County protest "due to lack of any evidence presented."

The Brunswick County Board of Elections held its hearing on 22 November 2016. Once again, none of the associate attorneys attended. Before the board could render a decision on the Brunswick County protest, Agovino withdrew the protest.

Following these events, plaintiffs received negative media attention and adverse reactions in their respective communities. Accordingly, on 8 February 2017, Bouvier and the Niehans filed a complaint asserting a libel claim against Porter and seeking punitive damages pursuant to N.C.G.S. § 1D-1.

On 13 April 2017, Porter moved to dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. Specifically, Porter

argued that statements made in election protests are made in the due course of a quasi-judicial proceeding and therefore are immunized by the absolute privilege. On 9 June 2017, the trial court denied Porter's motion to dismiss. In his answer, Porter subsequently reasserted the absolute privilege among other affirmative defenses, including the right to petition the government.

Subsequently, plaintiffs filed an amended complaint on 9 November 2017, adding Golden as a plaintiff and law-firm defendants and the Defense Fund as defendants. The amended complaint reiterated the original claims for libel and punitive damages. Plaintiffs also asserted that defendants conspired to commit the "overt and wrongful acts" of "mak[ing] the statements and tak[ing] the actions described above . . . to delay certification of the election and suggest that voter fraud affected the election results."

Defendants moved to dismiss the amended complaint pursuant to the absolute privilege, among other defenses. On 6 June 2018, the trial court denied their motions to dismiss.[4]

On 12 and 16 July 2018, defendants submitted individual answers to plaintiffs' amended complaint. In their respective answers, each defendant asserted the absolute privilege along with other affirmative defenses, including the right to petition the government.

On 3 September 2019, plaintiffs moved for partial summary judgment on all the affirmative defenses, and all defendants, including Porter, jointly cross-moved for summary judgment on plaintiffs' claims. On 14 December 2020, the trial court denied defendants' motion and granted plaintiffs' motion, dismissing all affirmative defenses. Defendants, including Porter, appealed the trial court's order, which denied their claim to the absolute privilege.

The Court of Appeals unanimously affirmed in part, reversed in part, and remanded the case.[5] *Bouvier v. Porter*, 279 N.C. App. 528, 548, 865 S.E.2d 732, 745 (2021). First, the Court of Appeals noted that the absolute privilege is generally applicable to statements made in the course

4. As noted in footnote 8, defendants, including Porter, could have appealed the trial court's order denying their motions to dismiss.

5. Before addressing the merits, the Court of Appeals concluded that it had appellate jurisdiction over defendants' interlocutory appeal. *Bouvier v. Porter*, 279 N.C. App. 528, 540, 865 S.E.2d 732, 740 (2021). The Court of Appeals analogized the absolute privilege to other forms of "immunity from suit," which it recognized as "a substantial right . . . [that] would be lost[ ] absent interlocutory review." *Id.* at 539, 865 S.E.2d at 739 (quoting *Topping v. Meyers*, 270 N.C. App. 613, 617, 842 S.E.2d 95, 99 (2020)).

of a judicial or quasi-judicial proceeding that are sufficiently relevant and pertinent to that proceeding. *Id.* at 541, 865 S.E.2d at 740–41. It then concluded that election-protest proceedings before county boards of elections are quasi-judicial proceedings and that "[c]onsequently, as a general principle, [the] absolute privilege applies to defamatory statements made in the course of an election protest filed with a [c]ounty [b]oard of [e]lections." *Id.* at 541–42, 865 S.E.2d at 741.

Second, the Court of Appeals concluded the statements at issue were relevant and pertinent to the election-protest proceedings. *Id.* at 543–44, 865 S.E.2d at 742. It stated that it "[could]not conclude [the statements] were so 'palpably irrelevant' to an election protest that 'no reasonable man [could] doubt [their] irrelevancy or impropriety.' " *Id.* (third and fourth alterations in original) (quoting *Scott v. Statesville Plywood & Veneer Co.*, 240 N.C. 73, 76, 81 S.E.2d 146, 149 (1954)). "Consequently," the Court of Appeals concluded that the "absolute privilege applie[d] to the election protests containing the allegedly defamatory statements in this case." *Id.* at 544, 865 S.E.2d at 742.

Although it concluded that statements in the election protests were covered by the absolute privilege, the Court of Appeals then adopted, without any citations to this Court's caselaw, plaintiffs' theory that the absolute privilege only "applies to statements *by participants* in judicial and quasi-judicial proceedings made within the scope of those proceedings." *Id.* at 544, 865 S.E.2d at 743 (emphasis added). Plaintiffs crafted this "participation" requirement by relying on inapposite Court of Appeals precedent, the *Restatement (Second) of Torts*, and caselaw from other jurisdictions. With plaintiffs' newly created "participation" requirement in mind, the Court of Appeals separately analyzed whether each defendant sufficiently participated in the quasi-judicial proceeding. *Id.* at 544–48, 865 S.E.2d at 742–45.

First, the Court of Appeals held that the "absolute privilege most clearly applie[d] to . . . Porter" because he "was the actual protestor." *Id.* at 545, 865 S.E.2d at 743. As to law-firm defendants, the Court of Appeals highlighted that they "disclaimed acting as attorneys for the protestors," "did not appear at the hearings," and did not make the allegedly defamatory statements "while they were participating as counsel in the election[-]protest proceeding." *Id.* at 546, 865 S.E.2d at 744. Thus, the Court of Appeals concluded that law-firm defendants did not qualify as "participants" under plaintiffs' novel theory. *Id.* at 545–47, 865 S.E.2d at 743–45. Finally, the Court of Appeals stated that the Defense Fund merely authorized the election-protest strategy, which it did not consider to be "participation." *See id.* at 548, 865 S.E.2d at 745. Therefore, the Defense

Fund also did not fulfill the newfound "participation" requirement. *Id.* In sum, the Court of Appeals affirmed the trial court's order denying law-firm defendants and the Defense Fund the absolute privilege, but it reversed the trial court's order denying Porter the absolute privilege. *Id.*

On 18 November 2021, law-firm defendants and the Defense Fund filed a petition for discretionary review with this Court, challenging the newly devised "participation" requirement. Plaintiffs did not seek review of the Court of Appeals' conclusion that Porter was protected by the absolute privilege. In fact, at oral argument, plaintiffs acknowledged that the absolute privilege precluded their lawsuit against Porter.[6] *See* Oral Argument at 38:50–41:54, *Bouvier v. Porter* (No. 403PA21), https://www.youtube.com/watch?v=CBX9oVMTLUg [hereinafter Oral Argument]. This Court allowed defendants' petition on 4 April 2023.

The issue presented is whether, like Porter, defendants are protected by the absolute privilege for the allegedly defamatory statements made in the election protests and are, therefore, entitled to summary judgment. Before this Court, plaintiffs do not challenge the Court of Appeals' conclusions that the absolute privilege applied to statements in the election protests in this case. That is, plaintiffs do not challenge that the statements were made in the due course of a quasi-judicial proceeding and were relevant and pertinent to that proceeding. And as explained below, we agree with the Court of Appeals on those issues. Therefore, the only question for this Court is whether the Court of Appeals erred when it adopted plaintiffs' new "participation" requirement for the application of the absolute privilege. *See* N.C. R. App. P. 16(a), 28(a)–(c).

This Court reviews orders granting or denying summary judgment de novo. *Quality Built Homes Inc. v. Town of Carthage*, 369 N.C. 15, 18, 789 S.E.2d 454, 457 (2016). Summary judgment is proper "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). "A 'genuine issue' is one that can be maintained by substantial evidence." *Dobson v. Harris*, 352 N.C. 77, 83, 530 S.E.2d 829, 835 (2000). A movant is entitled to judgment as a matter of law when "an essential element of the opposing party's claim does not exist, cannot be proven at trial, or would be barred by an affirmative defense," or when it is shown "through discovery that the opposing party cannot produce evidence to support an essential element

6. This candid admission begs the question: if plaintiffs knew that they were precluded from bringing a defamation action against Porter, why did they pursue that claim?

of her claim." *Id.* "The movant's papers are carefully scrutinized," and the nonmovant's factual allegations are taken as true and viewed in a light most favorable to that party. *Id.*

As a cause of action, defamation claims protect people from untrue statements that damage or degrade their reputations. Generally, "[i]n order to recover for defamation, a plaintiff . . . must show that the defendant [(1)] caused injury to the plaintiff [(2)] by making false, defamatory statements [(3)] of or concerning the plaintiff[ ] [(4)] [that] were published to a third person." *Desmond v. News & Observer Publ'g Co.*, 375 N.C. 21, 41, 846 S.E.2d 647, 661 (2020) (first alteration in original) (quoting *Desmond v. News & Observer Publ'g Co.*, 241 N.C. App. 10, 16, 772 S.E.2d 128, 135 (2015)). Defamation encompasses two separate torts: "libel" and "slander." 20 Strong's N.C. Index 4th: *Libel and Slander* § 1, at 541 (2017). Libel is a written defamatory statement, and slander is an oral defamatory statement. *Id.* In this case, plaintiffs alleged libel.

Even if a plaintiff establishes all the essential elements of libel, however, a defamation action will not lie if "the circumstances under which the statement was published confer upon the publisher a privilege to publish it." *R.H. Bouligny, Inc. v. United Steelworkers of Am., AFL-CIO*, 270 N.C. 160, 170, 154 S.E.2d 344, 354 (1967). Since before our independence, the common law has recognized "privileges" that protect the publication of defamatory speech. *See Shelfer v. Gooding*, 47 N.C. (2 Jones) 175, 178–84 (1855); *Dobson*, 352 N.C. at 81, 530 S.E.2d at 834. These privileges protect the public's interest in the "free expression and communication of ideas" when it outweighs the interest in protecting individuals' reputations. *R.H. Bouligny*, 270 N.C. at 170, 154 S.E.2d at 354.

One such privilege is the "absolute privilege," which applies when the public has an interest in the defendant speaking "his mind fully and freely." *Ramsey v. Cheek*, 109 N.C. 270, 273, 13 S.E. 775, 775 (1891). When the absolute privilege applies, "all actions in respect to the words used are absolutely forbidden"—even if the plaintiff alleges that the defendant published them falsely, knowingly, and with express malice. *Id.* This powerful protection is only granted in certain scenarios, such as debates in the General Assembly, communications between military or law enforcement officers and their superiors in the line of duty, and "everything said by a judge on the bench, by a witness in the box, *and the like*." *Id.* (emphasis added). Relevant to this case, a defamatory statement is absolutely privileged if it is made in the due course of a judicial or quasi-judicial proceeding and is relevant and pertinent to the subject matter of the proceeding. *Scott*, 240 N.C. at 76, 81 S.E.2d at 149; *Jarman v. Offutt*, 239 N.C. 468, 472, 80 S.E.2d 248, 251 (1954).

Broadly stated, statements are "made in the due course" of a proceeding if they are made in the regular progression of an action or proceeding or are "communications relevant to [a] proposed judicial proceeding[ ]." *Harris v. NCNB Nat'l Bank of N.C.*, 85 N.C. App. 669, 674, 355 S.E.2d 838, 842 (1987).[7] Importantly, this requirement encompasses statements that predate the formal commencement of an action or proceeding. *See id.* at 674, 355 S.E.2d at 842–43.

Statements made in the due course of a judicial or quasi-judicial proceeding must also be "relevant" and "pertinent" to the subject matter of the proceeding, which is a question of law for the courts. *Scott*, 240 N.C. at 76, 81 S.E.2d at 149. A statement is irrelevant or impertinent if it is "so palpably irrelevant to the subject matter of the controversy that no reasonable man can doubt its irrelevancy or impropriety." *Id.* Stated another way, a statement is relevant and pertinent "[i]f it is so related to the subject matter of the controversy that it may become the subject of inquiry in the course of the [proceeding]." *Id.*

Notably, "the [absolute privilege's] protection from liability to suit attaches by reason of the setting in which the defamatory statement is spoken or published. The privilege belongs to the occasion. It does not follow the speaker or publisher into other surroundings and circumstances." *R.H. Bouligny*, 270 N.C. at 171, 154 S.E.2d at 354.

The justification for the absolute privilege is rooted in the commonsense notion that in scenarios such as judicial and quasi-judicial proceedings, people must be able to communicate freely, uninhibited by the fear of retribution in the form of a defamation suit. *See Shelfer*, 47 N.C. (2 Jones) at 177–81. Indeed, the purpose of judicial and quasi-judicial proceedings is to discover the truth in a matter and do justice accordingly. *See In re Miller*, 357 N.C. 316, 334, 584 S.E.2d 772, 785–86 (2003). To accomplish this laudable end, North Carolina, like other American jurisdictions, employs an adversarial system of justice. *State v. Lawrence*, 365 N.C. 506, 512, 723 S.E.2d 326, 330 (2012). In the crucible of judicial

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7. *See also*, *e.g.*, *Scott*, 240 N.C. at 76, 81 S.E.2d at 149 (applying the absolute privilege to "pleadings and other papers filed"); *Jarman*, 239 N.C. at 472, 80 S.E.2d at 251 (applying the absolute privilege to "affidavit[s] [that] are pertinent to matters involved in a judicial proceeding"); *Wall v. Blalock*, 245 N.C. 232, 232–33, 95 S.E.2d 450, 451–52 (1956) (applying the absolute privilege to "words spoken by an attorney in the course of a trial," including arguments before the jury); *Harman v. Belk*, 165 N.C. App. 819, 824–25, 600 S.E.2d 43, 47–48 (2004) (applying the absolute privilege to statements made in depositions); *Burton v. NCNB Nat'l Bank of N.C.*, 85 N.C. App. 702, 706, 355 S.E.2d 800, 802–03 (1987) (applying the absolute privilege to relevant out of court communications between parties or their attorneys).

or quasi-judicial proceedings, parties pit their evidence and arguments against each other, *id.*, and in that arena, "partisan advocacy on both sides of [the] case . . . best promote[s] the ultimate objective"—truth and justice. *Herring v. New York*, 422 U.S. 853, 862, 95 S. Ct. 2550, 2555 (1975). For this reason, "complete immunity" attaches "[w]here the public service or the due administration of justice require it," *Ramsey*, 109 N.C. at 273, 13 S.E. at 775, and "the law does not allow recovery of damages, actual or punitive, occasioned by the defamatory speech or publication," *R.H. Bouligny*, 270 N.C. at 170, 154 S.E.2d at 354. With these principles in mind, we hold that all defendants in this case are shielded by the absolute privilege.

This Court has said that county boards of elections are quasi-judicial bodies. *See James v. Bartlett*, 359 N.C. 260, 264, 607 S.E.2d 638, 641 (2005); *Burgin v. N.C. State Bd. of Elections*, 214 N.C. 140, 146, 198 S.E. 592, 595–96 (1938); *cf. Ponder v. Joslin*, 262 N.C. 496, 501, 138 S.E.2d 143, 147 (1964) (stating the State Board of Elections acts as a quasi-judicial agency when resolving election protests). Therefore, election protests before county boards of elections are quasi-judicial proceedings. The Court of Appeals correctly reached this conclusion, and plaintiffs do not argue otherwise.

Moreover, the statements complained of were relevant and pertinent to the subject matter of the election-protest proceedings. The allegations contained in the election-protest forms were obviously destined to "become the subject of inquiry in the course of the [proceedings]." *Scott*, 240 N.C. at 76, 81 S.E.2d at 149. Indeed, the statements' allegations were in and of themselves the subject matter of the election-protest proceedings. No one could seriously argue that the statements were "so palpably irrelevant to the subject matter of the controversy that no reasonable man can doubt [their] irrelevancy or impropriety." *Id.* Again, the Court of Appeals correctly reached this conclusion, and plaintiffs do not ask this Court to revisit that court's determination.

Accordingly, defendants were protected by the absolute privilege because the statements at issue were made in the due course of quasi-judicial proceedings and relevant and pertinent to the proceedings' subject matter. Because there are no genuine issues as to any material fact, and because defendants have shown that they are entitled to judgment as a matter of law, the trial court erred when it denied all defendants summary judgment.[8] The Court of Appeals' analysis should have ended

8. Given that the absolute privilege so clearly applies to this case, plaintiffs' libel claims should have been dismissed with prejudice much earlier at the pleading stage

there, and it should have remanded to the trial court with an instruction to dismiss the action with prejudice.[9]

Instead, the Court of Appeals, in response to novel "participation" arguments advanced by plaintiffs, concluded that defendants are not entitled to the absolute privilege because law-firm defendants did not participate "as counsel" and the Defense Fund did not "participat[e] in the election protest." *Bouvier*, 279 N.C. App. at 546, 548, 865 S.E.2d at 744–45. This baseless participation requirement concocted by plaintiffs has no foundation in this Court's jurisprudence. Rather, plaintiffs rely on the *Restatement (Second) of Torts* and appellate decisions from other jurisdictions, and they selectively lift quotes from decisions that do not actually articulate the rule plaintiffs advance. Plaintiffs fail to point to any precedent from this Court or the Court of Appeals requiring a defendant to "participate" as a party, counsel, or witness to obtain the benefit of the absolute privilege.

Accordingly, we reject plaintiffs' unsupported argument. Instead, we reiterate what this Court has long held: "The privilege belongs to the occasion," and "the protection from liability to suit attaches *by reason of the setting in which the defamatory statement is spoken or published*." *R.H. Bouligny*, 270 N.C. at 171, 154 S.E.2d at 354 (emphasis added); *see also Perry v. Perry*, 153 N.C. 265, 267, 69 S.E. 130, 131 (1910); *Shelfer*, 47 N.C. (2 Jones) at 176–77. The public has an interest in judicial and quasi-judicial bodies arriving at the truth in matters brought before them and in the "due administration of justice." *Ramsey*, 109 N.C. at 273, 13 S.E. at 775. This interest is especially strong when the quasi-judicial proceeding implicates accuracy in elections. To that end, the absolute privilege must apply broadly to *anyone* involved in any aspect of an election protest, even if they did not actually "participate" as a party, counsel, witness, or the like at a subsequent proceeding.

This Court's caselaw specifically requires the broad application of the absolute privilege. For example, in *Jarman v. Offutt*, a husband initiated a "lunacy proceeding" before a clerk of superior court

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under Rule 12(b)(6). *Cf. Scott*, 240 N.C. at 77, 81 S.E.2d at 149–50. Nevertheless, defendants elected not to appeal the trial court's denials of their motions to dismiss and proceeded to summary judgment. Throughout the course of this appeal, defendants only raised issues pertaining to the trial court's summary judgment order. Accordingly, we resolve the appeal as presented. *See* N.C. R. App. P. 16(a), 28(a), 28(b)(6).

9. Plaintiffs predicated their civil conspiracy claim entirely on the "overt and wrongful acts" of the alleged libel. Because defendants are immune from the defamation suit by virtue of the absolute privilege, defendants are also entitled to summary judgment regarding plaintiffs' civil conspiracy claim. *See Dobson*, 352 N.C. at 83, 530 S.E.2d at 835.

to involuntarily commit his wife. 239 N.C. at 470, 472, 80 S.E.2d at 250, 252. The husband contacted a physician who had evaluated the wife, and the physician completed an affidavit stating that the wife was "suffering from a mental disease" and was "a fit subject for admission into a hospital for the mentally disordered." *Id.* at 470–71, 80 S.E.2d at 250. The husband did not follow through on the involuntary-commitment proceeding, however, *see id.* at 471, 80 S.E.2d at 250–51, and he never filed the physician's affidavit with the clerk, *id.* at 473–74, 80 S.E.2d at 252. Rather, the wife found the defendant's affidavit "folded up and sticking behind a tool cabinet in the husband's barber shop." *Id.* at 471, 80 S.E.2d at 250–51. The wife then filed a defamation action against the physician. *Id.* at 468, 80 S.E.2d at 248. This Court held that the absolute privilege protected the physician because he "made the affidavit . . . in the due course of a proceeding previously instituted." *Id.* at 473–74, 80 S.E.2d at 252. Significantly, this Court applied the absolute privilege to the physician in *Jarman* even though his affidavit was never filed and he never actually "participated" in the proceeding.

Not only does this Court's caselaw compel the broad application of the absolute privilege, but plaintiffs also acknowledged its propriety. At oral argument, this Court asked plaintiffs' counsel whether a doctor would be protected by the absolute privilege if he advises a prospective medical-malpractice plaintiff that another doctor deviated from the applicable standard of care but is never called to be a witness at trial. In response, plaintiffs' counsel acknowledged that the absolute privilege would protect the advising doctor from any subsequent defamation suit. Plaintiffs' counsel attempted to distinguish that hypothetical situation from the facts in this case, however, as a "consultation . . . about a prospective lawsuit" involving "a person who is or could be a potential witness." Oral Argument at 23:27–27:45.

We see no material distinction, however, between the hypothetical described above, the facts in *Jarman*, and the facts presented in this case. Like the doctor in *Jarman* and the advising doctor in the hypothetical, defendants were involved in the preliminary stages of the election protests but did not play a role at the election-protest hearings. Generally, the Defense Fund oversaw the postelection activities, approving of the election-protest strategy and facilitating exchanges of information. For their part, law-firm defendants assessed data, consulted with the actual protestors about the evidence, prepared the election-protests, and filed the protests with the county boards of elections on the protestors' behalf. Moreover, defendants in this case were potential witnesses for the election-protest hearings. *See* N.C.G.S. § 163-182.10(c)(2)

(2015) ("The county board may receive evidence at the hearing from any person with information concerning the subject of the protest."); *see also id.* § 163-182.10(c)(2) (2023) (same). Simply put, defendants were inextricably intertwined with the election protests in this case. Because "the privilege belong[ed] to the occasion"—i.e., to the election protests—defendants are still entitled to the absolute privilege even if they did not "participate" as a party, counsel, or witness at the election-protest hearings. *R.H. Bouligny*, 270 N.C. at 171, 154 S.E.2d at 354.

The broad application of the absolute privilege's protection is especially critical in fast-paced proceedings like election protests. After the polls close, the initial counting of votes begins "immediately," and precinct officials provide a preliminary report of the vote count to the county boards of elections "as quickly as possible." N.C.G.S. § 163-182.2(a)(1), (5) (2015); *see also id.* § 163-182.2(a)(1), (5) (2023) (same). Then the boards of elections conduct "canvasses" to "determin[e] that the votes have been counted and tabulated correctly" and "authenticat[e] . . . the official election results." *Id.* § 163-182.5(a) (2015); *see also id.* § 163-182.5(a) (2023) (same).

The timing of election protests is measured relative to the county boards of elections' canvasses, which are normally held ten days after an election. *Id.* § 163-182.5(b) (2023); *cf. id.* § 163-182.5(b) (2015). At the latest, an election protest may be filed by "5:00 P.M. on the second business day after the county board of elections has completed its canvass and declared the results." *Id.* § 163-182.9(b)(4) (2015); *see also id.* § 163-182.9(b)(4) (2023) (same).

"[A]s soon as possible after the protest is filed," the county board of elections meets to preliminarily determine (1) whether the protest "substantially complies" with statutory filing requirements, and (2) whether the protest "establishes probable cause" to believe that a violation of election law, an irregularity, or misconduct has occurred. *Id.* § 163-182.10(a)(1) (2015); *see also id.* § 163-182.10(a)(1) (2023) (same). If both requirements are met, the county board of elections schedules a full hearing to resolve the matter. *Id.* § 163-182.10(a)(1) (2015); *see also id.* § 163-182.10(a)(1) (2023) (same).

Relevant here, if the protest is filed before the canvass and concerns the counting and tabulation of votes, the county board of elections must resolve the protest before the canvass is completed. *Id.* § 163-182.10(a)(2) (2015); *see also id.* § 163-182.10(a)(2) (2023) (same). The county board of elections may pause the canvass to ensure election protests are resolved before the canvass is completed, but it "shall not delay the

completion of the canvass for more than three days unless approved by the State Board of Elections." *Id.* § 163-182.10(a)(2) (2015); *see also id.* § 163-182.10(a)(2) (2023) (same). In all election protests, however, swiftness is the order of the day. County boards of elections must expeditiously resolve election protests to facilitate appeals and the timely certification of elections. *See id.* §§ 163-182.11,-182.14 to -182.15 (2015); *see also id.* §§ 163-182.11, -182.14 to -182.15 (2023).

Accordingly, election protests proceed rapidly, and the process does not lend itself to exhaustive discovery and absolute precision. Indeed, many times a prospective protestor must solicit the help of numerous individuals to evaluate voluminous evidence extracted from many different sources. Without the absolute privilege, the specter of civil defamation liability would chill these individuals' willingness—and undermine their ability—to engage in the election-protest process.

Such an outcome is especially unacceptable because election protests are a valuable tool in safeguarding North Carolinians' right to free elections. The public rightfully expects that we have a "government of the people, by the people, for the people." Abraham Lincoln, Gettysburg Address (Nov. 19, 1863). This requires integrity throughout the election process. Thus, citizens must be able to voice their concerns. In light of the public's strong interest in ensuring that all individuals can fully and freely collaborate and communicate in the course of an election protest, we hold that the absolute privilege's protection extends to everyone involved in that process, not just those who act as party, counsel, or witness.

Undoubtedly, in fast-paced scenarios like election protests, mistakes will be made, and the evidence will not always confirm election protestors' suspicions. Yet it remains true that "[i]n a political process meant to address public concerns, a commitment to 'free and open debate' means other parties are free to counter selfish or misleading speech with speech of their own." *Cheryl Lloyd Humphrey Land Inv. Co.*, 377 N.C. at 388–89, 858 S.E.2d at 799 (quoting *Connick v. Myers*, 461 U.S. 138, 145, 103 S. Ct. 1684, 1689 (1983)). In judicial and quasi-judicial proceedings, an aggrieved party is remedied by "expos[ing] the falsity of the statements and submit[ting] alternative evidence," *id.* at 390, 858 S.E.2d at 800—which is exactly what happened in this case. Ultimately, plaintiffs were vindicated because the protests were either withdrawn or dismissed. Further subjecting defendants to civil defamation liability for election protests impermissibly strikes "fear of retribution" in the minds of other concerned citizens, which will assuredly chill their future

willingness to "voice their concerns to the government" in future elections. *Id.*

The statements at issue were made in the due course of a quasi-judicial proceeding and were both relevant and pertinent to its subject matter. Defendants are therefore entitled to the protection of the absolute privilege.[10] Accordingly, the decision of the Court of Appeals creating a "participation" requirement is reversed. The matter is remanded to that court with instructions to further remand to the trial court for dismissal with prejudice and for any other proceedings warranted by this disposition.

REVERSED AND REMANDED.

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

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10. Although not at issue in this case, we observe that statements concerning matters of public concern generally enjoy the protection of the "qualified privilege." *See generally Stewart v. Nation-Wide Check Corp.*, 279 N.C. 278, 285, 182 S.E.2d 410, 415 (1971) ("The essential elements [for the qualified privilege to exist as a defense to defamation claims] are . . . [1] good faith, [2] an interest to be upheld, [3] a statement limited in its scope to this purpose, [4] a proper occasion, and [5] publication in a proper manner and to the proper parties only." (quoting 50 Am. Jur. 2d *Libel and Slander* § 195 (1970))). Indeed, the state constitution's Free Speech Clause grants everyone a qualified privilege "to comment on matters of public interest and concern, provided he does so fairly and with an honest purpose. Such comments or criticisms are not libelous, however severe in their terms, unless they are written maliciously." *Yancey v. Gillespie*, 242 N.C. 227, 229–30, 87 S.E.2d 210, 212 (1955) (quoting *Hoeppner v. Dunkirk Printing Co.*, 172 N.E. 139, 140 (N.Y. 1930)). To that end, this Court has recognized that when a publication concerns "political matters, public officials[,] . . . candidates for office," or other "matters of public concern," *Ponder v. Cobb*, 257 N.C. 281, 297, 126 S.E.2d 67, 79 (1962) (quoting *Utah State Farm Bureau Fed'n v. Nat'l Farmers Union Serv. Corp.*, 198 F.2d 20, 22 (10th Cir. 1952)), the publisher is given "the benefit of [a] presumption that he made the statements . . . in good faith and without malice," *id.* at 299, 126 S.E.2d 67, 80. Indeed, "[t]he burden . . . [is] placed upon the plaintiffs to establish by a preponderance of the evidence[,] or by its greater weight[,] that the defendant made his charges in bad faith, without probable cause[,] and with express malice." *Id.* at 299, 126 S.E.2d at 80. Notably, this Court held that the qualified privilege extended to "a statement made in good faith by the chairman of a political party charging misconduct of election officials, the statement being made to public officials from or through whom redress might be expected, even though the statement [was] also made public in a press release." *R.H. Bouligny*, 270 N.C. at 172, 154 S.E.2d at 355 (citing *Ponder*, 257 N.C. at 281, 126 S.E.2d at 67).

LATOYA CANTEEN AND PAMELA PHILLIPS
v.
CHARLOTTE METRO CREDIT UNION

No. 10A23

Filed 23 May 2024

Contracts—covenant of good faith and fair dealing—consumer agreement—unilateral changes—arbitration amendment—relation back to original contract—contract not rendered illusory

A credit union's unilateral changes, with notice, to a standard membership contract (which contained a change-of-terms provision) to require arbitration for certain disputes and to waive members' right to file a class action suit were enforceable because they did not violate the implied covenant of good faith and fair dealing inherent in contracts where the changes reasonably related to the universe of terms, including those that related to dispute resolution, that existed in the original contract. Further, the change-of-terms provision that permitted unilateral modifications did not render the contract illusory since the implied covenant of good faith and fair dealing acted as a sufficient check on the credit union's power to modify the contract. Finally, a member's argument that the arbitration amendment was unenforceable without her mutual assent had no merit where she gave her assent to the credit union's ability to make changes with notice when she entered into the original contract that contained the change-of-terms provision.

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, 286 N.C. App. 539 (2022), reversing an order entered on 7 September 2021 by Judge George C. Bell in Superior Court, Mecklenburg County. Heard in the Supreme Court on 21 February 2024.

Fox Rothschild LLP, by Troy D. Shelton, Nathan W. Wilson, Brian Bernhardt, and Vess A. Miller, for plaintiff-appellant.[1]

1. After oral arguments, the firm of Fox Rothschild LLP and attorneys Brian C. Bernhardt and Nathan W. Wilson, withdrew as counsel for plaintiff-appellant. Troy

Cranfill Sumner LLP, by Steven A. Bader, Mica N. Worthy, and Ryan D. Bolick, for defendant-appellee.

Ellis & Winters LLP, by Michelle A. Liguori, James M. Weiss, and Tyler C. Jameson, for Carolinas Credit Union League, amicus curiae.

Ward and Smith, P.A., by Christopher S. Edwards and Taylor B. Rodney, and Henson Fuerst, P.A., by Rachel A. Fuerst and C. Jordan Godwin, for North Carolina Advocates for Justice, amicus curiae.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P., by Christopher G. Smith, for the North Carolina Chamber Legal Institute and the North Carolina Association of Defense Attorneys, amicus curiae.

Joshua H. Stein, Attorney General, by Nicholas S. Brod, Deputy Solicitor General, Ryan Y. Park, Solicitor General, and Daniel P. Mosteller, Deputy General Counsel, for the State of North Carolina, amicus curiae.

BERGER, Justice.

This case involves a contract between two parties that allowed for the unilateral change of contractual terms by one party upon notice to the other. Based upon the dissenting opinion below, the question before this Court is whether defendant's modification of the contract to include an arbitration amendment complies with the implied covenant of good faith and fair dealing and the rule against illusory contracts. We conclude that it does, and as such the modification is enforceable.

I. Factual and Procedural Background

In 2014, plaintiff Pamela Phillips[2] opened a checking account with defendant Charlotte Metro Credit Union. Phillips and the Credit Union

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D. Shelton, along with Vess A. Miller of Cohen & Malad, LLP remain as counsel for plaintiff-appellant.

2. Latoya Canteen is a party to the underlying class action. However, the Credit Union's Motion to Stay Action and Compel Arbitration only challenged Phillips's right to join the class action without arbitration, and as such, Canteen is not a party to the current appeal.

entered into a standard membership agreement. Included in the terms of the contract was a "Notice of Amendments" provision and a "Governing Law" provision.

The Notice of Amendments provision provided:

> Except as prohibited by applicable law, [defendant] may change the terms of this Agreement. We will notify you of any change in the terms, rates, or fees as required by law. We reserve the right to waive any term in this Agreement. Any such waiver shall not affect our right to future enforcement.

The Governing Law provision stated:

> This Agreement is governed by the credit union's bylaws, federal laws and regulations, the laws, including applicable principles of contract law, and regulations of the state in which the credit union's main office is located, and local clearinghouse rules, as amended from time to time. As permitted by applicable law, you agree that any legal action regarding this Agreement shall be brought in the county in which the credit union is located.

Phillips agreed to the terms of the membership agreement and opted to receive electronic statements and communications from the Credit Union including membership disclosures.

In 2020, a separate class action was filed alleging that the Credit Union was charging overdraft fees on accounts which had not been overdrawn. Phillips was not a party to this litigation. In January 2021, the Credit Union amended its membership agreement with all members to require arbitration for certain disputes and to waive their right to file class actions. (Arbitration Amendment). In compliance with the Notice of Amendments provision and Phillips's selected form of notice, the Credit Union emailed Phillips with notice of the Arbitration Amendment on 5 January 2021, 2 February 2021, and once again on 2 March 2021.

The 5 January 2021 email was titled "Charlotte Metro CU Online Statement and Changes to Membership and Account Agreements are Available."The body of the email included a section concerning "Additional Forms and Notices." This section contained underlined and hyperlinked phrases, including "Information about Arbitration," "Arbitration and Class Action Waiver," and "Membership and Account Agreement Change in Terms." The "Information about Arbitration"

hyperlink led to a letter authored by the Credit Union's chief administrative officer and general counsel, which informed all Credit Union members:

> [The] Arbitration and Class Action Waiver provision will become effective on February 1, 2021. You do have until February 10, 2021 to exercise your right to opt-out of this provision (instructions on how to opt-out are included in the attached provision). However, if you don't opt out of this provision, then your continued use or maintenance of your Charlotte Metro account will act as your consent to this new provision.

Attached to the letter was the Arbitration Amendment at issue in this case.

The text of the Arbitration Amendment likewise notified members of their right to opt-out. The Arbitration Amendment's timeline for opting out stated that Phillips, like all members, "ha[d] the right to opt out of this agreement to arbitrate if you tell us within 30 days of the opening of your account or the mailing of this notice, whichever is sooner." Phillips did not opt out within the 30-day window.

On 25 March 2021, Phillips filed a class action complaint in the Superior Court, Mecklenburg County against the Credit Union for the collection of overdraft fees on accounts that were never overdrawn. In response, the Credit Union filed a motion to stay the action and to compel arbitration, stating that because "Phillips received and did not opt-out of the Mandatory Arbitration and Class Action Waiver requirements," arbitration was required.

The trial court denied the Credit Union's motion to stay and compel arbitration. The trial court concluded as a matter of law that, "the 'Notice of Amendments' provision here, by its plain language, did not permit CMCU to unilaterally 'add' a wholly new arbitration provision and then claim that Plaintiff's silence or inaction in the face of the unauthorized addition shows Plaintiff's assent." The trial court further held that "[e]ven if CMCU had the ability to 'add' new provisions . . . that ability was restricted by the duty of good faith and fair dealing." The Credit Union appealed this interlocutory order to the Court of Appeals.

The Court of Appeals reversed the trial court's determination and remanded the case to the trial court to stay the action pending arbitration. *Canteen v. Charlotte Metro Credit Union*, 286 N.C App. 539, 544

(2022).The Court of Appeals held that the Arbitration Amendment was an enforceable amendment to the original contract. *Id.* at 542. However, the dissent contended that there was no binding arbitration agreement between Phillips and the Credit Union, arguing that this change violated the implied covenant of good faith and fair dealing and rendered the contract illusory. *Id.* at 545 (Arrowood, J., dissenting). We affirm the Court of Appeals.

II. Analysis

In North Carolina there is a "strong public policy favoring the settlement of disputes by arbitration." *Johnston Cnty. v. R.N. Rouse & Co.*, 331 N.C. 88, 91 (1992); *see also Cyclone Roofing Co. v. David M. LaFave Co.*, 312 N.C. 224, 229 (1984). In fact, "any doubt concerning the existence of such an agreement must . . . be resolved in favor of arbitration." *R.N. Rouse & Co.*, 331 N.C. at 92. But despite this favorable view, "submission to arbitration is a contract" and as such must meet the demands of contract law. *Charlotte City Coach Lines, Inc. v. Brotherhood of R.R. Trainmen*, 254 N.C. 60, 67 (1961). The party seeking to compel arbitration has the burden to "show that the parties mutually agreed to arbitrate their disputes." *T.M.C.S., Inc. v. Marco Contractors, Inc.*, 244 N.C. App. 330, 339 (2015). A trial court's determination of whether a dispute is subject to arbitration is a conclusion of law reviewed de novo. *Id.*

We begin with the threshold question of whether the Arbitration Amendment is a valid and enforceable contract between the parties. There is no dispute that Phillips and the Credit Union entered into a valid contract in 2014.[3] The membership agreement included a "Notice of Amendments" provision which reserved the right for the Credit Union to "change the terms of th[e] agreement" upon notice to Phillips. However, this Court has not addressed the boundaries of a party's ability to include a change-of-terms provision and then unilaterally amend a contract pursuant to that provision. We take this opportunity to do so.

Common law principles dictate that traditionally, any "alter[ation] [of] the terms of a contract must be supported by new consideration," *Wheeler v. Wheeler*, 299 N.C. 633, 637 (1980), and that parties to an agreement must consent to a modification of the terms of said agreement. *Rowe v. Rowe*, 305 N.C. 177, 183 (1982).

However, "[w]ritten contracts are to be construed and enforced according to their terms." *Galloway v. Snell*, 384 N.C. 285, 287 (2023)

3. Phillips concedes that the 2014 contract was valid and enforceable yet argues the "Notice of Amendments" provision would render the contract illusory.

(cleaned up). Because "parties ha[ve] the legal right to make their own contract[s]," when the parties' intent is "clearly expressed, it must be enforced *as it is written*." *Home Owners' Loan Corp. v. Ford*, 212 N.C. 324, 326–27 (1937) (emphasis added) (quoting *Am. Potato Co. v. Jenette Bros. Co.*, 172 N.C. 1 (1916)); *see also Galloway*, 384 N.C. at 288 (stating that contracts must be interpreted in a way "to give every word and every provision effect" (cleaned up)). Further, this Court has long held that "the law will not relieve one who can read and write from liability upon a written contract, upon the ground that he did not understand the purport of the writing." *Leonard v. So. Power Co.*, 155 N.C. 10, 11 (1911).

Thus, when parties have mutually agreed to a unilateral change-of-terms provision, said provision "must be enforced as it is written," *Home Owners' Loan Corp.*, 212 N.C. at 327, subject to certain limitations. Contrary to plaintiff's assertions, the traditional modification analysis which requires mutual assent and consideration does not apply to changes stemming from a valid unilateral change-of-terms provision in an existing contract.[4]

Nonetheless, a change-of-terms provision does not grant a party free rein to alter a valid agreement; a party seeking to implement a change pursuant to a change-of-terms clause must comply with the implied covenant of good faith and fair dealing. Because this Court has not yet addressed the legal framework surrounding the limitations on change-of-terms provisions, we turn to other jurisdictions and to our Court of Appeals for persuasive guidance. While these decisions are not binding on this Court, "we borrow freely from these cases to the extent we find their reasoning to be persuasive and applicable." *See Reynolds Am. Inc. v. Third Motor Equities Master Fund Ltd.*, 379 N.C. 524, 528 (2021).

A. Implied Covenant of Good Faith and Fair Dealing

"In every contract there is an implied covenant of good faith and fair dealing that neither party will do anything which injures the right of the other to receive the benefits of the agreement." *Bicycle Transit Auth., Inc. v. Bell*, 314 N.C. 219, 228 (1985) (cleaned up). Thus, in this context, when a party makes unilateral changes to the terms of a contract pursuant to a change-of-terms clause which modify the original "benefits of the agreement," the implied covenant of good faith and fair dealing *may* be implicated. *Id.*; *see Value Health Sols., Inc. v. Pharm. Rsch. Assocs.*,

4. If a party's amendment falls outside the "universe of terms" of the original agreement, it is no longer a permissible unilateral amendment and thus must comply with the traditional modification elements of offer, acceptance, and consideration.

Inc., 385 N.C. 250, 268 (2023) (in applying Delaware law, this Court held that the implied covenant of good faith and fair dealing is limited to situations where contractual gaps exist that "neither party anticipated" and for which the complaining party could not have contracted around).

In *Badie v. Bank of Am.*, the California Court of Appeal addressed the tension between the implied covenant of good faith and fair dealing and unilateral changes to a contract, 79 Cal. Rptr. 2d 273 (Cal. Ct. App. 1998). At issue in *Badie* was an arbitration amendment which was unilaterally added by a party pursuant to a change-of-terms provision. *Id.* at 276–77.

The *Badie* court held that to comply with the covenant of good faith and fair dealing, changes to a contract must relate to "the universe of terms included in the original agreement." *Id.* at 285. Changes fall within the same "universe of terms" if they relate to the "general subject matter [which] was anticipated when the contract was entered into," *id.* at 281, and thus were "within the reasonable contemplation of the parties at the time of contract formation." *Id.* at 284 (cleaned up). Ultimately, the court held that because the original contract "did not include any provision regarding the method or forum for resolving disputes," the arbitration amendment did not relate back to the universe of terms of the original agreement, and therefore violated the covenant of good faith and fair dealing. *Id.* at 283–84.

Badie has been relied on by other jurisdictions as the framework for addressing this same issue. *See Decker v. Star Fin. Grp., Inc.*, 204 N.E.3d 918, 921–22 (Ind. 2023); *Kortum-Managhan v. Herbergers NBGL*, 204 P.3d 693, 698 (Mont. 2009); *Pruett v. WESTconsin Credit Union*, 998 N.W.2d 529, 545–46 (Wis. Ct. App. 2023).

Our Court of Appeals also adopted this approach twenty years ago in *Sears Roebuck and Co. v. Avery*, 163 N.C. App. 207 (2004). In *Sears*, our Court of Appeals, applying Arizona law, was tasked with determining whether a bank was permitted to unilaterally amend a consumer contract to include an arbitration provision. *Id.* at 212. The contract at issue in that case, as the one *sub judice*, contained a provision which permitted Sears to "change any term or part of th[e] agreement" upon written notice to the customer. *Id.* at 208.

Relying on *Badie*, the Court of Appeals concluded that parties can only rely on change-of-terms provisions "insofar as the new or modified terms relate to subjects already addressed in some fashion in the original agreement." *Id.* at 220. The Court of Appeals emphasized that changes which relate back to the "universe of terms" of the original agreement

are consistent with the covenant of good faith because they relate to subjects "within the reasonable contemplation of the parties at the time of [contract] formation." *Id.* at 218 (cleaned up). Based on this reasoning, the Court of Appeals concluded that because the original agreement "made no reference to arbitration or any other dispute resolution procedures and did not in any manner address the forum in which a customer could have disputes resolved," *id.* at 208, the arbitration clause "did not fall within the universe of subjects included in the original agreement," and thus violated the covenant of good faith and fair dealing, *id.* at 222.

These cases suggest that if the original agreement includes any provisions relating to forums or methods for dispute resolution, then a modification to include an arbitration agreement is within the same universe of terms and therefore permissible under change-of-terms provisions. *See Sears Roebuck and Co.*, 163 N.C. App. at 220; *Badie*, 79 Cal. Rptr. 2d at 284. This conclusion is further supported by the Supreme Court's holding that "[a]n agreement to arbitrate before a specified tribunal is, in effect, a specialized kind of forum-selection clause that posits not only the situs of suit but also the procedure to be used in resolving the dispute." *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 (1974).

We find this analytical framework persuasive. Given the nature of the modern economy,[5] change-of-terms provisions are a necessary and efficient way for companies to update contractual provisions without canceling accounts and renegotiating contractual terms every time modification may be required.[6] At the same time, the implied covenant

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5. Our dissenting colleague ignores fundamental economic realities of the market. While lay consumers may not understand every legal intricacy involved in the contractual process with companies, the market provides a way for consumers to respond to policies with which they disagree. As needs arise, competitor companies can provide alternatives for consumers, forcing improvements or updates to products or services, including terms to satisfy consumers' desires. *See NSA Scandal Delivers Record Numbers of Internet Users to DuckDuckGo*, The Guardian, (July 10, 2013), https://www.theguardian.com/world/2013/jul/10/nsa-duckduckgo-gabriel-weinberg-prism (last visited May 16, 2024) (Noting that within days of the NSA claiming "direct access to the servers of companies including . . . Google, Microsoft and Yahoo," the "zero tracking" website received "50% more traffic than ever before.").

6. Based on our dissenting colleague's analysis, which again ignores market realities, it appears that every user contract between consumers and major companies such as Apple, Facebook, and Amazon are illusory because they contain change-of-terms provisions alongside governing law and/or arbitration agreements. *See Terms and Conditions*, Apple Payments, Inc., https://www.apple.com/legal/applepayments/directpayments/ (last visited May 16, 2024) (Requiring arbitration, while also reserving the right to "modify, suspend, or discontinue the Direct Payments Service and/or revise these . . . terms from time to time in [Apple's] sole discretion without prior notice or liability"); *Conditions of Use*, Amazon, https://www.amazon.com/gp/help/customer/display.

of good faith and fair dealing ensures that change-of-terms provisions do not provide carte blanche to parties seeking to modify agreements, as the changes must relate to the same universe of terms as the original agreement. Thus, we conclude that modifications made pursuant to change-of-terms provisions comply with the covenant of good faith and fair dealing if the changes reasonably relate to subjects discussed and reasonably anticipated in the original agreement.

Therefore, the remaining question is whether the membership agreement contained terms related to dispute resolution such that a reasonable person could have anticipated the inclusion of an arbitration clause. We conclude that it did.

Here, the contract between Phillips and the Credit Union contained a "Governing Law" provision. This provision stated that the contract was subject to the laws of North Carolina, and that both parties agreed to bring any legal action regarding the contract "in the county in which the credit union is located." Based on these terms, the Governing Law provision clearly contemplated the forum and method for dispute resolution between the parties. Because the Arbitration Amendment simply changed the forum in which the parties could raise certain disputes, *see Sherck*, 417 U.S. at 519, we find that it was within the same universe of terms as the Governing Law provision. Therefore, contrary to Phillips's contention, the Arbitration Amendment did not violate the implied covenant of good faith and fair dealing.

B. Illusoriness

Phillips next contends that permitting the unilateral Arbitration Amendment pursuant to the Notice of Amendments provision would render the contract illusory. We disagree.

A contract is illusory when the promisor "reserve[s] an unlimited right to determine the nature or extent of his performance." *State v. Phillip Morris USA, Inc.*, 363 N.C. 623, 641–42 (2009) (cleaned up).

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html?nodeId=GLSBYFE9MGKKQXXM (last visited May 16, 2024) (Containing a "Disputes" resolution provision, while also reserving the right "to make changes to [the] . . . Service Terms, and these Conditions of Use at any time"); *Terms of Service*, FACEBOOK, https://m.facebook.com/legal/terms (last visited May 16, 2024) (Requiring dispute resolution in U.S. District Court for the Northern District of California, but also reserving the right to "update these Terms from time to time" and binding the user if they "continue to use [the] Products."). How would my dissenting colleague propose products and services be efficiently delivered if, under such a limited view of the modern market, consumer contracts had to be canceled and renegotiated with every necessary update, some of which benefit consumers?

However, as acknowledged by our Court of Appeals in *Sears*, "an otherwise illusory contract may be remedied because a limitation on a promisor's freedom of choice 'may be supplied by law.' " *Sears Roebuck and Co.*, 163 N.C. App. at 220 (citing Restatement (Second) of Contracts 2d § 77 cmt. d (1981)); *see also 24 Hour Fitness, Inc. v. Superior Court*, 78 Cal. Rptr. 2d 533, 541–42 (Cal. App. 1998) (Because the party's "discretionary power to modify the terms of the [contract] in writing indisputably carries with it the duty to exercise that right fairly and in good faith . . . . the modification provision does not render the contract illusory."); *Bassett v. Elec. Arts, Inc.*, 93 F. Supp. 3d 95, 106 (E.D.N.Y. 2015) ("[T]he arbitration provision was not invalid as illusory simply because [the party] had the unilateral right to modify the agreement . . . as the discretionary power to modify or terminate an agreement carries with it the duty to exercise that power in good faith and fairly.").

Here, the Notice of Amendments provision explicitly limited its scope by stating "[e]xcept as prohibited by applicable law." As discussed above, the implied covenant of good faith and fair dealing requires that any modifications made pursuant to a change-of-terms provision fall within the universe of terms included in the original agreement. This requirement serves as a sufficient "limitation on a promisor's freedom of choice" and as such remedies any purported issues of illusoriness which may arise from a change-of-terms clause.[7]

C. Mutual Assent

Finally, Phillips asserts that she "did not accept the Credit Union's offer to arbitrate through silence" and therefore, the Arbitration Amendment is not an enforceable agreement between the parties. Phillips argues that if it is found to be binding without her mutual assent, then this logic would also permit "[t]he Credit Union's members [to] send letters to the Credit Union stating that, unless the Credit Union expressly opts out, the Credit Union is bound to deposit an extra

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7. Our dissenting colleague dedicates more than two pages of her opinion to case law which she concedes is distinguishable on several grounds. First and foremost, out of the fifteen cases cited, only one relates to a consumer contract containing a unilateral change-of-terms provision which is later amended to include an arbitration provision. *See Pruett*, 998 N.W.2d at 539–44 (Adopting the same *Badie* and *Sears* framework as this opinion but concluding that the arbitration amendment was an addition rather than a permissible change). Also, all but four of these cases concern employment contracts which initially contained arbitration agreements, but which the employer retained significant authority to retroactively alter, amend, retract, or delete either the arbitration provision itself, or the rules for the arbitration proceedings. Given the distinct factual differences of these cases, they are inapposite to our conclusion today.

$1,000 in their accounts each month." However, this argument is wholly misguided and neglects to address the fact that Phillips consented to a change-of-terms provision which permitted the Credit Union to amend terms upon notice, and the membership agreement did not contain a provision which permitted Phillips to do the same.

The Notice of Amendments provision at issue demonstrated an agreement between Phillips and the Credit Union that the Credit Union was free to change the terms upon notice to Phillips—not consent by Phillips. Therefore, contrary to Phillips's argument, this was not an "offer" which required mutual assent.[8] Any mutual assent which was required was given in 2014 when Phillips agreed to be bound by the Notice of Amendments provision.

III. Conclusion

Change-of-terms provisions permit unilateral amendments to a contract so long as the changes reasonably relate back to the universe of terms discussed and anticipated in the original contract. Here, the Arbitration Amendment was within the universe of terms of the contract between the parties, and thus complies with the implied covenant of good faith and fair dealing and does not render the contract illusory. As such, we affirm the Court of Appeals' determination that the Arbitration Amendment is a binding and enforceable agreement between Phillips and the Credit Union.

AFFIRMED.

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

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8. We note that while both parties categorize the Arbitration Amendment as a unilateral modification, and we analyze as such, one could argue that the opt-out provision acts as an offer to modify, which in turn requires acceptance by the other party. *See Snyder v. Freeman*, 300 N.C. 204, 218 (1980). However, because the Court of Appeals' dissent did not raise this argument, we do not address it. *See Cryan v. Nat'l Council of Young Men's Christian Assn's of U.S.*, 384 N.C. 569, 574–575 (2023). Nonetheless, we note that even under that theory, Phillips's failure to opt out of the modification here would likely still be fatal to her claim.

Justice RIGGS dissenting.

Today's decision upends what should be a level playing field between ordinary customers and commercial entities. It hurts consumers, unfairly favors sophisticated corporations, and abandons the scrutinous approach generally taken to agreements of adhesion like form consumer contracts. Charlotte Metro Credit Union (CMCU), while facing a class action lawsuit related to the alleged assessment of unlawful fees against its customers, unilaterally imposed new terms on its membership agreement with Pamela Phillips in an apparent attempt to retroactively insulate itself from the full consequences of those allegedly unlawful acts. Relying on a materially unrestrained modification provision in a consumer contract, CMCU single-handedly deprived Ms. Phillips of her constitutional right to a jury trial on her claims *and* the ability to defray the burden of vindicating that right through a class action. To make matters worse, the modification's language—drafted and adopted by CMCU alone—left Ms. Phillips without an avenue to opt out of arbitration and the class action waiver.

I would hold that these actions by CMCU violate North Carolina contract law. These unilaterally adopted provisions are illusory—nothing precludes CMCU under the majority's opinion from one-sidedly restoring CMCU's rights to bring its claims in court. CMCU's arbitration amendment also violated the implied covenant of good faith and fair dealing, which precludes parties from single-handedly "recaptur[ing] opportunities forgone upon contracting." Steven J. Burton, *Breach of Contract and the Common Law Duty to Perform in Good Faith*, 94 Harv. L. Rev. 369, 373 (1980). Finally, the majority's holding is at odds with the realities of consumer contracts and the effects of arbitration on the constitutional right to trial by jury, both generally and in this particular case. For these reasons, I respectfully dissent.

I. Analysis

My disagreement begins with the recognition of a fundamental principle of contract law: an illusory contract, which "confers upon [a party] an unlimited right to determine the nature or extent of his performance," *Wellington-Sears & Co. v. Dize Awning & Tent Co.*, 196 N.C. 748, 752 (1929), is no contract at all. *See, e.g.*, *Kirby v. Stokes Cnty. Bd. of Educ.*, 230 N.C. 619, 626 (1949) ("One of the essential elements of every contract is mutuality of agreement. And mutuality of promises means that the promises, to be enforceable, must each impose a legal liability upon the promisor. Each promise then becomes a consideration for the other." (cleaned up)).

The unilateral modification provision in this case—allowing CMCU to modify any provisions at will and waive[1] contract terms in its sole discretion—renders the terms of the arbitration and class action waiver amendment illusory. The majority simultaneously holds that: (1) Ms. Phillips contracted away all essential elements for modification, i.e., offer, assent, and new consideration, *Wheeler v. Wheeler*, 299 N.C. 633, 637 (1980); (2) the arbitration amendment was a "change" to existing terms—rather than an addition of new terms—because the underlying contract contained a forum selection clause; and (3) retroactively and prospectively restricting claims to arbitration satisfied the implied covenant of good faith and fair dealing because such action "fall[s] within the universe of terms included in the original agreement . . . [which] remedies any purported issues of illusoriness which may arise from a change-of-terms clause." If this is so, CMCU remains free to single-handedly unbind itself from arbitrating anything at all.

Under the rule from the majority opinion, CMCU could promulgate an amendment today eliminating any obligation to arbitrate *its* claims while leaving the requirement that Ms. Phillips arbitrate *hers* intact. Such an act would not offend the logic of the majority's holding; having diminished the covenant of good faith and fair dealing to merely requiring that the unilateral amendment "reasonably relate to subjects discussed and reasonably anticipated in the original agreement," and with no requirements for assent or new consideration, such an amendment is perfectly consistent with the majority's position. On a whim, CMCU could effortlessly free itself from arbitration while leaving Ms. Phillips helplessly bound.

And yet, cases from other jurisdictions rejecting this logic are strewn throughout the pages of those jurisdictions' case law. *See*, *e.g.*, *Hooters of Am.*, *Inc. v. Phillips*, 173 F.3d 933, 938–39 (4th Cir. 1999) (affirming a trial court's determination that an arbitration agreement supplemental to an employment contract was illusory partly because the employer could unilaterally change or eliminate arbitration); *Coady v. Nationwide Motor Sales Corp.*, 32 F.4th 288, 292–93 (4th Cir. 2022) (holding an arbitration provision subject to a unilateral modification clause allowing one party to "change, abolish, or modify existing policies, procedures or benefits . . . as it may deem necessary with or without notice" was illusory); *Morrison v. Amway Corp.*, 517 F.3d 248, 257 (5th Cir. 2008) (holding an arbitration amendment inserted into multi-level marketing

1. In addition to allowing unilateral changes, the amendment clause also authorized CMCU to "waive any term in this Agreement" and added that "[a]ny such waiver shall not affect our right to future enforcement."

distribution agreements were illusory because "nothing . . . precludes amendment to the arbitration program—made under Amway's unilateral authority to amend its Rules of Conduct—from eliminating the entire arbitration program or its applicability to certain claims or disputes"); *Torres v. S.G.E. Mgmt., L.L.C.*, 397 F. App'x 63, 68 (5th Cir. 2010) (holding arbitration promise in a multi-level marketing contract was illusory when the promisor "essentially could renege on its promise to arbitrate by merely posting an amendment to the agreement on its website"); *Carey v. 24 Hour Fitness, USA, Inc.*, 669 F.3d 202, 206 (5th Cir. 2012) (holding an employment contract's arbitration clause was illusory under Texas law where another provision of the contract allowed the employer to unilaterally modify all provisions of the agreement and did not contain a savings clause); *Floss v. Ryan's Fam. Steak Houses, Inc.*, 211 F.3d 306, 315–16 (6th Cir. 2000) (holding an arbitration agreement illusory because it allowed one party "to alter the applicable rules and procedures without any obligation to notify, much less receive consent from [the other party]"); *Penn v. Ryan's Fam. Steak Houses, Inc.*, 269 F.3d 753, 759–60 (7th Cir. 2001) (holding an arbitration agreement was illusory when it gave one party "the sole, unilateral discretion to modify or amend" the arbitration provisions); *Dumais v. Am. Golf. Corp.*, 299 F.3d 1216, 1219 (10th Cir. 2002) ("We join other circuits in holding that an arbitration agreement allowing one party the unfettered right to alter the arbitration agreement's existence or its scope is illusory." (citations omitted)); *Canales v. Univ. of Phoenix, Inc.*, 854 F. Supp. 2d 119, 126 (D.Me. 2012) ("[B]ecause Phoenix retained the unfettered right to amend the terms of the arbitration agreement with its employees, the arbitration agreement was illusory and unenforceable."); *In re Zappos.com, Inc. Customer Data Sec. Breach Litigation*, 893 F. Supp. 2d 1058, 1066 (D.Nev. 2012) ("In effect, the agreement allows Zappos to hold its customers and users to the promise to arbitrate while reserving its own escape hatch.. . . Because the Terms of Use binds consumers to arbitration while leaving Zappos free to litigate or arbitrate wherever it sees fit, there exists no mutuality of obligation."); *Cheek v. United Healthcare of the Mid-Atl., Inc.*, 835 A.2d 656, 662 (Md. Ct. App. 2003) ("[T]he fact that United HealthCare reserves the right to alter, amend, modify, or revoke the Arbitration Policy at its sole and absolute discretion at any time with or without notice creates no real promise and, therefore, insufficient consideration to support an enforceable agreement to arbitrate." (cleaned up)); *Baker v. Bristol Care, Inc.*, 450 S.W.3d 770, 776–77 (Mo. 2014) (en banc) (holding arbitration agreement was illusory notwithstanding a thirty-day notice provision where one party "retain[ed] unilateral authority to amend the agreement retroactively");

Peleg v. Neiman Marcus Grp., 140 Cal. Rptr. 3d 38, 58 (Cal. Ct. App. 2012) (holding a retroactive arbitration amendment pursuant to an unlimited unilateral amendment clause in the underlying contract was illusory because "one party can avoid its promise to arbitrate by amending the provision or terminating it altogether" (cleaned up)); *Pruett v. WESTconsin Credit Union*, 998 N.W.2d 529, 544–45 (Wis. Ct. App. 2023) (holding, based in part on the discussion of illusoriness by the Court of Appeals' dissent in this case, that a credit union could not unilaterally add an arbitration clause to its services agreement notwithstanding the fact that the original agreement required "any legal action . . . be brought in the county in which the credit union is located"); *cf. Donelson v. Ameriprise Fin. Servs., Inc.*, 999 F.3d 1080, 1091 (8th Cir. 2021) (holding an arbitration provision was not illusory where any modification required separate "acknowledgment and agreement" of that modification through an unconditioned duty to notice the change and the customer's continued use following said notice).[2]

To be sure, many of the above cases do not address amendments to agreements that contained forum selection clauses.[3] But the irrelevance of that fact is self-evident: if *original* agreements containing arbitration clauses are illusory by virtue of unrestricted unilateral amendment clauses, *see*, *e.g.*, *Coady*, 32 F.4th at 293, then what does a pre-existing forum selection clause matter to a subsequent *amendment* unilaterally imposing arbitration? Whether the amendment is foreseeable or not, one party retains complete control over which and what claims are arbitrated—and the implied covenant described by the majority does nothing to restrict a one-sided abuse of that right.[4]

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2. Several of these cases make mention of notice. I do not believe the notice contemplated by the contract here meaningfully alters the equation. *See Peleg*, 140 Cal. Rptr. 3d at 58–59 (detailing how notice requirements do not save an illusory arbitration provision). Notably, the notice provision in this case is qualified by "as required by law" language, disclosing that notice is not always—or even often—required. *See*, *e.g.*, *Bailey v. Mercury Fin., LLC*, 694 F. Supp. 3d 613, 2023 WL 6244591, *6–7 (D.Md. 2023) (holding a unilateral arbitration amendment to be illusory notwithstanding a notice provision because this "as is required by law" language did not impose any meaningful restriction on a party's ability to unilaterally revoke arbitration).

3. That many of these cases do not involve amendments to consumer contracts is not the meaningful distinction the majority believes it to be. Form consumer contracts are, if anything, *more* adhesive than traditional contracts.

4. The majority cites to *24 Hour Fitness, Inc. v. Superior Court*, 78 Cal. Rptr. 2d 533 (Cal. Ct. App. 1998), for the proposition that the implied covenant acts as an adequate constraint on future modifications to arbitration amendments. That case is illustrative of the hole in the majority's logic. As *Peleg* later observed, *24 Hour Fitness* did not "precisely define[ ] the limitations that the covenant of good faith and fair dealing places on an employer's unilateral right to modify an arbitration agreement," 140 Cal. Rptr. 3d at 67.

The implied covenant of good faith and fair dealing also carries with it more duties than the majority recognizes. Setting aside the issue of a party's ability to freely unbind itself from arbitration, numerous authorities have also held that the unilateral imposition of a *retroactive* arbitration clause violates this covenant. *See*, *e.g.*, *Sears Roebuck & Co. v. Avery*, 163 N.C. App. 207, 219 (2004) ("A customer would not expect that a major corporation could choose to disregard potential contractual opportunities and then later, if it changed its mind, impose them on the customer unilaterally."); *Peleg*, 140 Cal. Rptr. 3d at 59-62; *Carey*, 669 F.3d at 206; *Pruett*, 998 N.W.2d at 639; *Sevier Cnty. Schs. Fed. Credit Union v. Branch Banking & Tr. Co.*, 990 F.3d 470, 481 (6th Cir. 2021); *Avery v. Integrated Healthcare Holdings*, *Inc.*, 159 Cal. Rptr. 3d 444, 454 (Cal. Ct. App. 2013); *cf. Davis v. USA Nutra Labs*, 303 F. Supp. 3d 1183, 1195 (D.N.M. 2018) (holding an arbitration amendment was not "unreasonably one-sided" because it "d[id] not purport to render modifications retroactively applicable"). Bolstering the conclusion reached by these courts is the skeptical eye taken by this Court and others toward adhesion contracts. *See Tillman v. Com. Credit Loans*, *Inc.*, 362 N.C. 93, 103 (2008) (concluding that an arbitration agreement in an unnegotiated adhesion contract was procedurally unconscionable where, among other things, "the bargaining power between defendants and plaintiffs was unquestionably unequal in that plaintiffs are relatively unsophisticated consumers contracting with corporate defendants who drafted the arbitration clause and included it as boilerplate language in all of their loan agreements"); *see also Powertel*, *Inc v. Bexley*, 743 So.2d 570, 574 (Fl. Dist. Ct. App. 1999) (declining to enforce and apply a retroactive arbitration provision to ongoing litigation in part because "the arbitration clause [was] an adhesion contract"). Indeed, even the current draft of the Restatement of the Law of Consumer Contracts—itself a document designed to facilitate such agreements—acknowledges that "a modification clause that grants the business wide discretion to modify the terms of the contract is unenforceable by the business if the business attempts to modify the contract with retroactive effect or otherwise in the absence of good faith," Restatement of Consumer Contracts § 5 cmt. 5. (Am. L. Inst., Rev. Tentative Draft No. 2, 2022).

On the subject of consumer contracts specifically, the majority grounds itself in practical concerns like "the nature of the modern economy," yet fails to fully recognize the realities existing on both sides of

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That court then held that *the protection against retroactive modifications* contained in the implied covenant is what protected the *24 Hour Fitness* arbitration amendment from illusoriness. *Id.*

the contractual arrangement. As the majority acknowledges, consumer contracts are designed *not* to be negotiated, and they purposefully and explicitly target ordinary lay *consumers*. But a reliable economy that supports meaningful consumer engagement (and maximal consumer spending) must accommodate consumer-oriented actualities, rather than only examining interactions from the business-side perspective. The majority misses this mark: while some, not all, lawyers may realize that "[a]n agreement to arbitrate before a specified tribunal is, in effect, a specialized kind of forum-selection clause that posits not only the situs of suit but also the procedure to be used in resolving the dispute," *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 (1974), the reality is that most ordinary lay consumers are neither aware of this legal precept nor in a position to understand its import.[5] *See, e.g.*, Jeff Sovern et al., "*Whimsy Little Contracts" with Unexpected Consequences: An Empirical Analysis of Consumer Understanding of Arbitration Agreements*, 75 Md. L. Rev. 1, 62 (2015) ("Our research suggests that typical consumers do not realize when they have agreed to arbitrate and do not understand the consequences of agreeing to arbitrate. While that finding may be unsurprising on its face, the depth of consumer misunderstanding did surprise us. Even those respondents who claimed to read and understand the contract got the most basic questions about the nature and effect of the arbitration clause wrong."). An arbitration amendment *and* class action waiver is not foreseeable, in any practical sense, to an ordinary consumer simply because of the existence of a forum selection clause in the underlying contract.[6] The majority thus

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5. It is reasonable to assume the vast majority of lay people do not hire an attorney to review the terms of consumer contracts prior to entering into them; requiring customers to do so would itself drastically alter the economics of these arrangements and likewise upend the "modern economy." In this particular case, the contract and other disclosures provided by CMCU to Ms. Phillips did not encourage her to seek advice of counsel prior to execution so that she might have understood the significance of the forum selection clause that CMCU and the majority now place upon that clause.

Though the majority claims lay consumers may look for alternative service providers to avoid "policies with which they disagree," this ignores the obvious and fails, yet again, to consider the consumer's position in these transactions: if people do not generally understand what arbitration is or what arbitration provisions do, then how can they know whether they agree or disagree with them?

6. I stress that the amendment in this case did more than simply change the tribunal in which claims may be brought; it also removed a mechanism for enforcing those claims. It is one thing to suggest that Ms. Phillips should have foreseen a potential shift in the available judicial bodies based on the forum selection clause, but it is a further leap to say she should have also expected to lose her right to bring claims via class action *regardless of forum*. And while the contract at issue did contain a severability clause, the plain text of the arbitration and class action waiver amendment show them to be inseparable: "ARBITRATION REPLACES . . . THE RIGHT TO PARTICIPATE IN A CLASS ACTION OR SIMILAR PROCEEDING."

represents a one-sided view of consumer contracts—the view that is antagonistic to consumer protection—that contradicts both the factual circumstances accompanying most consumer contracts and three basic premises of contract law: (1) a binding arbitration agreement requires mutual assent and a meeting of the minds, *Routh v. Snap-On Tools Corp.*, 108 N.C. App. 268, 271–72 (1992); (2) waiver of the right to trial by jury "must be examined cautiously," *King v. Bryant*, 225 N.C. App. 340, 349 (2013); and (3) adhesion contracts should be *more* carefully scrutinized than negotiated arms-length transactions, *Tillman*, 362 N.C. at 103.

These practical implications are heightened by the particular facts of this case and the constitutional rights at issue. As we have previously observed:

> [S]ince the right of trial by jury is highly favored, . . . waivers of the right are always strictly construed and are not to be lightly inferred or extended by implication, whether with respect to a civil or criminal case. . . . *[I]n the absence of an express agreement or consent*, a waiver of the right to a jury trial will not be presumed or inferred. Indeed, every reasonable presumption should be made *against* its waiver.

In re Gilliland, 248 N.C. 517, 522 (1958) (cleaned up) (emphases added).

Here, the trial court found that the arbitration provision was inserted by CMCU without Ms. Phillips' actual assent, knowledge, or notice. The email sent in this case—though including the subject line "Changes to Membership and Account Agreements are Available" and links to "Information about Arbitration" and an "Arbitration and Class Action Waiver"—did not disclose on its face that Ms. Phillips was waiving her right to a jury trial *unless* she took action to stop it. Indeed, the links explaining the arbitration amendment were *separate* from the link explaining the "Membership and Account Agreement Change in Terms," suggesting to any reasonable reader that the "Arbitration and Class Action Waiver" was not a self-executing change to the underlying contract but instead something Ms. Phillips could elect to pursue. And even if she did follow the links and read the arbitration and class action waiver amendment, the opt-out provision of the amendment—by its plain language—did not clearly and unambiguously apply to her: it allowed customers "to opt out of this agreement to arbitrate if you tell us within 30 days of the opening of your account or the mailing of this notice, whichever is sooner." In Ms. Phillips' case, the "sooner" of these

events was thirty days within the opening of her account *seven years earlier in 2014*. Ms. Phillips also could not obviously opt out by cancelling her account; even though the accompanying letter from CMCU's chief administrative officer and general counsel indirectly suggested such a possibility by stating that continued use of the account constituted assent, the amendment itself provided that it applied "regardless of whether [ ] your account is closed."

The lack of clarity in these opt-out provisions further weighs heavily against validating the arbitration and class action waiver amendment. *See Pruett*, 998 N.W.2d at 548 ("The fact that the opt-out provision was ambiguous and must therefore be construed against WCU supports our conclusion that WCU failed to demonstrate that Pruett assented to its offer to add the Arbitration Clause . . . ."); *Duling v. Mid. Am. Credit Union*, 530 P.3d 737, 750 (Kan. Ct. App. 2022) ("Construing the [ambiguous] opt-out provisions against MACU, we find that MACU failed to show Duling assented to its offer to add an arbitration clause."). Construing these facts *against* waiver of a constitutional right as required by law, *In re Gilliland*, 248 N.C. at 522, Ms. Phillips cannot be said to have knowingly, intelligently, and voluntarily waived her constitutional right to a jury trial through a unilateral amendment by CMCU.

Finally, and to answer the rather simple question posed of this dissent by the majority, recognizing a breach of the implied covenant of good faith and fair dealing in this case would not require the cancellation and renegotiation of every consumer contract in the event an amendment is desired by a service provider. A change in terms that is not retroactive and contains a savings clause does not offend the maxim that an attempt to recapture foregone opportunities breaches the implied covenant. *See*, *e.g.*, *Peleg*, 140 Cal. Rptr. 3d at 59–62. Service providers might also notice such changes on an opt-*in* rather than opt-*out* basis—or, at a minimum, provide actual clear notice of opt-out rights in a plain and unambiguous manner. *See*, *e.g.*, *Trudeau v. Google LLC*, 349 F. Supp. 3d 869, 881 (N.D.Ca. 2018) (holding addition of an arbitration clause to Google's AdWords terms of service under a unilateral amendment provision was not illusory or in violation of the implied covenant of good faith and fair dealing where "it provided ample notice to the advertisers, required them to accept or decline, and gave them a valid opportunity to opt out"). Finally, even if the common law of contracts precludes unilateral contract modifications, our legislative branch is well equipped to weigh the interests of businesses and consumers and enact laws that strike the appropriate balance. *See*, *e.g.*, *March v. First USA Bank, N.A.*, 103 F. Supp. 2d 909, 915 (N.D.Tx. 2000) (enforcing a

unilateral arbitration amendment to a credit card agreement where an applicable state statute specifically authorized unilateral arbitration amendments to credit card agreements).[7]

II. Conclusion

"[I]mplicit in every contract is the obligation of each party to act in good faith." *Great Am. Ins. Co. v. C.G. Tate Constr. Co.*, 303 N.C. 387, 399 (1981). The majority's holding in this case functionally erases that obligation in the context of unilateral retroactive amendments to consumer contracts, thereby disrupting the leveling effect of our law on parties that have dramatically different negotiating power. So now, as long as the original consumer contract touched on the subject of the amendment, the amending party has free rein to make whatever changes it wishes—including relieving itself of any duty to arbitrate while leaving that restriction on the other party. This is true even when: the lay consumer had no actual notice of the amendment; the amendment itself was unclear as to her ability to opt out; the amendment was retroactive in effect; and the amendment deprived her of constitutional rights previously recognized, protected, and reserved by the original contract. Like the trial court and the dissent from the Court of Appeals, I would hold the arbitration and class action waiver amendment in this case to be void for these reasons. I respectfully dissent.

Justice EARLS joins in this dissenting opinion.

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7. There is, of course, no small irony in claiming this dissent "ignores market realities" while simultaneously presuming that: (a) lay consumers—who frequently do not read or have the education or resources to understand consumer contracts of adhesion—are able to meaningfully shop around for market alternatives whose agreements lack forum selection, arbitration, and unilateral amendment clauses; and (b) enormous—and enormously sophisticated—commercial entities like Amazon, Apple, and Facebook are so helpless as to be unable to imagine these (and perhaps other) alternatives that would accomplish their business objectives without offending basic contract principles of fundamental fairness.

ERIC STEVEN FEARRINGTON, CRAIG D. MALMROSE
v.
CITY OF GREENVILLE, PITT COUNTY BOARD OF EDUCATION

No. 89PA22

Filed 23 May 2024

1. Jurisdiction—standing—taxpayer—constitutional challenge—local red light camera enforcement program—remedies permitted

After the legislature passed a local act implementing a city's red light camera enforcement program and authorizing an interlocal agreement—which laid out a cost-sharing framework for funding the program—between the city and its county's school board, two individuals (plaintiffs) who received citations and were each fined $100.00 for running red lights had taxpayer standing to challenge the local act's constitutionality. First, plaintiffs effectively sued on the school board's behalf by alleging that, under the Fines and Forfeitures Clause of the state constitution, the board was entitled to a larger share of red light penalties than what it retained under the interlocal agreement. Second, plaintiffs adequately alleged a "direct injury" where they argued that at least part of the $100.00 penalty they paid to the city was unconstitutionally rerouted away from the local school board. Third, plaintiffs sufficiently alleged a "demand" on the board to protect its interests and the board's refusal to do so by challenging plaintiffs' claims. Finally, plaintiffs' taxpayer standing permitted them to pursue injunctive and declaratory relief, but not money damages (specifically, a refund of the fines).

2. Schools and Education—local school board—cost-sharing agreement with city—funding for red light camera enforcement program—"clear proceeds" allotted to board—exemption from statutory collection cap

Where the legislature passed a local act implementing a city's red light camera enforcement program and authorizing an interlocal agreement between the city and its county's school board, the funding scheme laid out in the agreement did not violate N.C.G.S. § 115C-437 by allotting to the board less than 90% of the penalties collected under the program. Section 115C-437 promises local school administrative units the "clear proceeds" that they are constitutionally owed under such government programs, defining "clear proceeds" as the full amount of all penalties or fines collected minus

the costs of collection, with those costs not to exceed 10% of the amount collected. Nevertheless, the text of the local act authorizing the red light program showed that the legislature intended to exempt the board and the city from having to follow the statutory 10% cap and to allow them to split costs differently.

3. Constitutional Law—North Carolina—Fines and Forfeitures Clause—interlocal agreement—"clear proceeds"—fines from red light camera enforcement program

A local act implementing a city's red light camera enforcement program and authorizing an interlocal agreement—which laid out a cost-sharing framework for funding the program—between the city and its county's school board did not violate the Fines and Forfeitures Clause of the North Carolina Constitution (Art. IX, section 7), where the board received all of the fines collected under the program and then reimbursed the city for two main expenses: the fee for the private company hired to install the cameras, maintain them, and process captured violations; and the salary of an officer hired to review the recorded evidence and approve citations. Through this framework, the city recouped only the "reasonable costs of collection," and therefore the board retained the "clear proceeds" of collected red light penalties as that term is defined under the Fines and Forfeitures Clause.

Justice BERGER dissenting.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 282 N.C. App. 218 (2022), dismissing in part, affirming in part, and reversing and remanding in part orders entered on 22 April 2020, 22 July 2020, and 28 July 2020 by Judge Jeffery B. Foster in Superior Court, Pitt County. Heard in the Supreme Court on 21 February 2024.

Stam Law Firm, PLLC, by R. Daniel Gibson and Paul Stam, for plaintiffs-appellees.

Hartzog Law Group, LLP, by Dan M. Hartzog, Jr., Katherine Barber-Jones, and Rachel G. Posey, for defendant-appellant City of Greenville.

Brooks, Pierce, McLendon, Humphrey & Leonard, LLP, by Elizabeth L. Troutman, Robert J. King III, Jill R. Wilson, and

William A. Robertson, for defendant-appellant Pitt County Board of Education.

Michele Delgado, Samuel J. Davis, and Kristi L. Graunke for American Civil Liberties Union of North Carolina Legal Foundation, amicus curiae.

Jeanette K. Doran for North Carolina Institute for Constitutional Law, amicus curiae.

EARLS, Justice.

In 2017, the City of Greenville (Greenville) installed traffic cameras at its most dangerous intersections. As part of Greenville's Red Light Camera Enforcement Program (RLCEP), those cameras automatically detect and photograph drivers who run red lights. The RLCEP was over a decade in the making. Greenville's first try was in 2004, when it contracted with a company to install and operate red light cameras. *See* City of Greenville, N.C., *Termination of agreement for the Redlight Photo Enforcement Program* 1 (Aug. 9, 2007), http://www.thenewspaper.com/rlc/docs/2007/gvnc-cancel.pdf [hereinafter *2007 Termination Agreement*]. But the City abandoned that effort just three years later after a court decision stymied its ability to fund the program using collected penalties. *See id.* Under that legal regime, Greenville explained, it would be "economically infeasible for [it] to proceed." *Id.* at 2. So it did not.

Almost a decade later, however, Greenville saw a way forward. Inspired by Fayetteville's system of red light cameras, the City asked the legislature for permission to start a "fiscally prudent" program of its own via a cost-sharing agreement with the Pitt County Board of Education (Board). The General Assembly assented. *See* An Act to Make Changes to the Law Governing Red Light Cameras in the City of Greenville, S.L. 2016-64, 2015 N.C. Sess. Laws (Reg. Sess. 2016) 179 (Local Act).

With that legislative blessing, Greenville approved the RLCEP and negotiated an Interlocal Agreement with the Board. The City agreed to forward 100% of collected red light penalties to the Board. It would then invoice the Board for the actual costs needed to keep the program afloat. All told, the Board kept 72% of the collected funds—about $1.7 million for Pitt County schools. Greenville, in turn, got its long-awaited traffic cameras.

In 2018, plaintiffs Eric Fearrington and Craig Malmrose received citations for red light violations captured by RLCEP cameras. Plaintiffs challenged their citations—first at administrative hearings and then in court. In both forums, plaintiffs argued that the RLCEP violated Article IX, Section 7 of North Carolina's Constitution. That provision—called the Fines and Forfeitures Clause (FFC)—promises the public schools the "clear proceeds" of all penalties, forfeitures, and fines "collected in the several counties for any breach of the penal laws of the State." N.C. Const. art. IX, § 7. In plaintiffs' view, the Interlocal Agreement between the Board and City diverted the "clear proceeds" of red light fines away from Pitt County public schools. The Court of Appeals agreed and struck down the RLCEP's funding mechanism.

On appeal, we consider two questions. First, as residents and taxpayers of Pitt County, do plaintiffs have standing to challenge the RLCEP and seek injunctive and declaratory relief? If so, is the RLCEP—and the statute authorizing it—constitutional under the FFC? We answer yes to both inquiries, and thus affirm in part and reverse in part the Court of Appeals.

I. Background

A. Greenville's Red Light Camera Program

Failure to stop at a red light is a civil infraction that carries a maximum $100 penalty. *See* N.C.G.S. § 20-176(a)-(b) (2023). To enforce that provision, the General Assembly has allowed some cities to install red light cameras. *See* N.C.G.S. § 160A-300.1(d) (2023). In 2000, legislators added Greenville to that list. *See* An Act to Authorize the [City of Greenville] to Use Photographic Images as Prima Facie Evidence of a Traffic Violation . . ., S.L. 2007-37, 1999 N.C. Sess. Laws (Reg. Sess. 2000) 149. But though the City had permission to install traffic cameras, that course was not viable under existing law. *See 2007 Termination Agreement*. More specifically, the limits prescribed by N.C.G.S. § 115C-437—and court decisions interpreting that provision—required "90% of the money received from citations be paid to the county school systems." *Id.* at 1. To Greenville, the 10% statutory cap on collection costs made red light cameras "economically infeasible." *Id.* at 2.

But in 2016, the City charted a path towards a "fiscally prudent" red light camera program. Paralleling a similar arrangement in Fayetteville, the Greenville City Council passed a resolution asking the General Assembly for permission "to implement a red light camera enforcement program utilizing an interlocal agreement with the [Board] which includes provisions on cost sharing and reimbursement." The resolution

explained that Greenville "has the authority to implement a red light camera enforcement program," but "it is not financially viable unless" coupled with the requested "interlocal agreement with the Board." Without the legislature's approval, Greenville continued, it "could only retain the amount which represents the cost of collection of the fines which could not exceed 10% of the amount of the fines." The City thus sought greater fiscal leeway to share costs with the Board. Pitt County's Board of Commissioners passed a similar resolution.

The General Assembly considered and approved those requests. *See* Local Act. In 2016, lawmakers statutorily authorized Greenville and the Board to enter an Interlocal Agreement "necessary and proper to effectuate the purpose and intent of G.S. 160A-300.1 and this act." *Id.* § 4, at 180. Most importantly—and as requested by the Board and City—the legislature permitted the Interlocal Agreement to "include provisions on cost-sharing and reimbursement," so long as Greenville and the Board "freely and voluntarily agree[d] to" those terms. *Id.*

In response, Greenville amended its code of ordinances to provide for a red light violation offense. *See* Greenville, N.C., Code § 10-2-283 (2016). Drivers who received citations could appeal them through an administrative process reviewable in superior court. *Id.* § 10-2-285. To manage the RLCEP, Greenville hired Officer Patrick O'Callaghan at a salary of $75,000 per year. It also contracted with American Traffic Solutions, Inc. (ATS)—a private company headquartered in Arizona—to install, maintain, and manage the cameras.[1] The City agreed to pay ATS $31.85 of every $100 citation, on top of other service expenses.

To share the costs of the program and the collected funds, Greenville and the Board entered an Interlocal Agreement. The City agreed to administer the cameras and collect the penalties for red light violations. On the front end, Greenville would forward 100% of the money to the Board. But each month, Greenville would invoice the Board for program expenses, including the "actual cost of the Service Contract" with ATS and Officer O'Callaghan's salary and benefits. The Agreement also contained a backstop: the Board was not required to pay if the costs of the program exceeded the collected fines. In other words, the Board could only make money from the program.

With those agreements in place, Greenville installed red light cameras at five intersections. The cameras are synchronized with the traffic

1. ATS has since become Verra Mobility Corporation. For clarity and consistency with the Court of Appeals opinion under review, we refer to the corporate entity by its previous name.

signals. Sensors in the pavement monitor traffic flow just before the stop bar. When a car crosses that bar and enters the intersection during a red light, the sensors send a signal to the camera. The camera automatically snaps two pictures—one of the car at the stop bar, the other as it continues through the intersection. Both photos include the car's license plate and the traffic signal. For good measure, the camera also tapes a video of the violation.

ATS processes the recorded evidence and matches the car's license plate to its registered owner. The company then turns that evidence over to Officer O'Callaghan, who reviews it and decides whether to issue a citation. If he sees a red light violation, ATS mails a civil citation—called a Notice of Violation—to the car's registered owner. The Notice includes pictures of the violation and the car's license plate. It also instructs the recipient how to view video footage, how and when to pay the $100 civil penalty, and how to request an administrative appeal.

From 2017 to 2019, the RLCEP collected about $2.5 million in red light penalties. Greenville forwarded that money to the Board before invoicing the agreed-upon expenses. The Board, in turn, reimbursed the City a little over $700,000, of which $580,000 went to ATS. In the same two years, the Board kept 72% of the total penalties, netting almost $1.7 million for Pitt County schools. As explained by the Board's Superintendent, the RLCEP "provides additional resources to the [Board] that it would not otherwise have" to "spend exclusively on educational purposes." Those funds, for instance, helped "pay for increased safety measures in schools, including security cameras, warning systems, and modern locks."

B. Plaintiffs' Suit

On 15 May 2018, Mr. Fearrington received a citation for running a red light. He requested an administrative appeal, arguing that the RLCEP and the Interlocal Agreement violated the FFC because the Board received less than 90% of the collected fines. After a hearing, Mr. Fearrington was found "liable" and notified that he had exhausted his administrative remedies. He then petitioned the Pitt County Superior Court for a writ of certiorari.

In response, the Board and City alerted Mr. Fearrington that "[t]he proper mechanism through which to present your two constitutional challenges to the [RLCEP] is through a declaratory judgment action." The parties drafted—and the superior court entered—a Consent Order stipulating that Mr. Fearrington "fully exhausted his administrative remedies with the City of Greenville concerning his citation," and that a

"declaratory judgment action, rather than a [petition for certiorari], is the most efficient means for [Mr. Fearrington] to present his as-applied challenges" to the RLCEP.

Mr. Malmrose also received and appealed a red-light citation. After an administrative hearing, he too was found "liable."

In April 2019, plaintiffs jointly filed a complaint against the City and the Board arguing that the RLCEP violated various statutes and provisions of North Carolina's Constitution. The complaint specifically targeted the program's funding framework, contending that it breached the FFC by channeling less than 90% of collected penalties to the Board.

The trial court ultimately ruled for the Board and City on all claims. Relevant here, the court granted the Board's and City's motions to dismiss and denied plaintiffs' motion for summary judgment on their FFC challenge. Plaintiffs appealed the trial court's orders on their various claims.

C. The Court of Appeals Opinion

The Court of Appeals affirmed in part, reversed in part, and remanded with instructions. *See Fearrington v. City of Greenville*, 282 N.C. App. 218, 220 (2022). More specifically, the court reversed the dismissal of plaintiffs' FFC claim and remanded for entry of summary judgment in their favor. *Id.* at 238. The court otherwise affirmed the trial court's orders. *Id.*

As to jurisdiction, the court concluded that plaintiffs had standing to sue as taxpayers. *Id.* at 226–28. In North Carolina, the court explained, litigants need not demonstrate an injury-in-fact—rather, alleging an infringement of a legal right is enough. *Id.* at 227–28. The court noted too that "there is no serious question that a taxpayer has an equitable right to sue to prevent an illegal disposition of the moneys of a county." *Id.* at 227 (cleaned up). Because plaintiffs were residents and taxpayers of Pitt County, the court reasoned, they had standing to challenge the disbursement of penalties extracted by the RLCEP. *Id.* at 227–28.

On the merits, the court concluded that the funding scheme created by the Interlocal Agreement violated the FFC by allotting to the Board less than 90% of the "clear proceeds" of collected penalties. *See id.* at 235. Under precedent, "clear proceeds" means the total sum collected minus the cost of collection. *Id.* at 235–36. Collection costs, however, do not include the costs of enforcing the law. *Id.* Also relevant, the General Assembly has statutorily defined "clear proceeds" as the net proceeds minus the collection costs, which may not exceed 10% of the total sum collected. *Id.* at 236 (citing N.C.G.S. § 115-437 (2019)).

According to the court, the RLCEP and the Interlocal Agreement violated the FFC by giving the Board just 72% of the total fines. *Id.* That amount fell short of the statutory floor of 90%. *See id.* The arrangement also included impermissible enforcement costs, namely ATS's fees and Officer O'Callaghan's salary and benefits. *Id.* at 237–38. The court thus awarded summary judgment to plaintiffs on their FFC claim. *Id.* at 238.

The Board and City petitioned this Court for discretionary review. We allowed the petition and now examine the questions raised.

II. Plaintiffs' Taxpayer Standing

[1] Standing is a "party's right to make a legal claim or seek judicial enforcement of a duty or right." *Comm. to Elect Dan Forest v. Emps. Pol. Action Comm.*, 376 N.C. 558, 564 (2021) (cleaned up). North Carolina's Constitution opens the courthouse doors to all who suffer injury. *See id.* at 609–10; *see also* N.C. Const. art. I, § 18. Implicit in that principle is the need for parties to have a "personal stake" in the case—an interest that assures the "concrete adverseness which sharpens the presentation of issues." *See Comm. to Elect*, 376 N.C. at 594–95 (quoting *Stanley v. Dep't of Conservation & Dev.*, 284 N.C. 15, 28 (1973)). That is so, we have explained, because a person "directly and adversely affected by the decision may be expected to analyze and bring to the attention of the court all facets of a legal problem." *City of Greensboro v. Wall*, 247 N.C. 516, 520 (1958). In other words, "only one with a genuine grievance" can "be trusted to battle the issue." *Mangum v. Raleigh Bd. of Adjustment*, 362 N.C. 640, 642 (2008) (quoting *Stanley*, 284 N.C. at 28). And "when specific legal problems are tested by fire in the crucible of actual controversy," the judiciary is better equipped to make "[c]lear and sound" decisions. *Wall*, 247 N.C. at 520.

Under our precedent, an "actual controversy" exists when taxpayers contest an "illegal and unconstitutional diversion of funds derived from taxes paid by [them] and others similarly situated." *Goldston v. State*, 361 N.C. 26, 34 (2006). For well over a century, then, we have recognized taxpayers' standing to "seek relief when they allege [that] government officials violated statutory and constitutional provisions by diverting tax levies appropriated for one purpose but disbursed for another." *Id.* at 27–28; *see also Stratford v. City of Greensboro* 124 N.C. 110, 127 (1899). In essence, taxpayer standing permits citizen-plaintiffs to bring "a representative class action in equity, brought on behalf of all taxpayers against officials of the government unit challenged." *See* Notes and Comments, *Taxpayers' Suits: A Survey and Summary*, 69 Yale L.J. 895, 906 (1960) (footnote omitted).

The doctrine provides a safety valve from government abuse. As we have explained, "public officers are sometimes derelict in the performance of official duties." *Branch v. Bd. of Educ.*, 233 N.C. 623, 625 (1951). And sometimes, that dereliction involves an "illegal diversion of public funds which may in some degree injuriously affect [a taxpayer's] rights." *Teer v. Jordan*, 232 N.C. 48, 51 (1950). When the "proper authorities have [ ] wrongfully neglected or refused to act, after a proper demand to do so," *Branch*, 233 N.C. at 625, equity allows a taxpayer to "restrain the unlawful use of public funds to his injury," *Teer*, 232 N.C. at 51 (cleaned up). After all, it is not "the manner of the courts of equity to close their doors on allegations of excessive use of power." *McGuinn v. City of High Point*, 219 N.C. 56, 65 (1941). Thus, in proper cases, a taxpayer may sue "on behalf of a public agency or political subdivision for the protection or recovery of the money or property of the agency or subdivision." *Branch*, 233 N.C. at 625. Without equitable protection, the taxpayers "who bear the burdens of government" would be "without remedy" and "liable to be plundered whenever irresponsible men might get into the control of the government of towns and cities." *Goldston*, 361 N.C. at 31 (quoting *Stratford*, 124 N.C. at 133–34).

That said, taxpayers do not enjoy a freewheeling right to "attack the constitutionality of any and all legislation." *Nicholson v. State Educ. Assistance Auth.*, 275 N.C. 439, 447 (1969). We have set prudential limits on taxpayer suits, recognizing the "disruptive tendency of officious intermeddling by taxpayers in matters committed to the decision of public officers." *Branch*, 233 N.C. at 625. First, a party asserting taxpayer standing must actually pay taxes. *See id.* at 626. In other words, "where a plaintiff undertakes to bring a taxpayer's suit on behalf of a public agency or political subdivision, his complaint must disclose that he is a taxpayer of the agency or subdivision." *Id.*; *see also United Daughters of the Confederacy v. City of Winston-Salem*, 383 N.C. 612, 631 (2022) (denying taxpayer standing because "the amended complaint alleges that plaintiff is a nonprofit (and, therefore, non-taxpaying) corporation" and "does not allege that any of [the organization's] members pay taxes to either the City or the County").

Second, a taxpayer attacking the constitutionality of a legislative or executive act must allege a "direct injury." *Comm. to Elect*, 376 N.C. at 593–94. The complaint must show that the challenged expenditure has or will infringe a personal legal interest distinct from the taxpayer's general concern "as a citizen in good government in accordance with the provisions of the Constitution." *Nicholson*, 275 N.C. at 448; *accord Sprunt v. Hewlett*, 208 N.C. 695, 696 (1935) ("Courts never pass upon

the constitutionality of statutes, except in cases wherein the party raising the question alleges that he is deprived of some right guaranteed by the Constitution, or some burden is imposed upon him in violation of its protective provisions." (quoting *St. George v. Hardie*, 147 N.C. 88, 97 (1908)). A "direct injury" can include the "deprivation of a constitutionally guaranteed personal right or an invasion of [ ] property rights." *Comm. to Elect*, 376 N.C. at 593 (cleaned up).

In that vein, a taxpayer may challenge the constitutionality of a statute that "imposes on him in its enforcement an additional financial burden." *See Stanley*, 284 N.C. at 29 (cleaned up). We have thus found a direct injury when taxpayers were specifically assessed and "paid motor fuel taxes, title and registration fees, and other highway taxes which by law were collected expressly for application to the Highway Trust Fund but had been diverted for other uses." *Goldston*, 361 N.C. at 29. In another case, by contrast, we held that taxpayers lacked the predicate injury for a constitutional claim because, although they were "taxpayers of the state," they were "not eligible students alleged to have suffered religious discrimination as a result of the admission or educational practices of a nonpublic school participating in the" challenged scholarship program. *Hart v. State*, 368 N.C. 122, 141 (2015); *see also Nicholson*, 275 N.C. at 451 (rejecting constitutional challenge to agency's power to issue bonds because "plaintiff, as taxpayer, can suffer no injury from the issuance of the bonds of which he complains and has no interest therein, except his general interest as a member of the public in good government pursuant to the Constitution"); *Newman v. Watkins*, 208 N.C. 675, 677 (1935).

Third, a taxpayer must allege that "there has been a demand on and a refusal by the proper authorities to institute proceedings for the protection of the interests of the public agency or political subdivision" or that "a demand on such authorities would be useless." *United Daughters*, 383 N.C. at 631 (quoting *Branch*, 233 N.C. at 626). We have borrowed this "demand" requirement from another equitable doctrine: shareholder derivative claims. *See Merrimon v. S. Paving & Constr. Co.*, 142 N.C. 539, 545–49 (1906); *see also Edenton Ice & Cold Storage Co. v. Town of Plymouth*, 192 N.C. 180, 183 (1926). When a government's "property or funds" are "illegally or wrongfully interfered with, or its powers [ ] misused," the government is "ordinarily the proper party to prevent or redress the wrong by appropriate action or suit." *Merrimon*, 142 N.C. at 546. A taxpayer of that government—much like a shareholder—must thus "seek remedial action through the directorate or the other controlling authorities of the corporation itself" before "bringing suit against

the corporation to protect its rights or to redress its wrongs." *Murphy v. City of Greensboro*, 190 N.C. 268, 275 (1925).

In other words, taxpayer standing enters the picture "only when and because the proper corporate officers will not, for some improper consideration, discharge their duties as they should do." *Merrimon*, 142 N.C. at 550 (cleaned up). As with shareholder derivative claims, the "demand" requirement offers the governing body a chance to fix the problem. *See* Daniel R. Fischel, *The Demand and Standing Requirements in Stockholder Derivative Actions*, 44 U. Chi. L. Rev. 168, 171–72 (1976). This requirement also preserves "the existence and efficient operation of corporate powers and functions." *Merrimon*, 142 N.C. at 547. A contrary rule would inject gamesmanship and trepidation into the machinery of government, allowing "any citizen of his own motion and without notice to the corporate agents [to] enjoin [its] work at any stage of its progress because he did not approve it or the manner in which it was being done." *Id.* at 548. In short, because governments "would find themselves embarrassed at every point of their corporate activity, unless protected by some such restraint upon suits by the citizens," taxpayer standing "requires that a demand be made upon the authorities before the [government] is forced into litigation." *Id.* at 549; *see also United Daughter*s, 383 N.C. at 631.

Finally, taxpayer standing is a vehicle to seek injunctive and declaratory relief, not money damages. That is because taxpayer suits are derivative claims "in the nature of a bill of equity." *See Shaw v. City of Asheville*, 269 N.C. 90, 95 (1967) (quoting *Merrimon*, 142 N.C. at 545). If the "proper authorities neglect or refuse to act," taxpayers—much like shareholders—may sue "on behalf of a public agency or political subdivision for the protection or recovery of [its] money or property." *Branch*, 233 N.C. at 625. Within that capacity, a taxpayer may seek to enjoin the government "from transcending [its] lawful powers or violating [its] legal duties in any mode which will injuriously affect the taxpayers." *Shaw*, 269 N.C. at 95 (quoting *Merrimon*, 142 N.C. at 545) So too do "citizens and taxpayers ha[ve] the right to seek equitable relief" if "the governing authorities [a]re preparing to put public property to an unauthorized use." *Id.* (cleaned up). A taxpayer may also request a declaratory judgment. *See Goldston*, 361 N.C. at 34–35.

But taxpayers may not convert an equitable device into a tool for personal gain. For that reason, this Court has never allowed plaintiffs invoking taxpayer standing to obtain damages. We have indeed disclaimed that approach. *See*, *e.g.*, *Waddill ex rel. Forsyth County v. Masten*, 172 N.C. 582, 585–86 (1916) (endorsing taxpayer suit for "recoveries for money

wrongfully disposed of or withheld from the counties" but cautioning that "the funds, if recovered, should be in proper custody and control"). In *Horner*, for instance, we blessed the recovery of "reasonable attorney fees and expenses" by a party who "successfully prosecutes a taxpayers' action and actually recovers for the public treasury moneys otherwise lost." *Horner v. Chamber of Commerce of the City of Burlington, Inc.*, 236 N.C. 96, 101–02 (1952). But we rejected "compensation or allowance of any kind for the time and effort of the suing taxpayer, thus fixing it so the taxpayer may not capitalize on the suit." *Id.* at 101. We now make clear what our precedent has left implicit: Taxpayers have standing to seek *only* "equitable relief and a declaratory judgment when alleging [that] government officials violated statutory or constitutional provisions by diverting" public funds "appropriated for one purpose but disbursed for another." *Goldston*, 361 N.C. at 34. Money damages, however, are unavailable to the taxpayer.

It is important to first clarify the nature of plaintiffs' suit. Though plaintiffs style their claim as an "as-applied challenge" to the RLCEP and Interlocal Agreement, they effectively mount a constitutional assault on the Local Act passed by the General Assembly. That is because the Interlocal Agreement—and by extension the RLCEP—were "given legislative efficacy by the statute." *See Boney v. Bd. of Trs.*, 229 N.C. 136, 142 (1948). In practical view, the Local Act brought the RLCEP into being and allowed Greenville and the Board to fund it by sharing costs and reimbursing each other for key expenses. So if the funding mechanism underlying the RLCEP and contained in the Interlocal Agreement violates the FFC, it is because the Local Act that blessed that financing framework exceeded the General Assembly's constitutional authority. *See id.* at 141 (treating a challenge to a school board's conveyance of property to a city as a constitutional attack on the statute authorizing that transfer).

With this dispute in focus, we conclude that plaintiffs have taxpayer standing to raise their constitutional arguments and to seek injunctive and declaratory relief. First, plaintiffs effectively sue on the Board's behalf, arguing that the FFC allots it a larger share of red light penalties than it retains under the Interlocal Agreement. To bolster their claim, plaintiffs allege that they live, vote, and pay property and local sales taxes in Pitt County. Plaintiffs' complaint thus discloses their status as taxpayers in the "political subdivision" for whom they sue. *Branch*, 233 N.C. at 625; *see also United Daughters*, 383 N.C. at 631.

Plaintiffs also assert a "direct injury" linked to the allegedly unlawful government expenditure. *See Comm. to Elect*, 376 N.C. at 593–94.

The RLCEP captured plaintiffs running red lights—Greenville then cited them and they each paid $100. In plaintiffs' view, however, the money extracted by the RLCEP was rerouted from its constitutionally mandated destination: Pitt County's public schools. That diversion was made possible by the statute they now challenge—without the Local Act, the City and Board could not have negotiated the Interlocal Agreement and moved forward with the RLCEP. Because the legislature approved the program's funding framework, plaintiffs allege that they are $100 poorer and county schools are short of their constitutionally earmarked funds. In sum, plaintiffs contend that the Local Act levied an "additional financial burden," *Stanley*, 284 N.C. at 29 (cleaned up), and allowed their money to be "extracted and spent in violation of specific constitutional protections against such abuses of legislative power," *see Flast v. Cohen*, 392 U.S. 83 106 (1968). They have thus alleged the personal and direct injury needed to raise their constitutional claims. *See Comm. to Elect*, 376 N.C. at 593–94.

Plaintiffs meet the demand requirement too. By statute, the Board is tasked with suing and recovering "all money or property which may be due to or should be applied to the support and maintenance of the schools." *See* N.C.G.S. § 115C-44(a) (2023); *see also Branch*, 233 N.C. at 625. Here, however, the Board worked with the City to craft the very funding scheme assailed as unlawful. And the Board has never challenged the Interlocal Agreement or sought a larger share of collected red light penalties. Just the opposite, in fact.

After Mr. Fearrington's administrative hearing, he sought a writ of certiorari in superior court. His petition argued that the RLCEP funneled less money to the Board than it was constitutionally owed under the FFC. In response, the Board not only declined to pursue that claim, but joined with Greenville to alert him of potential procedural hurdles to his petition. The Board and City underscored their interest in "reach[ing] the merits of this dispute" and "hav[ing] the substantive claims presented to the courts in an efficient manner." To avert procedural obstacles, both defendants suggested a declaratory judgment action as the "proper mechanism" for Mr. Fearrington's challenges. They then proposed and signed a Consent Order stipulating that Mr. Fearrington "fully exhausted his administrative remedies" and that a declaratory judgment action "is the most efficient means for [him] to present his as-applied challenges to the [RLCEP]." The Board and City's correspondence and Consent Order with Mr. Fearrington are the functional equivalent of refusing his request "to institute proceedings for the protection of [the Board's] interests." *See United Daughters*, 383 N.C. at 631 (citing *Branch*, 233 N.C. at 626). In this case, plaintiffs effectively demanded—and the Board

effectively declined—to vindicate any claim to a larger share of the red light penalties. The Board's tacit refusal of plaintiffs' request allowed them to challenge the allegedly unlawful expenditure in its stead.

On relief, though, plaintiffs exceed the compass of taxpayer standing. Their complaint seeks "declaratory relief, injunctive relief, and refunds." Of those remedies, the first two are permissible; the last is not. A "refund" is a repackaged request for damages—in effect, plaintiffs ask the Board to reimburse them and members of a proposed class for red light penalties already paid. As explained above, taxpayer standing is an equitable device for procuring equitable and declaratory relief. As taxpayers, then, plaintiffs may request a declaration on the constitutionality of the RLCEP and Interlocal Agreement, as well as the Local Act authorizing both. So too may they seek to enjoin any unlawful diversion of funds from Pitt County schools. But as taxpayers, plaintiffs may not "capitalize on the suit" and convert a derivative claim into a personal damages action. *See Horner*, 236 N.C. at 101. We thus hold that plaintiffs have taxpayer standing to challenge the "alleged misuse or appropriation of public funds" authorized by the Local Act, and to seek equitable and declaratory relief. *See Goldston*, 361 N.C. at 33–34.

III. The Merits of Plaintiffs' Claims

Plaintiffs make two arguments on the merits. They contend that the Interlocal Agreement violates N.C.G.S. § 115C-437 by giving the Board less than 90% of the penalties gleaned by the RLCEP. Plaintiffs also argue that the Interlocal Agreement—and the Local Act authorizing it—run afoul of the FFC by withholding from Pitt County schools the "clear proceeds" of collected penalties. We examine each claim in turn.

A. Claim Under N.C.G.S. § 115C-437

[2] Plaintiffs' first argument is, at bottom, a question of statutory interpretation. Section 115C-437 pledges to "local school administrative unit[s]" the "clear proceeds" they are constitutionally owed. *See* N.C.G.S. § 115C-437 (2023). The provision defines "clear proceeds" as "the full amount of all penalties, forfeitures or fines collected under authority conferred by the State, diminished only by the actual costs of collection, not to exceed ten percent (10%) of the amount collected." *Id.* Put simply, the statute promises county schools at least 90% of collected funds—a government may thus retain only the costs of collection, and only up to 10%. *See id.*

As plaintiffs note, however, the Board and City split funds differently. Under the cost-sharing and reimbursement provisions of the

Interlocal Agreement, the Board keeps roughly 72% of red light fines and remits the rest to the City. Because 72% is less than 90%, plaintiffs reason, the Interlocal Agreement flouts the cap set by section 115C-437. This argument turns on the meaning of the Local Act and the legislative purpose animating it. Because section 115C-437 is a statutory limit, the General Assembly can statutorily vary its scope. The question, then, is whether the Local Act intended to exempt the Board and City from the 10% cap and allow them to split costs differently.

When called to interpret a statute, "legislative intent is the guiding star." *Piedmont Canteen Serv., Inc. v. Johnson*, 256 N.C. 155, 161 (1962). We first look to the plain language, as the "actual words of the legislature are the clearest manifestation of its intent." *N.C. Dep't of Corr. v. N.C. Med. Bd.*, 363 N.C. 189, 201 (2009). If the text is ambiguous, we may also consult "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." *Wynn v. Frederick*, 385 N.C. 576, 581 (2023) (cleaned up).

In this case, the Local Act does not expressly mandate how the Board and City may allocate costs. The statute permits Greenville to "enter into a contract with a contractor for the lease, lease-purchase, or purchase" of a red light camera system. *See* Local Act § 2, at 180. And it follows that allowance with a broad grant of fiscal authority:

> The City of Greenville and the Pitt County Board of Education may enter into an interlocal agreement necessary and proper to effectuate the purpose and intent of G.S. 160A-300.1 and this act. Any agreement entered into pursuant to this section may include provisions on cost-sharing and reimbursement that the Pitt County Board of Education and the City of Greenville freely and voluntarily agree to for the purpose of effectuating the provisions of G.S. 160A-300.1 and this act.

Id. § 4, at 180.

Though the text does not explicitly exempt the Board and City from the 10% cap, other clues make clear the legislature's goal. Most tellingly, there was no reason to pass the Local Act except to vary the existing funding limits. In 2000, the General Assembly authorized Greenville to implement a red light camera program. *See* S.L. 2000-37, § 1. The City had no reason to seek added permission on top of that existing authority. Especially because multiple statutes already allowed Greenville

to enter agreements and share costs with the Board. *See* N.C.G.S. §§ 160A-460, -461, -466 (2023). Put simply, neither the City nor the Board needed extra legislative approval for an Interlocal Agreement funding the RLCEP, *unless* that Agreement allowed cost splitting above the 10% cap set by section 115C-437.

When interpreting statutes, we presume that the General Assembly "acted with care and deliberation and with full knowledge of prior and existing law." *Wilder v. Amatex Corp.*, 314 N.C. 550, 562 (1985) (cleaned up). We presume too that the General Assembly does not adopt superfluous legislation. *See State v. Coffey*, 336 N.C. 412, 417 (1994). Those principles in mind, we decline to construe the Local Act as a mere restatement of the Board and City's existing statutory authority. Instead, that provision is best read to exempt the Board and City from the strictures of section 115C-437 and to grant them greater flexibility to share costs and reimburse expenses.

Legislative history confirms that point. For one, Greenville sought the Local Act precisely because section 115C-437 made a red light camera program a pipe dream. As its resolution to the General Assembly made clear, Greenville could not afford to install the cameras if it "could only retain the amount which represents the cost of collection of the fines which could not exceed 10% of the amount of the fines." The legislature understood the City's request for fiscal flexibility. As the bill's sponsor explained when introducing it on the House floor, the measure "allows communication between the City of Greenville and a contract to be formed with a red light camera company, proceeds of which[,] after expenses being paid[,] will go to our local school board." *See* H. Deb. on H.B. 1126 (N.C. June 6, 2016) (statement of Rep. Greg Murphy). The sponsor also clarified the fiscal need for the Local Act, explaining that without leeway to apportion costs, the project was not feasible. *See id.* (specifying that Local Act was vital for financial reasons because "the feasibility was not profitable or not—was not at zero sum game for the city itself. Now the city's expenses will be taken care of so they want to put forward with the bill.").

Taken as a whole, statutory context, structure, and history show that the City and Board sought—and the General Assembly approved—a more pliable cost-sharing agreement than allowed by section 115C-437. Because the legislature intended to vary the 10% cap that would otherwise limit the Board and City's funding scheme, this case is not reducible to the simple formula "x > 10%," as the dissent contends. We thus reject plaintiffs' statutory claim and turn to the constitutional merits.

B. Claim Under the Fines and Forfeitures Clause

[3] In resolving constitutional challenges to a statute, this Court "begin[s] with a presumption that the laws duly enacted by the General Assembly are valid." *Hart*, 368 N.C. at 126. Courts, of course, "have the power, and it is their duty in proper cases, to declare an act of the General Assembly unconstitutional—but it must be plainly and clearly the case." *City of Asheville v. State*, 369 N.C. 80, 87 (2016) (cleaned up).

That is especially true in this case because the FFC is not self-executing. *N.C. Sch. Bds. Ass'n v. Moore*, 359 N.C. 474, 512 (2005). We have "long recognized that some constitutional provisions are self-executing while others require legislative action to implement and enforce the[ir] purpose and mandates." *Id.* The FFC falls in the latter category—it is not "complete in itself" and does not offer on its face a discernible "road map of how its mandate is to be" realized. *Id.* (quoting *Kitchin v. Wood*, 154 N.C. 565, 568 (1911)).

The FFC thus requires "legislation to give it effect" and vitalize its aims. *Id.* (quoting *Kitchin*, 154 N.C. at 568). Key too, we have specifically recognized the legislature's authority to clarify "what constitutes 'clear proceeds' of the relevant penalties." *Id.* Because of the FFC's unique status and the legislature's uniquely broad leeway to define its contours, "the General Assembly's actions in specifying how the provision's goals are to be implemented must be held to be constitutional unless the statutory scheme runs counter to the [FFC's] plain language of or the purpose behind" it. *Id.* Applying that rubric, we measure the Local Act and the RLCEP against the FFC's language and purpose.

By its text, the FFC pledges to schools the "clear proceeds" of gathered penalties—in other words, the "net proceeds." *See Cauble v. City of Asheville*, 314 N.C. 598, 604 (1985). To reach that sum, the "reasonable costs of collection constitutionally may be deducted from the gross proceeds." *Id.* But enforcement costs are not deductible. *See id.* at 606. That rule flows from the framer's intent and pragmatic considerations. *See id.* It would be "impractical and harsh" to "deny municipalities the reasonable costs of collections." *Id.* But without principled limits on deductions, the exception could swallow the rule and the "clear proceeds" promised to public schools could vanish. *See id.* The FFC compels neither extreme. In defining "clear proceeds," then, we struck a bargain: Collection costs are deductible, enforcement costs are not. *See id.* at 605–06.

Our precedent offers general principles distinguishing those spheres. Enforcement deals with governmental acts compelling adherence to the

law. It imports an active and direct role in locating, investigating, and prosecuting legal violations. *See Enforcement*, Black's Law Dictionary (11th ed. 2019) ("The act or process of compelling compliance with a law, mandate, command, decree, or agreement"). Enforcement also entails a degree of discretion—an officer compelling obedience to the law exercises independent judgment to detect its violation and decide whether and how to investigate and punish it. *Cf. Isenhour v. Hutto*, 350 N.C. 601, 610 (1999) (citing *State v. Hord*, 264 N.C. 149, 155 (1965)) (noting that a "police officer's authority in enforcing the criminal laws involves the discretionary exercise of some portion of sovereign power").

We have thus linked enforcement expenses to the "general costs of investigation and prosecution of a citizen's unlawful conduct." *Moore*, 359 N.C. at 491. Governments may not retain those sums because the "entire purpose of the [FFC] is to divert fines, penalties, and forfeitures from support of the general operations of government, including the operating costs of locating and prosecuting those who violate the law." *See* David M. Lawrence, *Fines, Penalties, and Forfeitures: An Historical and Comparative Analysis*, 65 N.C. L. Rev. 49, 67–68 (1986). In calculating the "clear proceeds," then, governmental bodies may not deduct their "normal operating costs" or the "general overhead attributable to prosecution." *Shore v. Edmisten*, 290 N.C. 628, 634 (1976). "Monies for *continued enforcement* are to be provided by the legislature," not siphoned from public schools. *Id.* at 638–39; *see also id.* at 638 (barring government from recovering from criminal defendant "the sum of $500.00 for the use and benefit of the Vice Squad of the High Point Police Department for continued enforcement").

Collection expenses, on the other hand, are the administrative and executory costs of recouping a penalty for unlawful conduct. *See Cauble*, 314 N.C. at 606. Compared to enforcement, collection is more passive and indirect. *See State v. Maultsby*, 139 N.C. 583, 585 (1905) (striking down statute that gave informants whose information led to convictions half of the fine imposed for selling whiskey because that cost was to induce enforcement, not to support collection). Collection also leaves less room for discretion—a person gathering a penalty is given discrete tasks directed towards a discrete goal. Our precedent on collection costs is of a pragmatic strand and recognizes the "economic penalties which might be forced upon the municipalities charged with the collection of fines." *Cauble*, 314 N.C. at 605. We have thus allowed a government to retain a specific sum "over and above its normal operating costs" and tied to the administrative and programmatic expense of recovering a fine. *See Shore*, 290 N.C. at 634; *see also Moore*, 359 N.C.

at 506–07 (permitting "state agencies and licensing boards" to collect payments "for the late renewal of licenses or the late payment of licensing fees" because those are "an administrative charge to cover the costs of collecting the license fees" and "these boards are dependent upon the revenue generated from fees to perform their statutorily mandated services").

Admittedly, the divide between enforcement and collection is not always exact. As this case well illustrates, technology can blur the line between those spheres. We have thus disclaimed a rigid approach, recognizing "the futility of trying to fashion a court-made specific mathematical formula for determining costs of collection." *Cauble*, 314 N.C. at 605. Given the legislature's leeway to define and advance the FFC's mandate, the key inquiry is a deferential one: "permissible deductions must bear a reasonable relation to the costs of collection of the fine." *Id.*

The deductions in this case meet that requirement. Under their cost-sharing agreement, the Board reimburses the City for two main expenses: (1) ATS's fee to install the cameras, maintain them, and process captured red light violations, and (2) the salary and benefits of Officer O'Callaghan, the RLCEP manager who reviews the evidence and approves the citations. In our view, those expenses are more like collection than enforcement and bear a "reasonable relation" to the administrative and procedural expense of recovering red light penalties. *See id.*

That is because installing the cameras, running them, and processing detected violations does not involve the same degree of active, direct, and discretionary functions that typify enforcement. *See id.* at 606. For one, red light cameras capture violations the second they happen—the process is automated rather than discretionary, reflexive rather than contemplated. When a car enters an intersection during a red light, sensors embedded in the pavement detect the movement and "trip" the cameras. Those cameras, in turn, automatically photograph and video the car as it moves through the intersection.

Everything else is downstream of the violation and geared towards collecting the resultant penalty. By its contract with Greenville, ATS has no "discretion to determine the process for addressing red light violations." It instead acts for "the limited purpose of administratively processing recorded images of potential violations." After its cameras capture and its systems screen red light violations, ATS deposits the evidence in a "review queue" for Officer O'Callaghan to examine. His task is limited too—he checks the photos to see that the car was in the intersection when the light was red and that the captured license

plate matches DMV records. With his approval, ATS mails a Notice of Violation to the registered owner, who may pay the fine or request an administrative hearing.

It is true, as plaintiffs argue, that "monies to be set aside for *future* enforcement of the law"—including for the "salaries and expenses" of law enforcement officers—"cannot be deducted from fines to arrive at clear proceeds[.]" *Shore*, 290 N.C. at 636 (cleaned up). Here, however, Officer O'Callaghan's role is more administrative and clerical than investigatory or proscriptive. His primary tasks are reviewing evidence of already-captured red light violations and managing the documentation and administrative process of collecting fines. On these facts, the officer's discrete, focused duties are more akin to collection than enforcement, and so his salary and benefits "bear a reasonable relation to the costs" of recouping the assessed penalties. *Cauble*, 314 N.C. at 605. The Board thus retains the "clear proceeds" of fines collected through the RLCEP. *See id.* And by authorizing the Interlocal Agreement and the cost-sharing framework employed by the Board and City, the Local Act does not "run[ ] counter to the plain language" of the FFC. *Moore*, 359 N.C. at 512.

The statute also tracks the FFC's purpose. That constitutional provision advances "two wise ends": "(1) to set apart the property and revenue specified therein for the support of the public school system; and (2) to prevent the diversion of public school property and revenue from their intended use to other purposes." *Boney*, 229 N.C. at 140. In plaintiffs' view, the Local Act clashes with those goals by allowing the Board and City to route funds away from their constitutionally intended destination: Pitt County's public schools.

This Court addressed a similar argument in *Boney*. There, a public school board bought a parcel of land to use "as an athletic field and playground" for children "attending the Kinston Graded Schools." *Id.* at 140. The board hoped to build an athletic stadium on the land but lacked the funds to do so. *See id.* at 137. In response, the General Assembly passed a statute allowing the board to convey the property to the City of Kinston "in fee simple and without monetary consideration." *Id.* Kinston, in turn, agreed to build a stadium on the land and grant the public schools the "free and unlimited use of the projected stadium and the grounds during the school term." *Id.* at 142. A taxpayer challenged the conveyance and the statute authorizing it, contending—much like plaintiffs do here—that those measures unconstitutionally "permitt[ed] school property to be diverted from its intended use to other objects." *Id.* at 141.

We rebuffed that formalistic claim, explaining that "the supposed diversion of the school property is apparent rather than real." *Id.* True, we acknowledged, the proposed conveyance divested the board "of its legal title to the [ ] property." *Id.* But that arrangement did "not result in any substantial diversion of the land from its intended use for athletic purposes by the children attending the Kinston Graded Schools." *Id.* As the statute stipulated and the written agreement affirmed, Kinston's public schools enjoyed "the free use of the stadium and its site" for athletic and recreational purposes. *Id.* at 142. All told, the board "exchang[ed] a practically unimproved $8,500 tract of land for the right to the substantial use of a $150,000 stadium." *Id.* We declined to elevate form over substance, underscoring that the contemplated conveyance was backed by "valuable consideration"—the public schools, in other words, got the benefit of the bargain. *Id.* In view of that result, we held that the statute authorizing the property transfer "harmonize[d] with the constitutional provision" and its guiding purposes. *Id.* at 141.

The same is true of the RLCEP. As plaintiffs contend, the Board remits to the City a portion of the collected red light penalties. But the "supposed diversion" of the money "is apparent rather than real," *id.*, for a simple reason: The RLCEP exists only because of the City and Board's cost-sharing agreement and the Local Act blessing it. Without those measures, Greenville could not run the program and the Board would collect no red light penalties whatsoever. Put in practical terms, the question is not whether the Board should receive 72% versus 90% of the funds—it is whether the Board should receive 72% or nothing at all. Here, as in *Boney*, the Interlocal Agreement rests on "valuable consideration," *id.* at 142, and furnishes Pitt County schools with a revenue stream they would otherwise lack. And so here, as in *Boney*, we reject plaintiffs' formalistic position and hold that the Local Act aligns with the FFC's core purposes.

In sum, the Local Act does not "plainly and clearly" violate the FFC by allowing the City and Board to negotiate a reasonable, carefully calibrated cost-sharing agreement. *See City of Asheville*, 369 N.C. at 87 (cleaned up). Pitt County's public schools enjoy the "clear proceeds" of collected red light penalties because the City—and through it, ATS—recoups only the "reasonable costs of collection." *Cauble*, 314 N.C. at 606. Greenville does not profit from the arrangement or use the fines to pad its general operating budget. *Cf. Shavitz v. City of High Point*, 177 N.C. App. 465, 467, 471 (2006) (striking down red light camera program that diverted virtually all collected penalties to operating costs and general traffic enforcement), *appeal dismissed and disc. rev. denied*, 361

N.C. 430 (2007). Most importantly, the Board and City's narrowly drawn funding arrangement makes the RLCEP possible—without it, the program would not exist and Pitt County schools would lose an important pillar of financial support.

IV. Conclusion

We affirm the Court of Appeals decision on plaintiffs' taxpayer standing but limit the available remedies to injunctive and declaratory relief, not a "refund." On plaintiffs' FFC challenge, however, we reverse the Court of Appeals. The Interlocal Agreement and the Local Act authorizing it do not countermand the FFC's text or purpose. *See Moore*, 359 N.C. at 512. Because we do not discern a "plain and clear" constitutional violation, *see Hart*, 368 N.C. at 126, we reverse the award of summary judgment to plaintiffs on their FFC claim, and remand this case to the Court of Appeals for further remand to the trial court for entry of summary judgment in favor of Greenville and the Board.

AFFIRMED IN PART; REVERSED IN PART; REMANDED.

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

Justice BERGER dissenting.

You often hear lawyers and judges say they went to law school because they hated math. The majority opinion may well prove that point by failing to correctly understand a simple numerical inequality statement. For a discipline that demands certainty, the mathematical formula "x > 10%" now means something quite different. The same can be said for the majority's apparent distaste for definitions. One could read the majority opinion and come away wondering what a law enforcement officer is.

The majority frames the question in this case as follows: "in practical terms, the question is not whether the Board should receive 72% versus 90% of the funds—it is whether the Board should receive 72% or nothing at all." To the contrary, the question is whether the fund-diversion scheme in the Interlocal Agreement comports with the explicit requirements of Article IX, Section 7 and N.C.G.S. § 115C-437.

Our constitution commands that the clear proceeds of fines must be used "*exclusively* for maintaining free public schools," N.C. Const.

art. IX, § 7 (emphasis added), and the diversion of funds to pay enforcement expenses here is plainly impermissible. We have defined "clear proceeds" as "the total sum *less only the sheriff's fees for collection*, when the fine and costs are collected in full." *State v. Maultsby*, 139 N.C. 583, 585 (1905) (emphasis added). But costs of collecting the fine or penalty "do not include the costs associated with enforcing [an] ordinance." *Cauble v. City of Asheville*, 314 N.C. 598, 606 (1985).

In addition, we have held that N.C.G.S. § 115C-437, which imposes a 10% cap on the costs of collection, "implements [A]rticle IX, [S]ection 7 of our state Constitution." *State ex rel. Thornburg v. Currency in the Amount of $52,029.00*, 324 N.C. 276, 285 (1989). Thus, if "x" represents the costs of collection, and $x \leq 10\%$, the financing scheme for collections is allowed by Article IX, Section 7. A funding scheme in which $x > 10\%$, however, is constitutionally and statutorily prohibited, and the majority's assertion that a local bill can override these statutory and constitutional strictures is the legal equivalent of saying $2 + 2 = 5$.

From 2017 to mid-2019, Greenville's Red Light Camera Enforcement Program generated over $2.4 million in revenue from fines. Pursuant to the Interlocal Agreement, however, only about 71.66% of that revenue reached the Pitt County schools. The diversion of funds here effectively reduced the amount of money available for public schools, contrary to the intent and explicit requirements of the Fines and Forfeitures Clause. *See* N.C. Const. art. IX, § 7. In addition, N.C.G.S. § 115C-437 reinforces the constitutional requirement by stipulating that school boards must receive at least 90% of the total fines collected, with only actual costs of collection (capped at 10%) deductible. N.C.G.S. § 115C-437 (2023). The expenses reclaimed by Greenville far exceed this limit.

In addition, the diversion of funds from the schools in the Interlocal Agreement includes enforcement-related costs that are explicitly nondeductible. *See Cauble*, 314 N.C. at 606 ("[C]osts of collection do not include the costs associated with enforcing the ordinance . . . . If . . . the costs of enforcing the penal laws of the State were a part of collection . . . , there could never b[e] any *clear proceeds* of such fines to be used for the support of the public schools.").

Interestingly, the Interlocal Agreement here acknowledges that "[f]or the purposes of determining the clear proceeds derived from the citations" there is a 10% cap on collection expenses like postage, printing, and the costs of computer services. But the agreement goes on to divert $6,250 per month "to pay the salary and benefits of a sworn law enforcement officer." According to the majority, this provision does not

pay for a sworn law enforcement officer, even though that officer has responsibility for "final approval of violations." In other words, the individual designated by the Interlocal Agreement as a sworn law enforcement officer, who is responsible for determining if a violation of the law occurred, is not a law "enforcement" officer, even though, as the majority concedes, he "reviews evidence and approves citations."[1]

The majority asks us to ignore the wording of the Interlocal Agreement and the duties performed by Officer Callahan, insisting that this case is a complicated matter because "technology can blur the line" between collection and enforcement. But it is the redefining of the term law enforcement officer that blurs the line. Officer Callahan may be surprised to learn that the majority believes he is no longer a police officer but merely a "manager" of a government program. I do not share that view.

The Interlocal Agreement as written cannot be squared with Article IX, Section 7, with section 115C-437, with basic math, or common definitions. According to the majority, because the school system receives some benefit, the Interlocal Agreement here is constitutional. We have rejected this idea previously: "if . . . the costs of enforcing the penal laws of the State were a part of collection . . . , there could never b[e] any *clear proceeds* of such fines to be used for the support of the public schools." *Cauble*, 314 N.C. at 606. Because the Fines and Forfeitures Clause has been redefined by the majority here, the question is now about where this Court will draw the line? A 1% benefit? The test appears to be "whether the Board should receive [an amount ≥ 1%] or nothing." One shudders to think what we would do if forced to grapple with an algebraic problem.

1. The remaining funds were used to cover the program's expenses, including payments to the out-of-state, for-profit company which administers the camera system.

WILLIAM HINMAN AND JOANNE W. HINMAN
v.
WADE R. CORNETT AND TERESA B. CORNETT

No. 219A23

Filed 23 May 2024

Adverse Possession—easement—claim by owner of dominant tenement—hostile possession—summary judgment

In a property dispute between neighbors, where a husband and wife (defendants) owned adjoining tracts of land, the first of which contained defendants' home and the second of which benefited from a 30-foot-wide easement containing a driveway and a strip of land east of the driveway leading up to plaintiffs' property, the trial court erred in denying summary judgment to defendants on their claim for adverse possession of the land between the driveway and plaintiffs' property line. Defendants' forecast of evidence—considered in the light most favorable to defendants—created a genuine issue of material fact concerning the hostility element of their adverse possession claim, with the evidence showing that: defendants mistakenly believed that they owned the disputed land; defendants made permanent improvements on the land that went beyond what the easement allowed, thereby rebutting the presumption of permissive use; and, although none of plaintiffs' predecessors in interest ever objected to defendants' use or improvement of the disputed tract, their silence did not amount to a grant of permission for such use or improvement.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 290 N.C. App. 30 (2023), reversing in part and remanding a summary judgment order entered on 22 November 2021 by Judge Susan E. Bray in Superior Court, Forsyth County. Heard in the Supreme Court on 16 April 2024.

Craige Jenkins Liipfert & Walker LLP, by Thomas J. Doughton, for plaintiff-appellants.

Law Office of Richard Munday, by Richard Munday, for defendant-appellees.

RIGGS, Justice.

This appeal tasks us with resolving whether defendants Wade R. Cornett and Teresa B. Cornett supported their claim for adverse possession at summary judgment sufficiently to send the claim to the jury. Specifically, we resolve whether their forecast of evidence, considered in the light most favorable to the Cornetts, created a genuine issue of material fact as to the hostility of their use of the disputed tract. After careful review, we agree with the Court of Appeals that the Cornetts' evidence, if credited, adequately established hostility—as well as all other elements of adverse possession—sufficient to survive summary judgment and submit the claim to the jury. We therefore affirm the opinion of the Court of Appeals and remand this matter for further proceedings in the trial court.

I. Factual and Procedural History

The Cornetts have lived on Griffin Road in Rural Hall, North Carolina, since 1983. After renting the property—identified in the record as Tract 1—for twelve years, the Cornetts purchased it and an adjoining tract to the south—Tract 2—from their lessor in 1995. The 1995 deed to the Cornetts showed a thirty-foot access easement along the western edges of both tracts, as Tract 2 did not abut or have access to Griffin Road. The Cornetts' neighbor owned the servient tract on which the easement ran.

According to the Cornetts, the easement area along the western boundary of both tracts had always been used for access to Griffin Road. The Cornetts had used a gravel driveway in the easement to reach the street upon moving into the home on Tract 1 in 1983. An existing carport utilized by the Cornetts straddled Tract 1 and the easement. A chain link fence surrounding the Cornetts' carport and a brick driveway column also sat in the easement. The Cornetts made other improvements in the easement over the ensuing decades. A shelter and additional carport were built partially in the easement in 1991 and 1996, respectively. They also installed a split rail fence, drainage piping, a garden, and crepe myrtle trees inside the easement, all under the apparent belief that they owned the property in the easement. The Cornetts and their neighbor on the servient tract, Bennie Church,[1] jointly agreed to pave the gravel access road; however, the road as paved did not follow the easement as recorded on the Cornetts' deed, and instead fell roughly halfway inside the easement's western border.

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1. The recorded deeds in the record do not demonstrate ownership of the servient tract by Mr. Church, but both parties agree that he at least resided there during the time frames discussed.

Bennie Church died in 2009, and the servient tract eventually came into possession of Alison and Mitchell Church. The Churches sold the land to plaintiffs Joanne and William Hinman in 2019. After closing on the property, the Hinmans commissioned a survey, which confirmed the existence of the easement on their land. They thereafter demanded the Cornetts remove the various improvements built inside the easement and asserted that the Cornetts could not use the portion of the paved driveway falling outside the easement boundary. The Cornetts refused both demands, and the Hinmans brought suit for trespass and to quiet title on 23 March 2021. The Cornetts filed a combined answer, motion to dismiss, and counterclaims on 26 May 2021, alleging adverse possession of the disputed area and nuisance in connection with an alleged spite fence constructed by the Hinmans.

Following discovery—which included the depositions of the Cornetts—the parties lodged competing motions for summary judgment. The trial court granted summary judgment for the Hinmans on all claims. The Cornetts appealed the trial court's judgment to the Court of Appeals.

On 1 August 2023, that court issued a divided opinion reversing the trial court and remanding for further proceedings. *Hinman v. Cornett*, 290 N.C. App. 30 (2023) (plurality opinion). Writing for the court, the authoring judge opined that the Cornetts' evidence showed open, continuous, exclusive, actual, and notorious use of the disputed land falling between the eastern edge of the paved driveway and the Cornetts' property line for over twenty years. *Id.* at 42. Because summary judgment on this issue was improper, and because the unresolved issue of ownership necessarily bore on the Hinmans' trespass claim and the Cornetts' nuisance counterclaim, the authoring judge further concluded that summary judgment for the Hinmans on those claims was likewise in error. *Id.* at 44-45. As for the right of access conferred by the easement, the plurality and the dissenting judge held that the easement granted access to Tract 2 only. *Id.*

The dissenting judge disagreed with the plurality's holding that the forecasted evidence showed hostile possession by the Cornetts. *Id.* at 47-50 (Tyson, J., concurring in the result in part and dissenting in part). Relying on Mr. Cornett's deposition testimony that Bennie Church " 'was fine with [the Cornetts] using the driveway['] . . . [and that] there was no problem with the placement of drainage pipes in the easement from the Churches nor when they planted the crepe myrtles in the easement," the dissenting judge would have held that the Cornetts' use was "permissive . . . [and] tolled the running of the twenty-year statute of limitations pursuant to N.C. Gen. Stat. § 1-40." *Id.* at 49. He otherwise agreed

with the plurality's holding confining the easement's access rights only to Tract 2. *Id.* at 50. The Hinmans now appeal on the basis of the dissent.

II. Analysis

The principal issue raised by the dissent—and thus the issue properly before us under the grant of jurisdiction found in N.C.G.S. § 7A-30(2) and N.C. R. App. P. 14—is whether the Cornetts' evidence raised a genuine issue of material fact concerning the hostility element of adverse possession sufficient to survive summary judgment. Applying the appropriate standard of review to this issue, we affirm the plurality opinion of the Court of Appeals.

A. Standard of Review

We review a trial court's summary judgment order de novo. *E.g.*, *Forbis v. Neal*, 361 N.C. 519, 524 (2007). A movant is entitled to summary judgment when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits" show that the movant is "entitled to a judgment as a matter of law" and "that there is no genuine issue as to any material fact." N.C. R. Civ. P. 56(c). The evidence proffered at summary judgment must be taken in the light most favorable to the nonmovant. *E.g.*, *Caldwell v. Deese*, 288 N.C. 375, 378 (1975).

B. Hostile Possession

Adverse possession under claim of right without color of title requires actual, open, notorious, continuous, and hostile possession for a period of at least twenty years. N.C.G.S. § 1-40 (2023); *see also Newkirk v. Porter*, 237 N.C. 115, 119 (1953). The latter element—hostility—does not require a rancorous row between claimants or that the adverse possessor to act with the mind of a thief; instead, "when a landowner, acting under a mistake as to the true boundary between his property and that of another, takes possession of the land believing it to be his own and claims title thereto, his possession and claim of title is adverse." *Walls v. Grohman*, 315 N.C. 239, 249 (1985).

Permissive use may defeat an assertion of hostility. *Potts v. Burnette*, 301 N.C. 663, 666 (1981). Indeed, the law presumes that use by a person other than the landowner is permissive. *Id.* at 666-67. That presumption is rebutted where there is "some evidence accompanying the user which tends to . . . repel the inference that it is permissive and with the owner's consent." *Dickinson v. Pake*, 284 N.C. 576, 581 (1974). Use and improvement of property under a mistake of right and without permission has long constituted evidence sufficient to rebut this presumption in the context of prescriptive easements. *See Potts*, 301 N.C. at 668 (holding

that evidence taken in the light most favorable to the nonmovant on directed verdict rebutted the presumption of permissive use where "[n]o permission has ever been asked or given[,] [p]laintiffs . . . smoothed, graded and gravelled the road . . . , [and] there was abundant evidence that plaintiffs considered their use of the road to be a *right* and not a privilege"). And, because the mind of a thief is no longer required to establish a claim of adverse possession, so, too, does use and improvement under a mistake of ownership without the true owner's permission. *Cf. Walls*, 315 N.C. at 249 ("[W]hen a landowner, acting under a mistake as to the true boundary between his property and that of another, takes possession of the land believing it to be his own and claims title thereto, his possession and claim of title is adverse.").

The Cornetts' evidence in this case sufficed to raise a genuine issue of material fact concerning the hostility of their possession of the land between the eastern edge of the paved driveway and the property lines of Tracts 1 and 2. Mr. Cornett testified that he always believed he owned the entirety of the property within the easement, a mistake that does not serve to defeat any assertion of hostility. *Id.* Ms. Cornett testified that no one ever asked them or complained about their use of the disputed land and driveway, and "[n]o one ever told us that that part was not—not ours." The Cornetts also built permanent fixtures between the edge of the paved driveway and their property line; this permanent use and improvement of the land beyond that granted by the easement—together with the Cornetts' mistaken belief of ownership and their testimony that no one demanded permission or complained about their use of the land—are sufficient to rebut any presumption of permissive use. *Potts*, 301 N.C. at 666; *Dickinson*, 284 N.C. at 581.

The Hinmans and the dissent below urge the opposite conclusion based on an overreading of the evidence and caselaw. While it is true that Mr. Cornett testified that Mr. Church did not object to the Cornetts' use of the driveway and that no one complained about the improvements and use of the land east of the pavement, this evidence, considered in the light most favorable to the Cornetts, does not amount to an express or admitted grant of permission as concluded by the dissenting judge. This testimony does not foreclose, for example, the possibility that the Hinmans' predecessors in interest did not object to the Cornetts' use of the disputed land because they, too, believed it to be the Cornetts' property. Because this evidence is reconcilable with a finding that the Hinmans' predecessors in interest never gave the Cornetts permission or consent to use and treat the disputed land as their own—and because the Cornetts' mistaken belief of ownership and their

permanent improvements on the property constitute evidence rebutting the presumption of permissive use—the Court of Appeals properly held that a genuine issue of material fact existed as to the Cornetts' hostile possession of the property by mistake.

The cases relied upon by the Hinmans and the dissent, *Eason v. Spence*, 232 N.C. 579 (1950), and *Jones v. Miles*, 189 N.C. App. 289 (2008), neither compel nor caution a different outcome. In *Eason*, we held that a landowner may lose title to an adverse possessor only when "he has legal power to stop it," 232 N.C. at 587, and persons validly occupying land under a life estate do not begin adversely possessing property against remaindermen or reversioners until the life tenant dies and the life estate is extinguished, *id.* Those circumstances—an attempt to count the length of a lawful life tenancy towards the statutorily prescribed time for adverse possession—are not present under the facts here. Nor does the plurality decision of the Court of Appeals in this case conflict with that court's prior decision in *Jones*; that case merely recognizes that permissive use defeats hostility when the adverse possessor encroaches on the landowner's property, the landowner gives permission for the encroachment, and the adverse possessor fails to reassert any claim of exclusive right and ownership to the subject land. 189 N.C. App. at 294. As explained above, the evidence taken in the light most favorable to the Cornetts does not disclose a grant of permission by the Hinmans' predecessors in interest for the Cornetts' permanent improvements and continued exclusive use of the land between their property line and the eastern edge of the paved driveway.

III. Conclusion

For the foregoing reasons, we affirm the decision of the Court of Appeals reversing summary judgment in favor of the Hinmans and remand this case to that court for further remand to the trial court for further proceedings not inconsistent with this opinion.

AFFIRMED AND REMANDED.

IN RE K.B.

[386 N.C. 68 (2024)]

IN THE MATTER OF K.B., A.M.H., M.S.H

No. 212A23

Filed 23 May 2024

Child Abuse, Dependency, and Neglect—guardianship—awarded to in-state relative—before home study of out-of-state relative was completed

After adjudicating respondent-mother's three minor children as neglected and dependent, the trial court did not abuse its discretion when it awarded guardianship to the children's great aunt, who lived in North Carolina, without waiting for the completion of a home study of an alternative relative placement—the children's grandmother, who lived in Georgia—pursuant to the Interstate Compact for the Placement of Children (ICPC). Neither the ICPC nor N.C.G.S. § 7B-903(a1) require a trial court to wait for the resolution of a home study to rule out placement with an out-of-state relative if the court concludes that an in-state relative is willing and able to provide proper care and supervision and that placement with the in-state relative is in the children's best interests. Further, in this case, the trial court made findings of fact that supported awarding guardianship to the great aunt, including that she had provided the children a safe, loving, and stable home for almost three years.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 290 N.C. App. 61 (2023), affirming in part, vacating in part, and remanding an order entered 21 March 2022 by Judge S. Katherine Burnette in District Court, Vance County. Heard in the Supreme Court 20 February 2024.

Tiffanie C. Meyers, for petitioner-appellee Vance County Department of Social Services.

Christopher M. Watford, for respondent-appellant mother.

Erica M. Hicks, for petitioner-appellee Guardian ad Litem.

RIGGS, Justice.

When a child is removed from a parent's custody due to abuse, neglect, or dependency, the preference is to place the child in a safe

environment with relatives while the parent works towards reunification. N.C.G.S. § 7B-903(a1) (2023). The legislature has evinced no statutory preference between different relatives, even out-of-state relatives. Because the legislature has not created a statutory preference system, when a trial court determines that an in-state relative is willing and able to provide proper care and supervision and the placement is in the best interest of the child, the court need not wait for a home study to rule out an alternative out-of-state relative placement. Still, when the trial court orders a home study of a relative placement, social services must perform a timely evaluation of the potential placement. Timely evaluation and attention to these matters is critical to expedite permanency and stability for a child and to provide the court with the thorough information needed to evaluate whether the placement is in the best interests of the child.

I. Factual & Procedural Background

In February of 2019, Vance County Department of Social Services (DSS) took nonsecure custody of Kelly, Amy, and Matt[1] because the parents had issues with homelessness, mental health, and domestic violence. At the time of removal, Kelly was 5 months old, Amy was 18 months old, and Matt was 2 years old. The children were temporarily placed in foster care.

At the dispositional hearing, on 20 February 2019, the trial court placed the children with their paternal great aunt (Great Aunt) and ordered that the "[m]aternal grandmother who lives in Georgia, shall be investigated as a possible placement." Shortly thereafter, the trial court adjudicated the children as neglected and dependent.

Initially, in March of 2019, DSS began the process of the out-of-state home study on the maternal grandmother (Grandmother) pursuant to the Interstate Compact on the Placement of Children (ICPC) by requesting birth certificates and social security cards for the children. After this initial effort, DSS took no further action on Grandmother's ICPC home study until November 2021.

Generally, when children are in DSS custody, the trial court holds permanency planning hearings on a regular basis to assess the status of the parents and the children. *See* N.C.G.S. § 7B-906.1 (2023). For a host of factors, some clear to us and some not, that did not occur here: the court granted seven continuances before the first permanency planning

1. The names are stipulated pseudonyms used pursuant to N.C. R. App. P. 42.

hearing in this case. The first permanency planning hearing took over seven months to complete; the hearing was held over the course of several days between 19 August 2020 and 25 February 2021. At the conclusion of the hearing, the trial court ordered the placement of the children to remain with Great Aunt and again ordered DSS to "initiate the ICPC [home study] for the juveniles' [Grandmother.]" The trial court ceased reunification efforts with the parents and changed the primary plan for the children to guardianship.

The trial court held a second permanency planning hearing on 7 July 2021. Even then, DSS still had not initiated the ICPC home study for Grandmother. DSS recommended establishing guardianship with Great Aunt and closing the matter. The guardian ad litem, however, recommended that the ICPC home study for Grandmother be expedited. The trial court ordered that the "ICPC [home study] for [Grandmother] be expedited" and scheduled a subsequent hearing on 25 August 2021. However, the hearing on 25 August 2021 was delayed because "the results of the ICPC [home study had] not been received by [DSS]."

The third permanency planning hearing began on 18 October 2021.[2] On the first day of the hearing, DSS's attorney told the court that the ICPC home study request had "been sent to Georgia, but we do not have results." The DSS social worker testified that first day, stating that since her initial contact with the Georgia ICPC office in March 2019, she did not contact them again until one week before the hearing when she left them a message. When the DSS social worker was cross-examined on the second day of the hearing, two months later, she testified that she did not actually send the request for the ICPC home study to Georgia until 5 November 2021.

Grandmother testified at this hearing about her desire to provide a home for the children. She stated that as a retired veteran she has financial resources and income to provide for the children in a safe and stable home. Grandmother also testified that she has three minor children living with her, and one of her children requires special accommodations at school.

Grandmother explained she had researched therapy options for the children if they were to be placed in her home. She also testified that she was not contacted by Georgia DSS for the ICPC home study until 21 December 2021. The request from North Carolina contained an incorrect phone number for Grandmother, which delayed Georgia DSS's ability to

2. The hearing was held on 18 October 2021, 8 December 2021, and 9 February 2022.

contact her. Grandmother testified that she was working with Georgia DSS to complete all aspects of the ICPC home study expeditiously. At the close of the hearing, the court did not respond when the children's mother's attorney inquired whether the ICPC home study would "still be proceeding."

After the hearing and before the completion of the ICPC home study, the trial court entered an order on 21 March 2022 granting guardianship of the children to Great Aunt. The trial court found that the children were "in need of permanency" and Great Aunt had "provided a safe, loving, caring and stable home" for the children for almost three years. As to Grandmother, the court noted that the children had infrequent contact with Grandmother in the three years since they had been placed with Great Aunt. The court noted that Grandmother already had three children in her home and placing the children in her care meant that there would be six children under the age of seventeen in the home. As to Great Aunt, the court found that she had met the children's education and development needs and removing them from her custody "would be basically removing them from the only home they have known." Additionally, the court found that there were family members in the local community willing to provide financial support for the children. The trial court did not terminate the parental rights of the children's mother (Mother) and left the matter open, noting that "any interested party may file a motion for review."

Mother appealed the order arguing that the trial court erred in entering an order granting guardianship to Great Aunt before Georgia DSS completed the ICPC home study of Grandmother. The majority at the Court of Appeals "conclude[d] there is no obligation under the ICPC that a home study be completed *to rule out* an out-of-state relative as a placement option." *In re K.B.*, 290 N.C. App. 61, 65 (2023). The majority concluded that the trial court's findings supported the grant of guardianship to Great Aunt and affirmed the order of the trial court as to the guardianship. *Id.* The Court of Appeals also vacated the order in part and remanded for reconsideration of Mother's visitation. *Id.* at 69. Mother appealed the issue of guardianship.

II. Analysis

This case presents a narrow issue that arises when a district court is presented with in-state and out-of-state relative placements for children that are in the custody of the Department of Social Services. The question is whether the North Carolina statutes or the Interstate Compact on the Placement of Children require the district court to perform a home

study to rule out an out-of-state relative if the trial court concludes that an in-state relative is willing and able to provide proper care and supervision *and* the placement is in the best interest of the child.

We hold that trial courts are not necessarily required to wait on completion of a home study to rule out the placement with an out-of-state relative if the trial court concludes that an in-state relative is willing and able to provide proper care and supervision *and* the placement is in the best interest of the children pursuant to N.C.G.S. § 7B-903(a1). But beyond the fact that the statutes do not specifically require the completion of a home study to rule out placement with an out-of-state relative, we agree with the Court of Appeals majority that "it may be an abuse of discretion in some cases *to rule out* a placement option, whether in-state or out-of-state, without the benefit of a home study assessment" and "it may be an abuse of discretion in some cases to place a child with an in-state person without a home study assessment of that person." *In re K.B.*, 290 N.C. App. at 66. Thus, the analysis of whether the trial court erred in placing a child with an in-state relative before the completion of a home study on an alternative relative is performed under an abuse of discretion standard of review. We further affirm that the requirements of the ICPC apply to placements of children with out-of-state relatives including grandparents.

A. Standard of Review

The question of whether a trial court has followed the plain language of a statute is a question of statutory interpretation that is ultimately a question of law for the courts. *Brown v. Flowe*, 349 N.C. 520, 523 (1998). We review conclusions of law de novo. *In re C.B.C.*, 373 N.C. 16, 19 (2019); *Matter of E.D.H.*, 381 N.C. 395, 398 (2022).

Further, the trial court's dispositional choices are reviewed for abuse of discretion. *In re J.M.*, 384 N.C. 584, 591 (2023). "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." *In re S.R.*, 384 N.C. 516, 520 (2023) (cleaned up) (quoting *In re C.B.*, 375 N.C. 556, 560 (2020)).

B. Requirement for an ICPC Home Study under N.C.G.S. § 7B-903(a1)

When children must be removed from the custody of their parents, our statutes indicate that placement with a relative is the preferred disposition. N.C.G.S. § 7B-903(a1). In a scenario where the trial court is deciding between two relative placements, N.C.G.S. § 7B-903(a1) does

not require the court to wait on the final resolution of an ICPC study for an out-of-state relative. If the trial court finds that an in-state relative is willing and able to provide proper care and supervision, then the court may make findings and conclude that, in its discretion, placement with the in-state relative is in the best interest of the children.

When the court exercises jurisdiction over a juvenile due to abuse, neglect, or dependency, N.C.G.S. § 7B-903(a1) indicates a preference to place the child with relatives. The statute requires the court to consider the propriety of keeping the child in the child's community but otherwise does not recognize any preference between in-state and out-of-state relatives.

> In placing a juvenile in out-of-home care under this section, the court shall first consider whether a relative of the juvenile is willing and able to provide proper care and supervision of the juvenile in a safe home. If the court finds that the relative is willing and able to provide proper care and supervision in a safe home, then the court shall order placement of the juvenile with the relative unless the court finds that the placement is contrary to the best interests of the juvenile. In placing a juvenile in out-of-home care under this section, the court shall also consider whether it is in the juvenile's best interest to remain in the juvenile's community of residence. *Placement of a juvenile with a relative outside of this State must be in accordance with the Interstate Compact on the Placement of Children.*

N.C.G.S. § 7B-903(a1) (emphasis added).

The ICPC, referenced in N.C.G.S. § 7B-903(a1), is a uniform law enacted by all fifty states that governs interstate placement of children. N.C.G.S. § 7B-3800 (2023). The General Assembly enacted the ICPC as N.C.G.S. §§ 7B-3800 to 3808 (2023), and the language of N.C.G.S. § 7B-903(a1) makes clear that placement of children with relatives outside of North Carolina must comply with the requirements found in the ICPC. N.C.G.S. § 7B-3800. The statutory language of N.C.G.S. § 7B-3800 reveals that a relevant purpose of the ICPC is to ensure that the authorities "of the state from which the placement is made may obtain the most complete information on the basis of which to evaluate a projected placement *before it is made*." N.C.G.S. § 7B-3800, art. I(c) (emphasis added).

To that end, the ICPC provides the trial court with information to ascertain if the out-of-state placement is in the best interest of the child by creating a "means of placing children across state lines with the same safeguards and services as are available when they are placed within their own state." N.C. Child Welfare Manual, *Interstate/Intercounty Services for Children*, 1 (December 2022), https://policies.ncdhhs.gov/document/interstate-compact-on-the-placement-of-children/ [hereinafter, ICPC Manual]. The receiving state performs a home study and provides an approval or denial of the placement as soon as practical—but no later than 180 days after the request is made and within twenty business days for an expedited approval process.[3] *Id.* at 58, 73–74. After a placement is approved, North Carolina retains final authority to determine whether to exercise the approved placement. *Id.* at 74.

The guiding consideration in the placement process is the best interest of the child. *See* N.C.G.S. § 7B-906.1(d1); N.C.G.S. § 7B-903(a1). For that reason, even when the court is considering placement with an out-of-state relative, the trial court may still conclude that placement with an in-state relative is in the best interest of the child based on any number of factors. But in some scenarios, the best-interest determination may require the completion of an ICPC home study before the trial court can make a placement. In this case, the majority at the Court of Appeals concluded that the order supported the trial court's discretionary decision to place the children with Great Aunt. *In re K.B.*, 290 N.C. App. at 66. The trial court found that Great Aunt's home was the only home the children have ever known, the children have bonded with Great Aunt, and that for all the reasons listed in the trial court's order, it was in the best interest of the children to remain in the current placement. *Id.* at 65.

Here, it is troubling that DSS seems to have unjustifiably delayed complying with the trial court's order to promptly conduct the ICPC study. *Id.* The trial court's discretion gives it the capacity and the obligation to hold parties accountable, including requiring DSS to show cause for repeatedly ignoring a court order. *See* N.C.G.S. § 7B-904(e) (2023). However, based on the facts of this case, we cannot conclude that the trial court's decision to proceed without a complete ICPC home study was an abuse of discretion. Grandmother already had three minor children living in her home. Significantly, the children have not

3. Notably, because the children were under the age of four at the time of removal, the ICPC home study initially qualified for an expedited review. ICPC Manual, at 34.

formed a bond with Grandmother due to infrequent contact between Grandmother and the children.[4]

To be sure, the trial court made findings of fact that support its award of guardianship to Great Aunt. The findings of fact establish that Great Aunt provided a safe, loving, and stable home for the children and supported the children's educational and developmental needs. The trial court found that the children were receiving therapy to address developmental delays and making appropriate progress to meet annual goals. Great Aunt had supported the children with the help of family members for almost three years. These findings of fact support the trial court's conclusion awarding guardianship of the children to Great Aunt.

It bears noting that while DSS provides trial courts with recommendations as to the proper placement for children, the ultimate decision as to the placement remains with the trial court. *See* N.C.G.S. § 7B-906.1 (recognizing that the court determines whether to maintain the juvenile's placement, order a different placement, or order any disposition authorized by statute). We have no doubt that, in most instances, DSS performs this difficult job admirably. But DSS may not, by delay, put a thumb on the scale of the court's best-interest evaluation or otherwise interfere with the court's ability to obtain all information relevant to the best-interest analysis by delaying compliance with court orders.

C. ICPC Applicability to Placements with Out-of-State Grandparents

The Court of Appeals' opinion highlighted some tensions in cases from that court addressing the applicability of the ICPC to placement with relatives, specifically grandparents, located outside the state lines. A prior decision from the Court of Appeals held that the ICPC did not apply to out-of-state placements with grandparents. *In re J.E.*, 182 N.C. App. 612 (2007). But *In re J.E.* relied upon now-outdated statutory language and a narrow reading of the ICPC definition of placement. *Id.* at 614. Thus, we take this opportunity to make clear that the ICPC does apply to an order granting guardianship to out-of-state grandparents.

A separate line of cases from the Court of Appeals aligns with this understanding of the ICPC's applicability, holding that placement with an out-of-state relative requires prior approval from the receiving state

4. Nevertheless, in a different factual scenario, a court may abuse its discretion by making conclusions about the best interests of the children without the additional information provided by a home study.

through the ICPC process. *See*, *e.g.*, *In re L.L.*, 172 N.C. App. 689, 702 (2005) (holding a child cannot be placed with an out-of-state relative until favorable completion of an ICPC home study) *abrogated on other grounds by In re T.H.T.*, 362 N.C. 446 (2008); *In re V.A.*, 221 N.C. App. 637, 641 (2012) (holding the trial court could not place a child with her grandmother in South Carolina because South Carolina authorities did not approve the placement); *In re J.D.M.-J.*, 260 N.C. App. 56, 63 (2018) (acknowledging a conflict in the holdings of *In re J.E.* and *In re V.A.* and relying upon the holdings of *In re V.A.* and *In re L.L.* to conclude that placement with an out-of-state relative triggered the requirements of the ICPC). Our decision affirms the holding of these cases: before the trial court can place an abused, neglected, or dependent child with an out-of-state relative, the trial court must first receive approval from the receiving state consistent with the ICPC.

III. Conclusion

In sum, our statutes express a preference to place abused, neglected, or dependent children with relatives who can provide proper care and supervision in a safe home. ICPC home studies provide trial courts with crucial information to determine whether out-of-state relatives can provide proper care and supervision in a safe home and help those courts assess with full information what is in the best interest of the children. Nevertheless, when a trial court considers a dispositional decision between relatives, that court is not required to wait on a completed ICPC home study to rule out an out-of-state relative when the trial court determines that an in-state relative can provide proper care and supervision in a safe home and the court is able to determine it is in the best interest of the child to be placed with that in-state relative before completion of that home study. Lastly, we note that our decision does not disturb the Court of Appeals' vacatur and remand on the issue of Mother's visitation with the children.

AFFIRMED.

IN RE McCLATCHY CO.

[386 N.C. 77 (2024)]

IN THE MATTER OF THE McCLATCHY COMPANY, LLC, D/B/A THE NEWS & OBSERVER; CAROLINA PUBLIC PRESS, INC. D/B/A CAROLINA PUBLIC PRESS; CAPITOL BROADCASTING COMPANY, INCORPORATED D/B/A WRAL-TV; LEE ENTERPRISES, D/B/A THE NEWS & RECORD; HEARST PROPERTIES, INC. D/B/A WXII; GANNETT CO., INC., D/B/A THE BURLINGTON TIMES NEWS; MACKENZIE WILKES, JOHN NORCROSS, AND GRACE TERRY, OF THE ELON NEWS NETWORK

No. 29A23

Filed 23 May 2024

1. Jurisdiction—custodial law enforcement agency recordings —media request—release—initiation by petition versus complaint—legislative intent

In an action seeking the release of custodial law enforcement agency recordings (CLEAR) of a protest march pursuant to N.C.G.S. § 132-1.4A(g), media petitioners were not required to file a civil complaint rather than a petition to invoke the trial court's jurisdiction. Where the language in subsection (g) instructing anyone seeking release of CLEAR to file an "action" was not clear and unambiguous, statutory interpretation principles supported the conclusion that legislative intent allowed for such an action to be initiated by petition.

2. Public Records—custodial law enforcement agency recordings—media request—release—no eligibility requirement

In an action seeking the release of custodial law enforcement agency recordings (CLEAR) of a protest march, initiated by the filing of a petition by media petitioners pursuant to N.C.G.S. § 132-1.4A(g), the trial court was not required to first find that petitioners were eligible to seek the release of the recordings before granting their request. Unlike subsection (f) of the statute regarding disclosure of CLEAR, which has eligibility requirements, subsection (g) authorizes "any person" seeking release of CLEAR to file an action for a court order.

3. Public Records—custodial law enforcement agency recordings —media request—release—scope of trial court's authority

In an action seeking the release of custodial law enforcement agency recordings (CLEAR) of a protest march, initiated by the filing of a petition by media petitioners pursuant to N.C.G.S. § 132-1.4A(g), where the trial court found that the release of the requested CLEAR would reveal highly sensitive and personal information but ordered the unredacted release of all CLEAR because it

"d[id] not have the authority to [c]ensor this information absent a legitimate or compelling state interest [ ] to do so," the trial court committed reversible error by misunderstanding the scope of its authority. The trial court had broad discretion under the CLEAR statute to place any conditions or restrictions on the release of the recordings, and its failure to acknowledge those options constituted an abuse of discretion.

Justice BERGER dissenting.

Chief Justice NEWBY joins in this dissenting opinion.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 287 N.C. App. 126 (2022), vacating an order entered on 15 June 2021 by Judge Andrew H. Hanford in Superior Court, Alamance County, and remanding the case. Heard in the Supreme Court on 7 November 2023.

Stevens Martin Vaughn & Tadych, PLLC, by Michael J. Tadych, Karen M. Rabenau, Hugh Stevens, and Elizabeth J. Soja, for petitioner-appellants.

Envisage Law, by Anthony J. Biller and Adam P. Banks, for respondent-appellee.

ALLEN, Justice.

Petitioners obtained a court order granting their petition for copies of law enforcement recordings of a march that took place in Graham, North Carolina. Individuals who wish to receive copies of such law enforcement recordings must follow the procedures set out in N.C.G.S. § 132-1.4A. A divided panel of the Court of Appeals vacated the trial court's order, holding that the trial court had failed to determine petitioners' eligibility to request copies of the recordings under the statute. *In re The McClatchy Co.*, 287 N.C. App. 126, 134–36 (2022). The Court of Appeals majority also held that the trial court had not understood that it could place conditions or restrictions on the release of the recordings. *Id.* at 135.

As explained below, anyone may seek copies of law enforcement recordings under the provision in N.C.G.S. § 132-1.4A invoked by

petitioners, so the trial court had no reason to question their eligibility to proceed. Moreover, we do not accept the Graham Police Department's argument to this Court that the statute required petitioners to file a civil action instead of a petition.

We agree with the Court of Appeals, however, that the trial court erroneously believed that it could not condition or restrict the release of the recordings. Accordingly, we affirm in part and reverse in part the decision of the Court of Appeals and remand this case for further proceedings consistent with this opinion.

I. Background

On 31 October 2020, approximately 200 people took part in the "I Am Change" march in Graham, North Carolina. According to news reports, clashes occurred between marchers and law enforcement officers as officers attempted to clear a blocked intersection and disperse a crowd gathered at the Alamance County Historical Courthouse. The confrontations resulted in numerous arrests.

On 2 March 2021, petitioners—a group of media organizations and reporters—filed a petition in the Superior Court, Alamance County, seeking the "release of all law enforcement and other recordings leading up to, during[,] and after the 'I am Change' march . . . from the time the first contact was made with marchers, spectators or media . . . until the last member of law enforcement left the scene." The petition identified the Alamance County Sheriff's Office (ACSO) and the Graham Police Department (GPD) as the law enforcement agencies with custody of the recordings. Petitioners served copies of the petition on the sheriff of Alamance County, the chief of the GPD, and the Alamance County district attorney.

The terms "release" and "disclosure" mean different things in N.C.G.S. § 132-1.4A, the statute that governs access to custodial law enforcement agency recordings (CLEAR). As defined by the statute, CLEAR include any "visual, audio, or visual and audio recording captured by a body-worn camera, a dashboard camera, or any other video or audio recording device operated by or on behalf of a law enforcement agency or law enforcement agency personnel when carrying out law enforcement responsibilities."[1] N.C.G.S. § 132-1.4A(a)(6) (2023). To release CLEAR is to "provide a copy of a recording." N.C.G.S.

1. The definition of "recording" in the CLEAR statute does not include "any video or audio recordings of interviews regarding agency internal investigations or interviews or interrogations of suspects or witnesses." N.C.G.S. § 132-1.4A(a)(6) (2023).

§ 132-1.4A(a)(7). To disclose CLEAR is to "make a recording available for viewing or listening . . . at a time and location chosen by the custodial law enforcement agency." N.C.G.S. § 132-1.4A(a)(4); *see also id.* ("[Disclosure] does not include the release of a recording.").

Under subsection (c) of the CLEAR statute, the only people eligible to request disclosure are individuals whose images or voices are captured in the recordings or their personal representatives.[2] N.C.G.S. § 132-1.4A(c). Unless the recording depicts a death or serious bodily injury, no court order is necessary for a law enforcement agency to disclose CLEAR to an eligible person. N.C.G.S. § 132-1.4A(b1)–(b3), (c). On the other hand, with certain exceptions not relevant to this case, the CLEAR statute prohibits the release of CLEAR except pursuant to a court order.[3] Subsection (f) of the statute authorizes individuals who are eligible for disclosure under subsection (c) to "petition the superior court in any county where any portion of the recording was made for an order releasing the recording." N.C.G.S. § 132-1.4A(f). More generally, subsection (g) allows "any person" requesting the release of CLEAR to "file an action in the superior court in any county where any portion of the recording was made for an order releasing the recording." N.C.G.S. § 132-1.4A(g).

In filing their petition for release, petitioners used a form created by the North Carolina Administrative Office of the Courts (AOC), form AOC-CV-270. They checked the box on the form indicating that they sought release under subsection (g) of the CLEAR statute. Petitioners also filed a memorandum of law outlining the legal basis for their petition.

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2. For purposes of the CLEAR statute, a personal representative is:

> A parent, court-appointed guardian, spouse, or attorney licensed in North Carolina of a person whose image or voice is in the recording. If a person whose image or voice is in the recording is deceased, the term also means the personal representative of the estate of the deceased person; the deceased person's surviving spouse, parent, or adult child; the deceased person's attorney licensed in North Carolina; or the parent or guardian of a surviving minor child of the deceased.

N.C.G.S. § 132-1.4A(a)(5).

3. Subsection (h) of the CLEAR statute authorizes the release of CLEAR without a court order for designated purposes, such as "[f]or suspect identification or apprehension." N.C.G.S. § 132-1.4A(h)(4).

On 15 March 2021, following a preliminary hearing, the trial court issued an order requiring the ACSO and the GPD to submit copies of the requested recordings to the court so that it could review them before the next hearing. The order further directed the head of each law enforcement agency "to give notice of the [p]etition and [the upcoming] hearing to any law enforcement personnel whose image or voice is in the recording." Finally, the order required the ACSO and the GPD to provide the court and petitioners' legal counsel with "a list identifying those portions of the requested recordings to which law enforcement objects to release and all bases for those objections." The ACSO and the GPD complied with the order.

On 10 June 2021, the trial court conducted a hearing on the merits of the petition. Petitioners argued that (1) the media's continued willingness to pursue the recordings testified to their ongoing newsworthiness; (2) the privacy interests at stake were minimal because the interactions between marchers and law enforcement officers took place in public; and (3) widespread media coverage of the march reduced the potential impact of the recordings on ongoing trials or investigations. The ACSO and the GPD urged the court to deny the petition, arguing among other things that (1) no compelling public interest supported the release of the recordings because nearly eight months had passed since the "I Am Change" march, rendering it no longer newsworthy; (2) other recordings of the march were widely available on social media; (3) petitioners' request was overly broad; (4) release of the recordings could damage the reputations of persons arrested on camera; and (5) release could influence ongoing criminal proceedings against persons arrested at the march.

At the conclusion of the hearing, the trial court ordered the release of all recordings requested by petitioners. The court emphasized that it had reviewed the eight statutory standards that courts must consider when deciding whether to release CLEAR:

> (1) Release is necessary to advance a compelling public interest.
>
> (2) The recording contains information that is otherwise confidential or exempt from disclosure or release under State or federal law.
>
> (3) The person requesting release is seeking to obtain evidence to determine legal issues in a current or potential court proceeding.

> (4) Release would reveal information regarding a person that is of a highly sensitive personal nature.
>
> (5) Release may harm the reputation or jeopardize the safety of a person.
>
> (6) Release would create a serious threat to the fair, impartial, and orderly administration of justice.
>
> (7) Confidentiality is necessary to protect either an active or inactive internal or criminal investigation or potential internal or criminal investigation.
>
> (8) There is good cause shown to release all portions of a recording.

N.C.G.S. § 132-1.4A(g).

The trial court assessed the applicability of the eight standards to its decision in the following terms:

> [No. 1,] That the release of the information is necessary to advance a compelling public interest. The Court finds that there is a compelling public interest in the accountability and transparency of law enforcement officers and that this factor weighs in favor of release.
>
> No. 2, The recording contains information that is otherwise confidential or exempt from disclosure or release under state or federal law. This Court finds this factor is not relevant and does not impact the Court's decision.
>
> No. 3, The person requesting release is seeking to obtain evidence to determine legal issues in a current or potential court proceeding. The Court finds this factor is not relevant and does not impact this decision.
>
> No. 4, Release would reveal information regarding a person that is of a highly sensitive and personal nature. This Court finds that this factor weighs against release.
>
> No. 5, That release may harm the reputation or jeopardize the safety of a person. This Court finds this factor also to weigh against release.

> No. 6, That release would create a serious threat to the fair and orderly administration of justice. This court finds that this factor does weigh in favor of release.
>
> No. 7, Confidentiality is necessary to protect an active internal criminal investigation or potential internal or criminal investigation. This Court finds this factor is not relevant and does not impact the Court's decision.
>
> No. 8, There is good cause shown to release all portions of the recordings.

Despite having found that release of the recordings would reveal highly sensitive and personal information and could harm a person's reputation or safety, the court concluded that it had no choice but to grant the petition in full.

> This Court finds that the photos and the recordings speak for themselves, and this Court does not have the authority to [c]ensor this information absent a legitimate or compelling state interest [ ] to do so. Most importantly this Court gives great weight to transparency and public accountability with regard to police action and considers a failure to release this information to possibly undermine the public interest and confidence in the administration of justice.

On 15 June 2021, the trial court entered a written order memorializing its decision and the basis for its ruling. The order repeated in even stronger terms the court's belief that it "d[id] not have the authority to censor the photos/recordings absent a compelling governmental interest."

The GPD appealed the trial court's 15 June 2021 order. On 20 December 2022, a divided panel of the Court of Appeals issued an opinion vacating the order and remanding the case. *McClatchy*, 287 N.C. App. at 136. The majority premised its decision on a reading of the CLEAR statute that no party to the litigation had advocated. Essentially, the majority interpreted the CLEAR statute to provide that only persons eligible for disclosure under subsection (c) may request the release of CLEAR. *See id.* at 133 ("[Subsection] 132-1.4A(c) provides the limited categories of persons who are authorized to seek release of the law enforcement recordings and records . . . ."); *see also id.* at 134 ("The release of [CLEAR] under any section [of the CLEAR statute] sequentially

requires the petitioning party to show it qualifies and the trial court to so find the basis of that qualification under [N.C.G.S.] § 132-1.4A(c).”). The majority ordered a remand so that the trial court could make the “statutory findings” necessary to determine whether petitioners were eligible under subsection (c) to request release. *Id.* at 135.

Turning to issues “likely to occur on remand,” the majority further held that the trial court had misapprehended the scope of its authority under the CLEAR statute. *Id.* at 134–35. Specifically, the trial court had erroneously believed that it had no choice but to order the release of complete copies of all recordings sought by petitioners. *Id.* at 135. The majority noted that subsection (g) requires a trial court to “release only those portions of the recording that are relevant to the person’s request” and permits the court to “place any conditions or restrictions on the release of the recording that the court, in its discretion, deems appropriate.” *Id.* (emphasis omitted) (quoting N.C.G.S. § 132-1.4A(g)). The majority explained that on remand “[p]etitioner[s] carr[y] and maintain[ ] the burden of eligibility, specificity, and relevance under the [CLEAR] statute. Respondents have no burden on remand.” *Id.* (citing N.C.G.S. § 132-1.4A(c)).

The dissenting judge disagreed with the majority’s contention that only persons eligible for disclosure under subsection (c) may seek the release of CLEAR:

> Though the [CLEAR] statute is long-winded, it is not complex. The statute plainly distinguishes between those persons who are entitled to disclosure of [CLEAR], and those who are not; a person who is entitled to disclosure under subsection (c) may petition for release under subsection (f); all other persons excluded by subsection (c) may petition for release under subsection (g).

Id. at 144–45 (Arrowood, J., dissenting).

The dissenting judge also highlighted the “dangerous” consequence of the majority’s reasoning:

> [T]he majority’s mischaracterization, and subsequent misapplication, of the plain language of [N.C.G.S.] § 132-1.4A wholly ignores subsection (g); as a result, the majority would have it so that those limited persons entitled to disclosure under subsection (c) would also be the only persons entitled to release.

. . . .

> . . . [S]uch an interpretation of [N.C.G.S.] § 132-1.4A would ensure that members of the media would *never* be allowed to petition the superior court for release of [CLEAR], let alone obtain them via court order.

Id. at 146.

Lastly, the dissenting judge argued that the trial court did not abuse its discretion by granting the petition in full: "The trial court analyzed each statutory standard with careful consideration and, based on its detailed analysis, concluded that the only acceptable outcome was to order . . . the release of all of the petitioned [CLEAR]." *Id.* at 150.

On 23 January 2023, petitioners filed a notice of appeal based on the dissent in the Court of Appeals. At the time, N.C.G.S. § 7A-30(2) 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) (2023), *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.

II. Jurisdiction

[1] In its brief to this Court, the GPD argues for the first time that the trial court lacked subject matter jurisdiction over the petition. Subject matter jurisdiction is a court's legal authority to adjudicate the kind of claim alleged. *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 254 (2010). Parties may raise the issue of subject matter jurisdiction at any point. *State v. Newborn*, 384 N.C. 656, 658 (2023). If the record substantiates the GPD's argument, the entire proceeding is void and we need not reach the issues that divided the Court of Appeals. *See High v. Pearce*, 220 N.C. 266, 271 (1941) ("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.").

"Whether or not a trial court possesses subject-matter jurisdiction is a question of law that is reviewed de novo." *Wing v. Goldman Sachs Tr. Co.*, 382 N.C. 288, 297 (2022) (quoting *In re A.L.L.*, 376 N.C. 99, 101 (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." *Town of Midland v. Harrell*, 385 N.C. 365, 370 (2023) (quoting *In re Greens of Pine Glen Ltd. P'ship*, 356 N.C. 642, 647 (2003)).

According to the GPD, the trial court lacked subject matter jurisdiction over the petition because subsection (g) of the CLEAR statute required petitioners to commence a civil action by filing a complaint, not a petition. The GPD points to textual differences between subsections (f) and (g) of the CLEAR statute as grounds for its position. In particular, the GPD observes that, whereas the word "petition" appears in subsection (f), subsection (g) instructs anyone seeking release under its provisions to do so by "fil[ing] an action." Given that petitioners have proceeded under subsection (g), the GPD argues that their decision to file a petition instead of commencing a civil action deprived the trial court of subject matter jurisdiction over their release request. The GPD directs our attention to decisions from the Court of Appeals that adopt this interpretation of subsection (g). *See*, *e.g.*, *In re Custodial L. Enf't Agency Recording*, 288 N.C. App. 306, 311 (2023) ("Because Petitioners used an AOC form, and did not file a civil action as provided by subsection (g), the trial court lacked subject matter jurisdiction over this case.").

"The principal goal of statutory construction is to accomplish the legislative intent." *Lenox, Inc. v. Tolson*, 353 N.C. 659, 664 (2001). "The process of construing a statutory provision must begin with an examination of the relevant statutory language." *Wilkie v. City of Boiling Spring Lakes*, 370 N.C. 540, 547 (2018). "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." *N.C. Farm Bureau Mut. Ins. Co. v. Hebert*, No. 281A22, slip op. at 9 (N.C. Mar. 22, 2024) (citing *N.C. Farm Bureau Mut. Ins. Co. v. Lunsford*, 378 N.C. 181, 188 (2021)). "[H]owever, where the statute is ambiguous or unclear as to its meaning, the courts must interpret the statute to give effect to the legislative intent." *Frye Reg'l Med. Ctr., Inc. v. Hunt*, 350 N.C. 39, 45 (1999) (citing *Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205 (1990)).

The plain language rule does not apply to the General Assembly's use of "action" in subsection (g) because the term is not clear and unambiguous. "All remedies in the courts of this State divide into (1) actions or (2) special proceedings." *In re Clark*, 303 N.C. 592, 598 n.3 (1981) (citing N.C.G.S. § 1-1). "An action is 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." N.C.G.S. § 1-2 (2023). "Every other remedy is a special proceeding." N.C.G.S. § 1-3 (2023). Ordinarily,

in the civil context, the term "action" is synonymous with "civil action" and "is commenced by filing a complaint with the court." N.C.G.S. § 1A-1, Rule 3(a) (2023). Nonetheless, the word "action" in subsection (g) is ambiguous for at least two reasons.

First, it is not evident that an "action" under subsection (g) fits the definition of "action" in N.C.G.S. § 1-2. As discussed in subsection III.B of this opinion, subsection (g) of the CLEAR statute does not create a right to the release of CLEAR; consequently, it is not a mechanism for the enforcement or protection of a right or the redress or prevention of a wrong.

Second, the General Assembly has applied the term "action" to proceedings initiated by the filing of petitions. The CLEAR statute itself offers an example. Subsections (b1) through (b3) establish a special process for the disclosure of CLEAR in cases where a recording depicts a death or serious bodily injury.[4] Within three business days of receiving a disclosure request that satisfies the notarization requirements in subsection (b2), the custodial law enforcement agency "shall file a petition in superior court" for "issuance of a court order regarding disclosure." N.C.G.S. § 132-1.4A(b3). Subsection (b3) prescribes the procedure that the court must follow and the factors it must consider in ruling on the petition. *Id.* Although such proceedings begin with the filing of petitions, subsection (b3) refers to them as "actions." *Id.* ("Any subsequent proceedings in such actions shall be accorded priority by the trial and appellate courts.").

Another example of a petition-initiated action appears elsewhere in Chapter 132, the state's public records law. Section 132-5.1 addresses the recovery of public records unlawfully held by persons or agencies. Specifically, it authorizes the custodian of the records to file a petition in superior court for their return. N.C.G.S. § 132-5.1(a) (2023). The statute labels this petition-initiated proceeding an "action." N.C.G.S. § 132-5.1(b).

The Juvenile Code in Chapter 7B of the General Statutes supplies more examples of the General Assembly's sometimes generic use of the term "action." Abuse, neglect, and dependency proceedings start with the filing of petitions, but the Code refers to them as actions: "The pleading

4. To be eligible for disclosure in such a proceeding, the requester must be "a personal representative of the deceased, the injured individual, or a personal representative on behalf of the injured individual." N.C.G.S. § 132-1.4A(b1).

in an abuse, neglect, or dependency *action* is the *petition*." N.C.G.S. § 7B-401(a) (2023) (emphases added); *see also* N.C.G.S. § 7B-405 (2023) ("An *action* is commenced by the filing of a *petition* in the clerk's office when that office is open . . . ." (emphases added)). Similarly, the Code characterizes a proceeding to terminate parental rights as an "action," even though it begins with the filing of a petition or motion. N.C.G.S. § 7B-1104 (2023).

Like the General Assembly, this Court has employed "action" in reference to proceedings commenced by the filing of petitions. Indeed, we have gone so far as to classify at least one type of petition-initiated proceeding as a civil action. In *Winkler v. North Carolina State Board of Plumbing*, 374 N.C. 726 (2020), this Court said that a disciplinary proceeding before an administrative agency becomes a "civil action" when "either party petitions for judicial review of the decision of the board or commission, and the matter becomes a contested case before a judge." *Id.* at 733; *see also Batson v. Coastal Res. Comm'n*, 282 N.C. App. 1, 5 (2022) ("But it is now well-settled [after *Winkler*] that a petition for judicial review is a civil action." (citation omitted)).

The mere presence of "action" in subsection (g) does not prove that the General Assembly had in mind traditional civil actions commenced by filing complaints. We must therefore "interpret the statute to give effect to the legislative intent." *Frye Reg'l Med. Ctr.*, 350 N.C. at 45 (citing *Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205 (1990)).

The GPD insists that other textual differences between subsection (f) and subsection (g) weigh in favor of construing subsection (g) to require the filing of a complaint. The thrust of the GPD's argument seems to be that these differences spring from a legislative desire to make it easier and quicker to obtain release under subsection (f) than under subsection (g). The CLEAR statute refers to subsection (f) but not to subsection (g) as an "Expedited Process." N.C.G.S. § 132-1.4A(f)–(g). The statute exempts persons who file petitions under subsection (f) but not under subsection (g) from paying filing fees. *Id.* The notice requirements in subsection (f) are less onerous than those in subsection (g). *See id.* In a proceeding under subsection (f), the head of the custodial law enforcement agency must receive notice and an opportunity to be heard. N.C.G.S. § 132-1.4A(f). In an action commenced pursuant to subsection (g), notice and an opportunity to be heard must be afforded to the head of the custodial law enforcement agency, any law enforcement personnel whose images or voices are in the recording, and the district attorney. N.C.G.S. § 132-1.4A(g). Finally, unlike subsection (g),

subsection (f) expressly mandates that any petition filed thereunder "be filed on a form approved by [AOC]." N.C.G.S. § 132-1.4A(f).

No doubt the General Assembly intended subsection (f) to provide a streamlined process for the adjudication of requests to release CLEAR. After all, the only people eligible for release pursuant to subsection (f) are persons—or the personal representatives of persons—eligible for disclosure under subsection (c), that is, individuals whose images or voices are in the recordings. *Id.* They have a personal interest in the recordings that those not depicted or heard in them do not share. Yet it does not follow that the General Assembly wished to foreclose the use of petitions by those seeking release pursuant to subsection (g). On the contrary, major similarities between the two subsections reflect a legislative intent that proceedings under both follow substantially the same procedures.

Both subsection (f) and subsection (g) require the trial court to schedule a hearing on a CLEAR request "as soon as practicable." N.C.G.S. § 132-1.4A(f)–(g). Both subsections also mandate that subsequent proceedings "be accorded priority" in the trial court. *Id.* Notably, subsection (g) goes further than subsection (f) in this regard, directing not just trial courts but also appellate courts to prioritize cases arising under its provisions. N.C.G.S. § 132-1.4A(g). Thus, the General Assembly has manifested a strong desire that the judiciary expeditiously resolve requests for release under either subsection.

Release requests are subject to the same content requirements under both subsections. A request must "state the date and approximate time of the activity captured in the recording, or otherwise identify the activity with reasonable particularity sufficient to identify the recording." N.C.G.S. § 132-1.4A(f)–(g).

Additionally, the decision-making process is nearly identical under both subsections. Regardless of which subsection a requester invokes, the trial court may review the requested CLEAR in chambers prior to making its decision. *Id.* Even when evaluating a subsection (f) petition, the court must "consider the standards set out in subsection (g)." N.C.G.S. § 132-1.4A(f). In other words, the same eight standards that a trial court must consider when deciding whether or to what extent to release CLEAR under subsection (g) likewise pertain to subsection (f) petitions. The scope of the trial court's release authority and ability to condition release is the same under both subsections: the court may order the release of "only those portions of the recording that are relevant to the person's request" and "may place any conditions or restrictions

on the release of the recording that the court, in its discretion, deems appropriate." N.C.G.S. § 132-1.4A(f)–(g). Simply put, subsections (f) and (g) resemble each other in form and function more than they differ.[5]

Moreover, try as we might, we cannot reconcile the GPD's rigid interpretation of "action" with the CLEAR statute's provision on attorneys' fees. Subsection (m) reads: "The court may not award attorneys' fees to any party in any action brought pursuant to [the CLEAR statute]." N.C.G.S. § 132-1.4A(m). If "action" in subsection (m) does not encompass proceedings initiated by petitions, we are left with a paradox involving the applicability of subsection (m) to subsection (b3) proceedings for CLEAR depicting death or serious bodily injury. *See id.* As noted above, although a law enforcement agency must commence a subsection (b3) proceeding by "fil[ing] a petition in the superior court," subsection (b3) refers to such proceedings as "actions." N.C.G.S. § 132-1.4A(b3). The GPD's construction of "action" would leave subsection (m) inapplicable to subsection (b3) because subsection (b3) requires the filing of a petition. However, subsection (m) must apply to subsection (b3) proceedings because subsection (m) applies to "any action" under the CLEAR statute and proceedings brought under subsection (b3) are actions. *See id.* Since we see no obvious reason why the legislature would want to allow attorneys' fees in certain kinds of CLEAR proceedings but not others, we choose not to create the paradox that would result from endorsing the GPD's position.

The General Assembly intended for trial courts to conduct subsection (f) and subsection (g) proceedings expeditiously and along roughly the same lines. Allowing parties to file petitions to request the release of CLEAR under subsection (g) advances this legislative purpose. The legislature's generic use of "action" in subsection (g) does not dictate a different conclusion. We therefore reject the GPD's contention that the trial court lacked subject matter jurisdiction over petitioners' release request because petitioners filed a petition instead of a complaint.

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5. The dissent accuses us of erasing the distinction between subsection (f) and subsection (g) by taking "the primary characteristic that makes subsection (f) expedited—the ability to initiate proceedings by petition, rather than filing a civil action—[and] writ[ing it] into subsection (g)." As we have seen, the legislature plainly intended courts to move promptly regardless of whether a CLEAR request is made under subsection (f) or subsection (g). Furthermore, we have highlighted differences between the subsections that make subsection (f) proceedings less demanding than subsection (g) proceedings, including that (1) no filing fee may be charged for a subsection (f) petition and (2) the notice and opportunity-to-be-heard requirements are less burdensome in subsection (f) proceedings.

III. Compliance with the CLEAR Statute

Having disposed of the GPD's jurisdictional argument, we now take up the points of disagreement between the majority and the dissent in the Court of Appeals: (1) whether the trial court erred by not addressing petitioners' eligibility to seek the release of CLEAR, and (2) whether the trial court abused its discretion in granting the petition.[6]

A. Eligibility to Initiate Subsection (g) Proceedings

[2] We disagree with the conclusion of the Court of Appeals majority that the trial court erred by granting the petition without first finding that petitioners were eligible to seek the release of the recordings described therein. *McClatchy*, 287 N.C. App. at 134. According to the majority, the trial court had to make such a finding because the CLEAR statute prohibits anyone who is not covered by subsection (c) of the statute from obtaining the release of CLEAR. *Id.*

"We review a lower court's interpretation of statutes *de novo*." *Morris v. Rodeberg*, 385 N.C. 405, 409 (2023) (citing *DTH Media Corp. v. Folt*, 374 N.C. 292, 299 (2020)); *see also State v. Fritsche*, 385 N.C. 446, 449 (2023) ("Conclusions of law, such as issues of statutory interpretation, are reviewed de novo by this Court and are subject to full review.").

The Court of Appeals majority misread subsections (c), (f), and (g) of the CLEAR statute. As explained above, subsection (c) addresses the disclosure—not the release—of CLEAR. N.C.G.S. § 132-1.4A(c). While it is true that only individuals who qualify for disclosure under subsection (c) may pursue the release of CLEAR through a subsection (f) proceeding, subsection (f) provides that, "[i]f the court determines that the person [who filed a subsection (f) petition] is not authorized to receive disclosure pursuant to subsection (c)[,] . . . the petitioner may file an action for release pursuant to subsection (g) of this section." N.C.G.S. § 132-1.4A(f). Thus, subsection (f) explicitly acknowledges that persons

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6. The GPD's brief to this Court includes an argument that the petition violates subsection (g) of the CLEAR statute because it fails to "identify a specific event or occurrence for which [petitioners] sought the recordings." *See* N.C.G.S. § 132-1.4A(g) ("The request for release must state the date and approximate time of the activity captured in the recording, or otherwise identify the activity with reasonable particularity sufficient to identify the recording to which the action refers."). There was no disagreement between the majority and the dissenting judge at the Court of Appeals on this matter. Accordingly, it 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)).

who do not qualify for disclosure under subsection (c) may initiate subsection (g) proceedings. *Id.* Any lingering doubt on this subject is extinguished by the text of subsection (g), which authorizes "any person" who requests release thereunder to "file an action in the superior court . . . for an order releasing the recording." N.C.G.S. § 132-1.4A(g).

In short, persons eligible for disclosure under subsection (c) may seek release through a subsection (f) proceeding. Anyone else who desires the release of CLEAR must do so in the form of a subsection (g) proceeding. In holding that the CLEAR statute restricts the release of CLEAR to individuals eligible for disclosure under subsection (c), the Court of Appeals majority inexplicably read subsection (g) right out of the statute.

Petitioners checked the box on their petition indicating that they were requesting CLEAR in accordance with subsection (g). Since anyone is entitled to make such a request through a subsection (g) proceeding, the Court of Appeals majority erred in ordering this case remanded for findings as to petitioners' eligibility under subsection (c).

B. Trial Court Discretion in Subsection (g) Proceedings

[3] We agree with the Court of Appeals majority that the trial court misunderstood the scope of its authority when it ordered the unredacted release of all recordings requested by petitioners. Trial court orders granting or denying release requests under the CLEAR statute are reviewed for abuse of discretion. *See In re Custodial L. Enf't Recording Sought by Greensboro*, 383 N.C. 261, 268 (2022) ("[O]rders imposing or denying relief from restrictions on the release of body camera videos are reviewed for abuse of discretion."). An abuse of discretion occurs when a trial court's ruling is so arbitrary that it cannot be the result of a reasoned decision. *State v. Hayes*, 314 N.C. 460, 471 (1985). "A trial court also abuses its discretion when it makes an error of law." *Greensboro*, 383 N.C. at 268 (citing *Da Silva v. WakeMed*, 375 N.C. 1, 5 n.2 (2020)).

As required by the CLEAR statute, the trial court considered the eight subsection (g) standards. The court determined that some standards weighed in favor of release, namely: standard (1) (release was necessary to advance a compelling public interest), standard (6) (release would not create a serious threat to the administration of justice), and standard (8) (good cause was shown for release). The court found that other standards weighed against release: standard (4) (release would reveal highly sensitive personal information) and standard (5) (release would threaten a person's reputation or safety). The court deemed the remaining standards irrelevant to its ruling.

Up to this point, the trial court's analysis seems to have tracked the CLEAR statute. The court departed from the statutory scheme, however, when it announced from the bench on 10 July 2021 that it "d[id] not have the authority to [c]ensor this information absent a legitimate or compelling state interest [ ] to do so." According to the trial court's written order of 15 June 2021, not even a legitimate state interest could support the full or partial denial of the petition. The court wrote that it "d[id] not have the authority to censor the photos/recordings absent a compelling governmental interest and none was shown." The trial court's statements on the limits of its authority constitute reversible error.

We noted earlier that Chapter 132 of the General Statutes contains the public records law. Under the public records law, "if an item meets the definition of public record [in N.C.G.S. § 132-1], the [records] custodian must allow public inspection unless the custodian can point to some North Carolina (or federal) statute that permits or requires denial of public access." David M. Lawrence, *Public Records Law for North Carolina Local Governments* 4–5 (2d ed. 2009).

The CLEAR statute expressly declares that CLEAR "are not public records as defined by [N.C.G.S. §] 132-1." N.C.G.S. § 132-1.4A(b). Thus, the right of public access created by the public records law does not extend to CLEAR. Moreover, nothing in subsection (f), subsection (g), or any other part of the CLEAR statute creates a presumption in favor of granting release requests. The burden rests on the requester to make the case for release.[7] Likewise, neither subsection tells a trial court how much importance to attach to each of the eight standards listed in subsection (g). A trial court must determine in its sound discretion what weight to assign to which standards based on the facts of a particular case.

This discretion does not end when a trial court concludes that subsection (g) standards and other relevant standards, if any, weigh in favor of granting a request for the release of CLEAR. In fashioning its order granting such a request, a trial court "may place any conditions or restrictions on the release of the recording that the court, in its discretion, deems appropriate." N.C.G.S. § 132-1.4A(g).

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7. In their brief to this Court, petitioners argue that they have a right to access the recordings under the First Amendment to the United States Constitution. Inasmuch as neither the majority opinion nor the dissent in the Court of Appeals addresses this argument, we lack jurisdiction over the issue. *McKoy*, 385 N.C. at 94.

Here the trial court failed to grasp its broad discretion under the CLEAR statute. Even if we assume for the sake of argument that it adhered to subsection (g) in deciding to grant the petition, the court did not appreciate that it could condition or restrict the release of the contested recordings. But for this misunderstanding, the trial court might have ordered redactions to or limited the release of the recordings, especially given its findings that releasing them would reveal highly sensitive personal information and could threaten a person's reputation or safety. Because the trial court premised its 15 June 2021 order on an error of law, that order amounts to an abuse of discretion. *Greensboro*, 383 N.C. at 268.

IV. Conclusion

Subsection (g) of the CLEAR statute did not mandate that petitioners file a civil action rather than a petition. Contrary to the decision of the Court of Appeals, the CLEAR statute also did not condition petitioners' ability to request the disputed recordings on petitioners' eligibility for disclosure under subsection (c). Nonetheless, the Court of Appeals correctly held that the trial court misunderstood its authority to place conditions or restrictions on the release of the recordings. We affirm in part and reverse in part the decision of the Court of Appeals and remand this case for further proceedings consistent with this opinion.

AFFIRMED IN PART; REVERSED IN PART; REMANDED.

Justice BERGER dissenting.

While I take no issue with the majority's analysis of the trial court's shortcomings regarding N.C.G.S. § 132-1.4A, those issues should not have been reached because appellants' filing of a petition failed to invoke the trial court's subject matter jurisdiction. The majority has, under the guise of statutory construction, improperly amended N.C.G.S. § 132-1.4A(g) to allow for the initiation of proceedings by the filing of the petition mentioned in subsection (f) of the statute. But the statute is clear—two distinct processes exist—one for those that the legislature deemed presumptively authorized to receive the video evidence and another for those who are not so authorized. N.C.G.S. § 132-1.4A(c), (f)–(g) (2023). Thus, N.C.G.S. § 132-1.4A(f) and (g) clearly and unambiguously establish separate mechanisms for obtaining video evidence from law enforcement, yet the majority eliminates these distinctions by reading ambiguity into a statute where none exists.

In doing so, the majority blurs the lines set out in our rules of civil procedure: "A civil action is commenced by filing a complaint . . . ." N.C.G.S. § 1A-1, Rule 3(a). Here, appellants did not file a complaint to initiate the "action" under subsection (g), but instead filed the petition set out in subsection (f). But "[w]ithout a proper complaint or summons under Rule 3 of the Rules of Civil Procedure, an *action* is not properly instituted and the court does not have jurisdiction." *Est. of Livesay ex rel. Morley v. Livesay*, 219 N.C. App. 183, 185 (2012) (emphasis added) (citing *Boyd v. Boyd*, 61 N.C. App. 334, 336 (1983)). Thus, appellants' filing of a petition, rather than a complaint as required by Rule 3(a), failed to initiate an action under subsection (g). N.C.G.S. § 132-1.4A(g); *id.* § 1A-1, Rule 3. Because appellants failed to file a complaint necessary to properly institute an action as required by subsection (g), the trial court lacked subject matter jurisdiction over appellants' petition.

"Our first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case. Our inquiry must cease if the statutory language is unambiguous and the statutory scheme is coherent and consistent." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997) (cleaned up).

It is important to note that the recordings at issue in N.C.G.S. § 132-1.4A are not public records. Thus, there is a presumption against disclosure and release. However, the legislature has established a process by which these recordings, which can contain evidence of criminal activity and police activity or tactics, may be released in the trial court's discretion. In searching for legislative intent beyond the statute's plain language, the majority declines to acknowledge or even address the potential release of *evidence* prior to trial. The majority's shortsighted approach could expand pretrial publicity and increase the likelihood that potential jurors are exposed to information that is better viewed fully in adversarial proceedings where the rules of evidence apply, rather than dissected and left on editing room floors. The differing requirements in subsections (f) and (g) aid in maintaining the integrity of criminal proceedings, or at least they did, and the majority seems more interested in performing statutory mental gymnastics to support their definition of "action" rather than addressing practical realities.

Regardless, subsection (f) provides an "Expedited Process" for release of evidence to the custodial law enforcement agency and various individuals "whose image or voice is in the recording" or their personal representative. N.C.G.S. § 132-1.4A(c), (f). This expedited process provides for the filing of a petition in superior court to obtain release of the

recording. *Id.* § 132-1.4A(f). No filing fee is required and the only notice necessary is to the "head of the custodial law enforcement agency." *Id.*

At a hearing on the petition, the trial court first determines if the petitioner is an authorized recipient of the disclosure, i.e., someone "whose image or voice is in the recording" or their personal representative. *Id.* § 132-1.4A(c), (f). When the court needs assistance in making this determination, the judge may "allow the *petitioner* to be present to assist in identifying the image or voice in the recording." *Id.* § 132-1.4A(f) (emphasis added). If the petitioner is entitled to disclosure, the trial court considers whether to release all or portions of the video recording pursuant to standards set forth in subsection (g) and "any other standards the court deems relevant." *Id.* This is a highly deferential standard; so much so that where a petitioner is not entitled to disclosure of the recording, there is no right of appeal. *Id.* The petitioner's only recourse is to "file *an action* for release pursuant to subsection (g) of this section." *Id.* (emphasis added).

By contrast, there is a more formal general process by which others not covered in subsection (f) may request the recording. Subsection (g) requires such persons to "file an action . . . for an order releasing the recording." *Id.* § 132-1.4A(g). This subsection sets forth a provision for notice and an opportunity to be heard by heads of affected law enforcement agencies, law enforcement personnel, and the district attorney. *Id.*

As a general proposition, the law treats the word "action" as a term of art. Specifically, our General Statutes generally define 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." N.C.G.S. § 1-2 (2023). There is "but one form of action for the enforcement or protection of private rights or the redress of private wrongs": the civil action. *Id.* § 1A-1, Rule 2 (2023). In contrast, "[e]very other remedy is a special proceeding." *Id.* § 1-3 (2023); *see generally id.* § 1-1 (2023) ("Remedies in the courts of justice are divided into—(1) Actions. (2) Special Proceedings."). Because "it is always presumed that the Legislature acted with full knowledge of prior and existing law," *Ridge Cmty. Invs., Inc. v. Berry*, 293 N.C. 688, 695 (1977), this Court presumes that the General Assembly intended for the word "action" in subsection 132-1.4A(g) to carry its established definition. Accordingly, a party proceeding pursuant to subsection 132-1.4A(g) is participating in an adversarial action.

The use of separate sections, distinct language, and different notice provisions creates a substantially more formal process for those seeking

disclosure under subsection (g), certainly more accustomed to our common understanding of a civil action. There exists a clear scheme by the legislature under which the processes for filing a petition and filing an action are different.[1] N.C.G.S. § 132-1.4A(f)–(g). Because this "statutory language is unambiguous and the statutory scheme is coherent and consistent," *see Robinson*, 519 U.S. at 340 (cleaned up), our inquiry must cease and the statute must be read as written; that is, to require a petition for parties who appear in the recordings and an action for those who do not.

Despite acknowledging that, "[o]rdinarily, in the civil context, the term 'action' is synonymous with 'civil action' and 'is commenced by filing a complaint with the court,' " the majority relies on subsections (b1), (b3), and (m) of the statute, the Juvenile Code, N.C.G.S. § 132-5.1, and this Court's inapposite precedent to support its determination that the word "action" in this context is ambiguous.

But each of the majority's examples is unpersuasive because the Rules of Civil Procedure allow for the General Assembly to provide for different procedures when it so desires. *See* N.C.G.S. § 1A-1, Rule 1. Thus, even though proceedings pursuant to subsections (b1) through (b3) are denominated "actions," despite being commenced by petitions, *see id.* § 132-1.4A(b1)–(b3), the General Assembly simply chose to provide a different procedure for proceedings pursuant to subsections (b1) though (b3). The same is true of section 132-5.1 and the Juvenile Code. *See id.* § 7B-405 (2023) ("An action is commenced by the filing of a petition in the clerk's office . . . ."); *id.* § 132-5.1(b) (2023) ("At any time after filing the petition set out in subsection (a) . . . [the public official may request] the court in which the action was filed to grant one of the

1. Contrary to the majority's assertion that the legislature was simply inartful in its wording, the legislative history demonstrates that the use of these distinct terms was no accident—it was an intentional act requiring nonauthorized parties to pass through the crucible of adversarial proceedings while relieving authorized parties of formalistic burdens. The first legislative drafts of 2015 House Bill 972 addressing release to nonauthorized parties required such parties to "file an action" in superior court. *See* Drafts of H.B. 972, 2015 Gen. Assemb., at 3 (N.C. June 8, 2016; June 23, 2016; June 27, 2016; June 28, 2016). Only in the seventh draft of the bill—introduced the day after the sixth draft—did the expedited release subsection appear, specifically providing that parties authorized to receive disclosure may *petition* the superior court for release. *See* Draft of H.B. 972, 2015 Gen. Assemb., at 3 (N.C. June 29, 2016). Thus, the general, non-expedited process for release to nonauthorized parties was the default process, and the expedited process for release to authorized parties was an exception deliberately inserted. According to the majority's reasoning, however, the legislature intended for these processes to be identical and the use of the word "petition" rather than "action" was simply an accidental bit of loose language.

following provisional remedies: . . . ."). Accordingly, these examples do not inform whether an action pursuant to subsection (g) may be commenced by filing a petition.

The majority transforms the coherent and consistent scheme carefully carved out by the legislature into one rife with inconsistency by mandating that the procedure to initiate proceedings for the release of evidence may take the same form under subsections (f) and (g). The majority renders the plainly evident scheme in section 132-1.4A of establishing a less formal process for parties implicated in the recordings into an incoherent and redundant hodgepodge in which the plain language of the statute is lost, and the legislative intent with it. All the while, the majority neglects to consider that if the legislature had intended both "subsection (f) and subsection (g) proceedings [to be conducted] expeditiously and along roughly the same lines," then it would have said so and it certainly would not have written them as two distinct subsections with separate language. Moreover, it would not have created a specific petition form for use under subsection (f) and not subsection (g).

Further, the majority eludes obvious questions to its construction of N.C.G.S. § 132-1.4A: if a petition and an action are to be read synonymously in this statute, can the remedial action in subsection (f) also be initiated through a petition? Why would the legislature differentiate the two in that subsection? What is the purpose of subsection (f)'s remedy if filing a petition is the same as filing an action? *See id.* § 132-1.4A(f)–(g). The majority's statutory construction renders subsection (f)'s remedy meaningless and creates the possibility that the denial of a petition under subsection (f) would presumably be reviewed by returning to the courthouse and filing the same petition. *See id.* If so, what role would issue or claim preclusion play in this discussion? Because the majority's construction would nullify subsection (f)'s remedy of filing a separate action where a petition is denied, and because we "presume that the General Assembly would not contradict itself in the same statute" by potentially barring its remedy by claim preclusion, *State v. James*, 371 N.C. 77, 85 (2018) (cleaned up), the majority's construction of the statute cannot be correct.

Lastly, the natural reading of the statute lends itself to the conclusion that proceedings under subsection (f), the "Expedited Process," should be more expeditious than filing an action under subsection (g), the "General; Court Order Required" process. *See* N.C.G.S. § 132-1.4A(f)–(g). The presumption against ineffectiveness "reflects the idea that [the legislature] presumably does not enact useless laws. In other words, when the plain meaning of a provision is not clear, we

should avoid interpretations that render the provision a 'dead letter.' " *In re Davis*, 960 F.3d 346, 354 (6th Cir. 2020) (cleaned up).

But under the majority's construction, the primary characteristic that makes subsection (f) expedited—the ability to initiate proceedings by petition, rather than filing a civil action—is now written into subsection (g).[2] *See* N.C.G.S. § 132-1.4A(f)–(g). Subsection (f)'s "Expedited Process" may be initiated by a petition, requires a finding that the petitioner is a person to whom disclosure is authorized under subsection (c), and requires the court to weigh the eight standards set out in subsection (g). *Id.* § 132-1.4A(f)–(g). In the majority's view, subsection (g)—what the legislature intended as the non-"Expedited Process"—may now also be initiated by a petition, rather than a civil action, and requires the court to weigh the same eight standards, bypassing the burdensome and adversarial civil action originally contemplated by the legislature. *Id.* § 132-1.4A(g). This begs the question, besides notice requirements, what is left to make subsection (f) more expedited in comparison? The two subsections become all but indistinguishable, and the primary reason to proceed under subsection (f)—the ability to initiate proceedings by petition, rather than filing a civil action—is lost, thus rendering subsection (f) "useless" and the legislature's demarcation of it as the "Expedited Process" a "dead letter." *In re Davis*, 960 F.3d at 354 (cleaned up); N.C.G.S. § 132-1.4A(f).

In the majority's view, any individual, activist group, or media organization may now initiate proceedings to obtain evidence via the special expedited process clearly reserved by the legislature for subsection (f) related parties. Not only does the majority opinion disturb three recent well-reasoned and consistent Court of Appeals opinions, it conflicts with the obvious intent of the statutory scheme enacted by the legislature. *See In re Custodial L. Enf't Agency Recording*, 288 N.C. App. 306 (2023); *In re Custodial L. Enf't Agency Recordings*, 287 N.C. App. 566 (2023); *In re The McClatchy Co.*, 287 N.C. App. 126 (2022). Conflating the procedures for presumptively authorized parties under subsection (f) and presumptively unauthorized parties under subsection (g) disregards the plain language of these subsections and "contravene[s] the manifest purpose of the Legislature," *State v. Beck*, 359 N.C. 611, 614 (2005), to make the process of requesting and obtaining evidence easier on parties described in subsection (c).

2. The majority's argument in fn. 5 bolsters this point.

The majority overlooks clear differences between the subsections. When the General Assembly indicated that it wanted a proceeding to be commenced by filing a petition, it was very clear. *See* N.C.G.S. § 132-1.4A(b3) ("[A] law enforcement agency shall file a petition in the superior court . . . ."); *id.* § 132-1.4A(f) ("Notwithstanding the provisions of subsection (g) of this section, a person authorized to receive disclosure pursuant to subsection (c) of this section, or the custodial law enforcement agency, may petition the superior court in any county where any portion of the recording was made for an order releasing the recording . . . ."). If the General Assembly had intended for proceedings pursuant to subsection (g) to be done the exact same way, why did it not follow the same formula as the preceding examples? The difference has to mean something.

But the majority uses every subsection of the statute except the ones actually at issue here to read ambiguity into the plain words of section 132-1.4A, thereby undermining the legislature's role and responsibility. The statute denominates proceedings pursuant to subsection (g) as "actions," and it does not imply or suggest that an action pursuant subsection (g) may be initiated by a petition. This Court is constrained to conclude that the General Assembly intended for persons proceeding pursuant to subsection 132-1.4A(g) to file a civil action, not a petition. Because petitioners did not do so here, the lower court lacked jurisdiction, and I respectfully dissent.

Chief Justice NEWBY joins in this dissenting opinion.

IN RE SOUTHEASTERN EYE CENTER

No. 192A23

Filed 23 May 2024

Appeal and Error—interlocutory order—failure to show grounds for appellate review—release of underlying claim

The Supreme Court dismissed the fifth appeal from an interlocutory order entered by the Business Court where, as was the case in his previous four appeals, appellant failed to demonstrate grounds for appellate review and instead advanced arguments that were unrelated to the Court's jurisdiction. Notably, the arguments that appellant did raise neither addressed the opposing party's main argument in the underlying action nor cured the fact that appellant had already released his claim giving rise to the action. The Court also cautioned appellant that he could face sanctions in the future if he continued to flout the Rules of Appellate Procedure and show disregard for the Court's time and resources.

Appeal pursuant to N.C.G.S. § 7A-27(a)(3) from an order entered on 9 March 2023 by Judge Louis A. Bledsoe III, Chief Business Court Judge, 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 10 April 2024.

Oak City Law, LLP, by Robert E. Fields III, plaintiff-appellee.

James Mark McDaniel Jr., pro se, defendant-appellant.

PER CURIAM.

This Court, once again, dismisses an appeal from James Mark McDaniel Jr., appellant in this case, for failing to demonstrate grounds for appellate review. The underlying facts are well summarized by the Business Court's numerous orders throughout the pendency of this case. *See Old Battleground Props., Inc. v. Cent. Carolina Surgical Eye Assocs., P.A.*, No. 15 CVS 1648, 2015 WL 846697 (N.C. Super. Ct. Feb. 25, 2015).

The Business Court's order is appropriately succinct. In denying appellant's request, the court wrote:

> [Appellant] released [his claim] through his execution of two release documents: (i) the Settlement Agreement and Release dated 6 August 2015 . . . and (ii) the Release dated 3 September 2015 . . . .
>
> . . . .
>
> . . . Indeed, [appellant] does not challenge the Receiver's release-based argument and instead advances equitable considerations that do not alter the fact that he has released the [c]laim that he now seeks to advance.

On 1 March 2018, this Court entered orders in 168A17, 259A17, and 358A16-1 dismissing appellant's appeals for failing to demonstrate grounds for appellate review under N.C.G.S. § 7A-27(a)(3). *See* N.C.G.S. § 7A-27(a)(3) (2023). On 12 October 2023, we again entered an order in 358A16-2 dismissing an appeal filed by appellant for failing to demonstrate grounds for appellate review. Today, for the fifth time, we again dismiss appellant's case for failing to demonstrate grounds for appellate review. As with the prior orders, the Business Court's order is interlocutory as the litigation is ongoing. Instead of addressing why this Court should exercise its jurisdiction, appellant advances arguments unrelated to any meaningful appellate review. Appellant's failure to appeal a final order from the Business Court or argue how the Business Court's order "affects a substantial right" deprives this Court of our ability to perform appellate review. *KNC Techs., LLC v. Tutton*, 381 N.C. 475, 476 (2022). Accordingly, this Court lacks jurisdiction to rule on appellant's case.

Although we ultimately dismiss appellant's appeal for lack of appellate jurisdiction, we pause to note that, as he did in the Business Court, appellant advances arguments to this Court which neither address the receiver's argument nor affect the fact that he has released his claim in two separate documents. Moreover, this is not the first instance of appellant advancing arguments inappropriate for our review.

Appellant has again failed to demonstrate that this Court has appellate jurisdiction under N.C.G.S. § 7A-27(a)(3). Appellant's continued egregious flouting of the appellate rules and utter disregard for this Court's time and resources is unacceptable. Sanctions against appellant would be appropriate if this behavior continues.

DISMISSED.

MIDFIRST BANK
v.
BETTY J. BROWN AND MICHELLE ANDERSON

No. 14PA23

Filed 23 May 2024

Equity—action to quiet title—equitable subrogation—applicability—genuine issues of material fact—culpable negligence

In plaintiff bank's declaratory judgment action to quiet title to a home sold under execution (which was held to satisfy a lien of judgment) to the homeowner's daughter—at which point plaintiff's lien was extinguished—where there were genuine issues of material fact regarding whether the doctrine of equitable subrogation was applicable to provide relief to plaintiff, which had a superior interest in the property to the holder of the lien of judgment, the Court of Appeals erred by concluding that defendants (the homeowner and her daughter) were entitled to summary judgment. On remand, the trial court was instructed to utilize broad discretion to obtain the necessary information to determine whether plaintiff's predecessor-in-interest was culpably negligent in agreeing to refinance the first loan on the property without exercising due diligence to discover the publicly-recorded lien of judgment, and to use all of the facts to balance the equities.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 286 N.C. App. 664 (2022), reversing an order entered on 19 July 2021 by Judge Karen Eady-Williams in Superior Court, Mecklenburg County, and remanding the case. Heard in the Supreme Court on 14 February 2024.

Alexander Ricks, PLLC, by Benjamin F. Leighton, Roy H. Michaux Jr., Ryan P. Hoffman, and David Q. McAdams, for plaintiff-appellant.

The Green Firm, PLLC, by Bonnie Keith Green; and Wesley L. Deaton for defendant-appellees.

BARRINGER, Justice.

This Court considers whether the Court of Appeals erred by reversing the trial court's order denying summary judgment for defendants, granting summary judgment to plaintiff, and remanding the case to the trial court. Upon careful review, we hold that the Court of Appeals erred. Therefore, we reverse the Court of Appeals' decision and remand to that court to further remand to the trial court for proceedings not inconsistent with this opinion.

I. Factual Background

Defendant Betty J. Brown took title to her Charlotte, North Carolina, property (the subject property) in 2000. In 2004, Brown obtained a loan in the amount of $265,100.00 from First Horizon Home Loan Corporation (First Horizon) secured by a deed of trust recorded with the Mecklenburg County Register of Deeds.

In 2010, a South Carolina judgment was entered against Brown. The judgment was domesticated by United General Title Insurance Company (United) and recorded in the public record of the Mecklenburg County Clerk of Superior Court's office in July 2014.

In 2016, Brown refinanced the First Horizon loan by mortgaging the subject property with Nationstar Mortgage LLC (Nationstar). Pursuant to the express terms of the refinance agreement, Nationstar paid off the remainder of Brown's loan with First Horizon in the amount of $219,873.01. Brown signed an Owner's Affidavit indicating there were no outstanding liens. The deed of trust for Brown's loan with Nationstar was recorded with the Mecklenburg County Register of Deeds in August 2016, after the 2010 South Carolina judgment. Plaintiff MidFirst Bank is Nationstar's successor in interest for the 2016 loan.

In 2019, United began enforcement proceedings against Brown in North Carolina in order to collect the 2010 South Carolina judgment. The Mecklenburg County Sheriff's Office seized the subject property in July 2019, and an execution sale was held pursuant to N.C.G.S. § 1-339.68. No bids were placed at the initial execution sale, held in August 2019. A second execution sale was held a week later. Brown's daughter, defendant Michelle Anderson, placed a successful upset bid of $102,900.00 at the second execution sale in August 2019 in satisfaction of the United judgment. In September 2019, the Mecklenburg County Clerk of Superior Court filed a confirmation of sale of the subject property to Anderson. Brown has continued to reside in the subject property.[1]

1. At oral argument, plaintiff argued the equities of the circumstance, including the fact that "Appellee Brown continues to reside at the property, she admits she never

II. Procedural Background

Plaintiff's complaint, filed on 22 April 2020, sought to quiet title via declaratory judgment. Plaintiff alleged that the Nationstar deed of trust still encumbers the subject property even after the execution sale was conducted pursuant to N.C.G.S. § 1-339.68, despite the Nationstar deed of trust being recorded after the United lien.

In the alternative, plaintiff alleged that the doctrine of equitable subrogation applies to subrogate Nationstar to the rights and priorities of the First Horizon deed of trust. Specifically, plaintiff alleged that Brown mortgaged the subject property to Nationstar for the purpose of paying off the First Horizon loan, and Nationstar did so. Therefore, plaintiff alleged that as Nationstar's successor in interest, it should be equitably subrogated into First Horizon's priority position, thus continuing to encumber the property after the execution sale.

Defendants and plaintiff filed cross motions for summary judgment. The trial court entered an order granting plaintiff's motion for summary judgment and denying defendants' motion for the same. Defendants filed a notice of appeal from the trial court's order.

On appeal, the Court of Appeals held that because the Nationstar lien became effective on 12 September 2016, after the United judgment was domesticated and recorded in Mecklenburg County in 2014, the Nationstar lien was extinguished by the execution sale in accordance with N.C.G.S. § 1-339.68(b). *MidFirst Bank v. Brown*, 286 N.C. App. 664, 668–69 (2022). Under the statute, "[a]ny real property sold under execution remains subject to all liens which became effective prior to the lien of the judgment pursuant to which the sale is held, in the same manner and to the same extent as if no such sale had been held." N.C.G.S. § 1-339.68(b) (2023).

Applying the principles of *expressio unius est exclusio alterius*, the Court of Appeals held that under subsection 1-339.68(b), a property sold at an execution sale is not subject to liens that have come into effect after the lien of the executed judgment pursuant to which the sale is held. *MidFirst Bank*, 286 N.C. App. at 668. The plaintiff disagrees. This issue was not addressed in plaintiff's petition for discretionary review and is not before this Court. Accordingly, unless the doctrine of equitable subrogation applies, the subject property is no longer encumbered

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stopped living there." Oral Argument at 26:30, *MidFirst Bank v. Brown* (No. 14PA23) (Feb. 14, 2024). This fact was not contested by defendants, and so is conceded. It is interesting to note that there are no *innocent* third-party purchasers for value involved in this case.

by the Nationstar lien after Anderson purchased it at the execution sale to help her mother.

The Court of Appeals further held that the doctrine of equitable subrogation was not available to plaintiff, because plaintiff was not "excusably ignorant" of the publicly recorded United lien, relying on *Peek v. Wachovia Bank & Trust Co.*, 242 N.C. 1, 15 (1955). *Id.* at 670–71, 673.

Plaintiff filed a petition for discretionary review with this Court seeking review of the issue of equitable subrogation. This Court allowed the petition pursuant to N.C.G.S. § 7A-31.

III. Standard of Review

We review an appeal from summary judgment de novo. *In re Will of Jones*, 362 N.C. 569, 573 (2008). Summary judgment is appropriate when the record shows that there is no genuine issue of material fact. *Id.* Evidence presented on a motion for summary judgment is to be viewed in the light most favorable to the nonmovant. *Id.*

IV. Analysis

This Court considers whether the Court of Appeals erred by reversing the trial court's order granting summary judgment in favor of plaintiff. We hold that the Court of Appeals erred by applying the incorrect standard regarding equitable subrogation, committing an error of law. Therefore, we reverse the decision of the Court of Appeals and remand the case to the Court of Appeals to be remanded to the trial court.

The Court of Appeals appears to correctly note that the State's "equitable subrogation precedent has [not] produced a bright-line rule" for when equitable subrogation is appropriate. *MidFirst Bank*, 286 N.C. App. at 672. The Court of Appeals further explained that equitable subrogation is "a fact-intensive inquiry that depends on the specific circumstances of each case." *Id.*

The Court of Appeals erred, however, when it cited *Peek* as "[t]he earliest case in North Carolina to discuss the doctrine of equitable subrogation." *Id.* at 670 (citing *Peek*, 242 N.C. at 15). The Court of Appeals cited to dicta within *Peek* as the general rule regarding equitable subrogation in North Carolina: that when one

> furnishes money for the purpose of paying off an encumbrance on real or personal property, at the instance either of the owner of the property or of the holder of the encumbrance, either upon the express understanding or under circumstances from

> which an understanding will be implied, that the advance made is to be secured by a first lien on the property, will be subrogated to the rights of the prior lienholder as against the holder of an intervening lien, of which the lender was *excusably ignorant.*

Id. at 671 (emphasis added) (quoting *Peek*, 242 N.C. at 15). The Court of Appeals held that plaintiff "cannot claim excusable ignorance of [the] existence" of the publicly recorded United judgment. *Id.* at 673. Accordingly, the Court of Appeals reversed the trial court's order, holding that defendants were entitled to summary judgment.

Reliance on *Peek* was error because it failed to recognize *Wallace v. Benner*, 200 N.C. 124 (1931), which provides the general rule for the application of equitable subrogation in this State. This Court has made it clear that "the rule [of equitable subrogation] is settled":

> [W]here money is expressly advanced in order to extinguish a prior encumbrance, and is used for this purpose, . . . the lender or mortgagee may be subrogated to the rights of the prior encumbrancer whose claim he has satisfied . . . . Also, if the money is advanced to a debtor to discharge an existing first mortgage upon his property, and in pursuance of an agreement that the lender is to have a first lien upon the property for the repayment of the sum loaned, *the lender is entitled, as against a junior encumbrancer, to be treated as the assignee of the first mortgage which has been paid off and discharged with the money loaned, whenever it becomes necessary to do so to effectuate the agreement with the lender, and to prevent the junior encumbrance from being raised accidentally to the dignity of a first lien, contrary to the intention of the parties.*
>
> . . . .
>
> The exceptions to the general rule to the doctrine of [equitable] subrogation: (1) [t]he relief is not granted to a volunteer; (2) nor where the party claiming relief is guilty of *culpable negligence*; (3) nor where to grant relief will operate to the prejudice of the junior lien holder.

Wallace, 200 N.C. at 131–32 (extraneity omitted) (emphases added).

Here, it is undisputed that the 2016 Nationstar loan was provided to Brown on the express condition that it be used to pay off the 2004 First Horizon loan and that Nationstar did so. When the judgment was recorded in North Carolina in 2014, United's judgment took its place as an encumbrance junior to First Horizon. *See* N.C.G.S. § 47-18(a) (2023) (North Carolina's pure race recording statute); *Jones v. Currie*, 190 N.C. 260, 263 (1925) (docketing is "necessary to create and prolong the lien thus acquired, for the benefit of the creditor against subsequent liens, encumbrances and conveyances of the same property" (quoting *Lytle v. Lytle*, 94 N.C. 683, 686 (1886))).

Without application of equitable subrogation, United, as a junior lienholder, would be "raised . . . to the dignity of a first lien, contrary to the intention of the parties." *Wallace*, 200 N.C. at 131 (quoting R.C.L. § 24, 1340–41). As an initial matter, as the payoff of the First Horizon loan was an express condition of the refinancing loan, Nationstar is not a volunteer.[2] *See id.* In analyzing the third exception, the trial court should consider that application of equitable subrogation "leaves the inferior lienor[, United,] in his former position." *Id.* at 132 (quoting 25 R.C.L. § 24, 1340–41). In fact, here, United's lien has been satisfied. Generally, a trial court should consider and take into account facts regarding potential prejudices to the junior lienholder, such as the principal amount of the loan to be subrogated as compared to the previously prioritized loan, any longer or shorter maturity date or amortization schedule of the loan, and any material differences in interest rates, among other relevant considerations.[3]

The second exception to the general rule requires a determination as to whether plaintiff was "culpably negligent" in its failure to be aware of the publicly recorded United lien and the resulting displacement of their intended and understood first-place lien priority. When the *Wallace* Court published its opinion, Black's Law Dictionary defined culpable as "[b]lamable; censurable; . . . connotes fault." *Culpable*, Black's Law Dictionary (2d ed. 1910). Further, Black's Law Dictionary defined culpable negligence as a "[f]ailure to exercise that degree of care rendered appropriate by the particular circumstances, and which a man of ordinary prudence in the same situation and with equal experience would not have omitted." *Culpable negligence*, Black's Law Dictionary (2d ed. 1910).

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2. A volunteer is one who "pays off or loans money to pay off an incumbrance without taking an assignment thereof, and without an agreement for substitution." 25 R.C.L. § 22, 1337.

3. Here, plaintiff has conceded that it only seeks equitable subrogation for the amount paid by Nationstar to satisfy the First Horizon loan. Oral Argument at 23:21, *MidFirst Bank v. Brown* (No. 14PA23) (Feb. 14, 2024).

Through its fact-intensive inquiry, a fact-finder should seek to determine who is "[b]lamable; censurable; . . . [at] fault." *See Culpable*, Black's Law Dictionary (2d ed. 1910). Thus, the inquiry becomes: throughout the process of agreeing to refinance and then, in fact, satisfying Brown's first mortgage with First Horizon, did Nationstar act with the degree of care of a lender of ordinary prudence in *that circumstance*?

"The observance of [docketing] is regarded as so important to subsequent purchasers and mortgagees that, wherever the system of docketing [is at issue], a very strict compliance with its provisions in every respect is required." *Jones*, 190 N.C. at 263–64 (quoting *Holman v. Miller*, 103 N.C. 119, 120 (1889)). It is extremely concerning that plaintiff has not produced evidence that either a title examination was conducted or that a credit report was obtained. However, the record reveals that Brown signed an Owners Affidavit attesting, *inter alia*, that "there is no person, firm, corporation or governmental authority entitled to any claim or lien against said property." It is undisputed that the United lien was publicly recorded. Additionally, the record reveals the extremely unique facts that Anderson, Brown's daughter, purchased the subject property at the execution sale for $102,900.00, an amount far less than the Nationstar lien owed by Brown, $282,865.00. Moreover, but for the application of equitable subrogation, Brown continues to occupy the property—only now without any enforceable mortgage lien. Considering all the facts at hand, the trial court's task is to balance the equities.

V. Conclusion

Whether Nationstar was culpably negligent is a fact-intensive inquiry that depends on the specific circumstances at hand. Considering the extremely unique facts of this case, it is for the fact-finder to determine which party is most "blamable." *See Culpable*, Black's Law Dictionary (2d ed. 1910). Given that this Court is not a fact-finding Court, we cannot properly answer this question. Under the extremely unique circumstances of this case, the trial court should utilize broad discretion to obtain the necessary information to determine whether there is a genuine issue of material fact. For the reasons stated above, we reverse the decision of the Court of Appeals and remand to the trial court for reassessment under the *Wallace* standard of culpable negligence.

We reverse the decision of the Court of Appeals and remand to the Court of Appeals for further remand to the trial court for application of the correct legal standard.

REVERSED AND REMANDED.

NORTH CAROLINA DEPARTMENT OF REVENUE
v.
FSC II, LLC

No. 150A23

Filed 23 May 2024

Appeal pursuant to N.C.G.S. § 7A-27(a)(2) from an order and opinion entered on 30 January 2023 by Judge Mark A. Davis, 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 16 April 2024.

Joshua H. Stein, Attorney General, by Tania X. Laporte-Reveron, Assistant Attorney General, Jonathan N. Wike, Special Deputy Attorney General, and Ronald D. Williams II, Special Deputy Attorney General, for petitioner-appellant.

K&L Gates LLP, by Zachary S. Buckheit, Robert B. Womble, and Ashley Lee Hogewood III, for respondent-appellee.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P., by William W. Nelson, for North Carolina Chamber Legal Institute, amicus curiae.

PER CURIAM.

Petitioner North Carolina Department of Revenue appealed the decision of the North Carolina Business Court affirming the final decision of the Office of Administrative Hearings granting summary judgment in favor of respondent FSC II, LLC. We hereby affirm the decision of the Business Court for the reasons stated in its 30 January 2023 order and opinion.

AFFIRMED.[1]

1. The order and opinion of the North Carolina Business Court, 2023 NCBC 9, is available at https://www.nccourts.gov/assets/documents/opinions/2023%20NCBC%209.pdf.

STATE v. COPLEY

[386 N.C. 111 (2024)]

STATE OF NORTH CAROLINA
v.
CHAD CAMERON COPLEY

No. 195A19-2

Filed 23 May 2024

1. Criminal Law—prosecutor's closing statement—self-defense to murder—characterization of defendant's actions as aggressive—no misstatements of law

In defendant's trial for first-degree murder, in which defendant asserted that he was acting in self-defense when he fired his shotgun out through the window of his garage toward attendees of a nearby house party, killing one person, there was no gross impropriety in the prosecutor's closing statement requiring the trial court's intervention where the prosecutor did not misstate the law on self-defense while characterizing certain of defendant's actions as aggressive. At no point did the prosecutor invoke the aggressor doctrine, claim that defendant had a duty to retreat within his home, or disclaim defendant's right to lawfully defend his home.

2. Homicide—jury instructions—self-defense—defense of habitation—request for aggressor doctrine language—invited error

In defendant's first-degree murder trial, in which defendant asserted that he was acting in self-defense when he fired his shotgun out through the window of his garage toward attendees of a nearby house party, killing one person, the trial court did not err in its jury instructions on the defense of habitation—the pattern jury instruction of which included a provocation exception—or self-defense. Not only did defendant not object to the instructions, but any error regarding the aggressor doctrine—which the court only included as part of the self-defense instruction—was invited error, since defendant specifically requested the aggressor doctrine language.

3. Homicide—instructions—murder by lying in wait—castle doctrine not properly accounted for—error cured by alternate theory of murder

In defendant's trial for first-degree murder, in which defendant asserted that he was acting in self-defense when he fired his shotgun out through the window of his garage toward attendees of a nearby house party, killing one person, the trial court's instruction on first-degree murder by lying in wait did not properly account for the castle doctrine—a justification for defensive force, about which

the jury was also instructed and, if applicable, would act as a shield from criminal culpability—where the trial court instructed the jury that if they found each element of murder by lying in wait, they must find defendant guilty, thereby impermissibly suggesting that the crime eclipses the castle doctrine. However, where the jury also found defendant guilty of first-degree murder by premeditation and deliberation, they necessarily concluded that defendant was not entitled to the castle doctrine defense; therefore, despite the error in the lying in wait instruction, defendant could not demonstrate prejudice that would entitle him to a new trial.

Justice BARRINGER concurring.

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, 276 N.C. App. 211 (2021), affirming a judgment entered on 23 February 2018 by Judge Michael J. O'Foghludha in Superior Court, Wake County. Heard in the Supreme Court on 14 February 2024.

Joshua H. Stein, Attorney General, by Benjamin Szany, Assistant Attorney General, for the State-appellee.

Marilyn G. Ozer for defendant-appellant.

EARLS, Justice.

On 6 August 2016, Chad Cameron Copley shot and killed Kourey Thomas as Mr. Thomas cut across the edge of Mr. Copley's front yard. The State charged and a grand jury indicted Mr. Copley for first-degree murder. At trial, he claimed self-defense and defense of habitation. A jury rejected those justifications and convicted him under two theories of murder. On appeal, Mr. Copley argued that the prosecutor impermissibly mentioned race during closing arguments. *See State v. Copley* (*Copley II*), 374 N.C. 224, 227 (2020). Mr. Copley is white; Mr. Thomas was black. *Id.* at 226. In impugning Mr. Copley's claim of self-defense, the prosecutor urged that "a fear based out of race is not a reasonable fear . . . . That's just hatred." *See id.* We found no prejudicial error in the prosecutor's remarks and remanded for the Court of Appeals to reach Mr. Copley's remaining claims. *Id.* at 232.

This second appeal stems from that remand. As directed, the Court of Appeals examined Mr. Copley's three outstanding arguments. *State*

v. Copley (*Copley III*), 276 N.C. App. 211, 212 (2021). It rejected each. *Id.* The court found no gross impropriety in the prosecutor's closing statements on the defense of habitation. *Id.* at 214–16. It saw no reviewable error in the trial court's jury instruction on the aggressor doctrine and habitation defense. *Id.* at 216. And it found no error in the jury instruction on first-degree murder by lying in wait. *Id.* at 218. Mr. Copley challenges each of those rulings. We again find no reversible error and affirm Mr. Copley's conviction.

I. Background[1]

A. The Shooting

In 2016, Mr. Copley lived on Singleleaf Lane, a quiet street in the suburban Neuse Crossing neighborhood. One- and two-story homes line the road. There are no sidewalks. On the evening of 6 August 2016, the street's usual tranquility was broken—first by party noises, then by a gunshot. That night, Jalen Lewis's parents were out of town, and he and his friends decided to throw a party. The Lewises lived a few houses up from Mr. Copley on the same side of the street.

As night fell and the party whirred to life, guests parked their cars up and down Singleleaf Lane, some in front of Mr. Copley's home. Around midnight, Mr. Thomas and two friends arrived at the party. They too parked on the street near Mr. Copley's house and joined the festivities at the Lewis home.

Soon after, a large group of about twenty people arrived at the party. Mr. Lewis had not invited them and wondered if they had gang ties—some wore all red, others all blue. Worried, he asked the group to leave. They agreed and returned to their cars parked in front of Mr. Copley's house.

The group stood on the curb between their cars and Mr. Copley's yard talking about where to go next. It was just after midnight. Mr. Copley—awoken by the noise of the party—leaned out of his upstairs window and yelled, "You guys keep it the f--- down; I'm trying to sleep in here." The group replied, "Shut the f--- up; f--- you; go inside, white boy." Mr. Thomas was not part of this group; at this point, he was still at the party.

1. Our first opinion in this case also summarized the factual background. *See Copley II*, 374 N.C. at 225–27. We provide additional facts relevant to the self-defense issues raised in this appeal.

At trial, witnesses gave conflicting testimony about guns. Mr. Copley claimed that he saw "firearms in the crowd" and that two people "lifted their shirts up" to flash weapons. Mr. Copley also testified that he was concerned for his family's safety—his wife and children were inside the house. The State's witnesses, on the other hand, testified that they did not see any guns at the party.

After exchanging words with the people outside, Mr. Copley dialed 911. Before the operator picked up but while the call was being recorded, Mr. Copley muttered, "I'm going to kill him." The State presented that recording at trial. In response, Mr. Copley testified that "him" referred to his son, who he thought was at the party. Once connected, Mr. Copley told the 911 operator that "hoodlums" were racing down the street and that the group outside was vandalizing his property. At trial, Mr. Copley admitted that these statements were not true.

Mr. Copley told the operator he was "locked and loaded" and going outside to "secure the neighborhood." He ended the call, grabbed his shotgun, loaded five rounds, and headed to his garage. Mr. Copley found his son there and told him to get a rifle and go upstairs for safety. *Id.* Mr. Copley stayed in the garage, however—the doors were closed and the windows shut.

During these events, Mr. Thomas was still at the Lewis home. He and his friends saw blue police lights from a traffic stop down the street and decided to leave, worried about the marijuana grinder in Mr. Thomas's pocket. The trio hurried towards their car parked at the end of the street.

Mr. Thomas was first. Again, Singleleaf Lane has no sidewalks. As Mr. Thomas ran from the Lewis house, he cut across Mr. Copley's yard near the street curb. A shot rang out. Mr. Thomas spun and fell to the curb next to Mr. Copley's mailbox, screaming "Help. Call 911." Mr. Copley—without warning—had fired through the window of his dark, closed garage. The bullet tore through Mr. Thomas's right arm and lodged in his right side, just below the rib cage.

Mr. Copley offered his perspective at trial. While in his garage and peering through a window, he testified that people were standing on the lawn near his wife's van. Mr. Copley yelled at them to leave and that police were on their way. Mr. Copley then testified that a young man entered his yard, appearing to move towards the garage. He claimed that the man pulled a gun. In response, Mr. Copley fired a single shot through the window. No weapon was found on Mr. Thomas or at the scene.

At the time of the shooting, Deputy Barry Carroll was just up the street providing backup for the traffic stop. Dispatch reported nearby

gunfire and he hurried to the scene. Deputy Carroll saw EMS workers huddled around Mr. Thomas as he lay on the grass near the street curb. The officer also noticed broken glass lying on Mr. Copley's driveway under a broken garage door window. He drew his gun, approached the house, and found Mr. Copley in the garage. The two spoke, and Mr. Copley admitted that he shot a man. He handed over his shotgun and cooperated with officers as they took him into custody.

Meanwhile, EMS rushed Mr. Thomas to a hospital, where he died from the gunshot. He was twenty years old.

B. Prior Proceedings

On 22 August 2016, a Wake County grand jury indicted Mr. Copley for first-degree murder. His trial began on 12 February 2018. Eleven days later, a jury convicted Mr. Copley of first-degree murder by premeditation and deliberation, and by lying in wait. The trial court sentenced him to life in prison without parole.

Mr. Copley appealed. He argued that the trial court erred by (1) overruling his objections to the prosecutor's closing remarks about the victim's race, (2) giving the jury erroneous instructions on the defense of habitation, and (3) instructing the jury on homicide by lying in wait. *State v. Copley* (*Copley I*), 265 N.C. App. 254, 257 (2019). The Court of Appeals awarded a new trial, holding that the trial court erred in allowing the prosecutor to suggest that the victim's race factored into Mr. Copley's use of deadly force. *See id.* at 255, 257. The court did not reach any other issues. *Id.* at 269. Based on the dissent, *Id.* at 269 (Arrowood, J., dissenting), the State appealed to this Court. We reversed the Court of Appeals and remanded to consider Mr. Copley's remaining claims. *Copley II*, 374 N.C. at 232.

On remand, Mr. Copley argued that the trial court erred by (1) allowing the prosecutor to misstate the defense of habitation during closing argument, (2) erroneously instructing the jury on the aggressor doctrine, and (3) instructing jurors on first-degree murder by lying in wait in a way that distorted his right to defend his home. *Copley III*, 276 N.C. App. at 218.

C. The Court of Appeals Opinion Under Review

The Court of Appeals examined each of Mr. Copley's claims, and a divided panel found no error. *Copley III*, 276 N.C. App. at 214. First, the court discerned no error in the trial court's failure to intervene during the prosecutor's closing remarks on the defense of habitation. *Id.* According to the court, the prosecutor did not misstate the law by

describing Mr. Copley walking downstairs as "aggressive," because characterizing specific conduct as "aggressive" is not the same as invoking the aggressor doctrine for self-defense purposes. *Id.* at 215–16. In context, too, the challenged statements referred to self-defense, not the defense of habitation. *Id.* at 215. Because there was no gross impropriety in the closing statements, the trial court's failure to intervene was not a reversible oversight. *Id.* at 214.

The court next rejected Mr. Copley's challenge to the jury instruction on the defense of habitation. *Id.* at 216. Since Mr. Copley specifically asked the trial court for extra language on the aggressor doctrine and never objected to the final jury charge, any error was invited by Mr. Copley himself. *Id.* at 217. In all events, the court noted, the trial court correctly instructed on provocation, an exception to the habitation defense. *Id.* at 216. Finally, the court found no error in the instruction on first-degree murder by lying in wait because the evidence, viewed in the light most favorable to the State, supported the requested instruction. *Id.* at 218.

The dissent reached a different conclusion on the lying-in-wait instruction. In its view, the trial court was asked to deliver a self-defense instruction and was thus required to examine the evidence in the light most favorable to Mr. Copley. *Id.* at 218 (Tyson, J., dissenting). From that perspective, the evidence did not support an instruction on murder by lying in wait, as it showed that Mr. Copley was "inside of his home and protecting his family with a shotgun, while facing an armed intruder after midnight with no response from his 911 call." *Id.* at 227 (Tyson, J., dissenting). Delivering that unsupported instruction to the jury was prejudicial error, the dissent concluded. *Id.* at 227–29 (Tyson, J., dissenting).

Relying on the dissenting opinion, Mr. Copley challenged the Court of Appeals ruling on the murder-by-lying-in-wait instruction. He also sought discretionary review on the trial court's habitation defense instruction and its failure to intervene during closing arguments. We allowed his petition, and now reach and resolve his claims.

II. Failure to Intervene During Closing Arguments

[1] First, Mr. Copley challenges the trial court's failure to interject during the prosecutor's closing argument. Mr. Copley specifically objects to these statements by the prosecutor:

> [Defense counsel] talked about that home a lot but he didn't talk about his reasonableness very much, and

> he certainly blew through the section where it talks about there being no other way to escape danger. He doesn't have to retreat from his home, but if you're upstairs and somebody makes a show of force at you, it's not retreating to stay upstairs. It's, in fact, the opposite of that, right? But if you take your loaded shotgun and go down to the garage and if you buy him at his word, which I don't know that you can, you are not retreating. You are being aggressive. You're continuing your aggressive nature in that case.

According to Mr. Copley, the prosecutor impermissibly suggested that he could not invoke the defense of habitation because he was the aggressor. Because that comment misstated the law, he continues, the trial court was duty-bound to step in and fix the error. It did not. Because of the trial court's silence, Mr. Copley contends, jurors would "necessarily conclude" that he could not invoke the defense of habitation.

Mr. Copley did not object at trial, and so we review for gross impropriety. *See State v. Jones*, 355 N.C. 117, 133 (2002) (citing *State v. Trull*, 349 N.C. 428, 451 (1998), *cert. denied*, 528 U.S. 835 (1999)). The question, then, is whether the closing arguments were so outside "the parameters of propriety that the trial court, in order to protect the rights of the parties and the sanctity of the proceedings, should have intervened on its own accord and: (1) precluded other similar remarks from the offending attorney; and/or (2) instructed the jury to disregard the improper comments already made." *Id.* To meet the gross-impropriety standard, a "prosecutor's remarks must be both improper and prejudicial." *Id.*; *see also State v. Huey*, 370 N.C. 174, 180 (2017).

A statement is improper if "calculated to lead the jury astray." *Jones*, 355 N.C. at 133. That is because a "lawyer's function during closing argument is to provide the jury with a summation of the evidence, which in turn serves to sharpen and clarify the issues for resolution by the trier of fact." *Id.* at 127 (cleaned up). Closing remarks must thus "be limited to relevant legal issues," *id.* (cleaned up), and "counsel may not place before the jury incompetent and prejudicial matters," *State v. Rogers*, 355 N.C. 420, 462 (2002) (quoting *State v. Johnson*, 298 N.C. 355, 368–69 (1979)). For that reason, "[i]ncorrect statements of law in closing arguments are improper." *State v. Ratliff*, 341 N.C. 610, 616 (1995). And arguments stray beyond permissible bounds when lawyers "become abusive, inject their personal experiences, express their personal belief as to the truth or falsity of the evidence or as to the guilt or innocence of

the defendant, or make arguments on the basis of matters outside the record." *Huey*, 370 N.C. at 180 (cleaned up).

The prejudice prong looks to whether a prosecutor's remarks were "so overreaching as to shift the focus of the jury from its fact-finding function to relying on its own personal prejudices or passions." *State v. Duke*, 360 N.C. 110, 130 (2005), *cert. denied*, 549 U.S. 855 (2006). Put differently, the closing comments must have veered far enough into improper terrain "to impede the defendant's right to a fair trial." *Huey*, 370 N.C. at 179; *see also State v. Tucker*, 190 N.C. 708, 714 (1925) ("If verdicts cannot be carried without appealing to prejudice or resorting to unwarranted denunciation, they ought not to be carried at all."). To examine prejudice, we "assess the likely impact of any improper argument in the context of the entire closing." *Copley II*, 374 N.C. at 230. Rather than atomizing statements and wrenching them from their surroundings, we consult the setting "in which the remarks were made" and the "overall factual circumstances to which they referred." *State v. Thompson*, 359 N.C. 77, 110 (2004) (cleaned up).

Applied here, Mr. Copley does not show gross impropriety because the prosecutor's closing argument did not clearly misstate the law. As the Court of Appeals reasoned, the prosecutor—in context—appeared to address Mr. Copley's generalized assertion of self-defense, not the defense of habitation. Even if Mr. Copley is correct that the prosecutor invoked the aggressor doctrine, we have routinely and recently applied that principle to claims of self-defense. *See*, *e.g.*, *State v. Hicks*, 385 N.C. 52 (2023). But Mr. Copley is not correct—the prosecutor never labeled him the "aggressor" for purposes of self-defense, but instead characterized discrete actions as "aggressive." Though the prosecutor could have chosen his words with more precision, labelling specific conduct as "aggressive" is not a pat invocation of the aggressor doctrine. *See State v. Bass*, 371 N.C. 535, 544 (2018). Key too, the closing remarks did not dilute Mr. Copley's right to defend his dwelling from unlawful entry. The prosecutor correctly explained that Mr. Copley "doesn't have to retreat from his home," before noting that "it's not retreating to stay upstairs." In context, then, the prosecutor merely observed that Mr. Copley intentionally placed himself closer to the action. So despite Mr. Copley's arguments, the challenged statements did not invoke the aggressor doctrine, saddle Mr. Copley with a duty to retreat in his home, or disclaim his right to lawfully defend his dwelling.

Because Mr. Copley has not identified an improper statement in the prosecutor's closing argument, he falters at the first step of the gross-impropriety standard. We need not reach the question of prejudice to

find that, on these facts, the trial court did not err by failing to intervene *ex mero motu*. *See Huey*, 370 N.C. at 179 ("Only when it finds both an improper argument *and* prejudice will this Court conclude that the error merits appropriate relief." (emphasis added)).

III. Jury Instructions

Mr. Copley next challenges the jury instructions on defense of habitation and first-degree murder by lying in wait. In his view, both instructions misstated the law and distorted his right to defend himself and his home. We examine de novo "whether a jury instruction correctly explains the law." *State v. Greenfield*, 375 N.C. 434, 440 (2020) (cleaned up). On de novo review, we consider "the issue with fresh eyes and may freely substitute our judgment" for the lower courts'. *State v. Woolard*, 385 N.C. 560, 570 (2023) (cleaned up).

A. Aggressor Instruction

[2] Mr. Copley first argues that the trial court erred by instructing jurors that the defense of habitation is unavailable to an aggressor. That argument is misguided on the facts and the law.

During the charge conference, the trial court decided to read Pattern Jury Instruction 308.80 on the defense of habitation, including footnote 4 which deals with provocation. Drawn from N.C.G.S. § 14-51.4(2), that footnote explains that a defendant cannot invoke the habitation defense if he first provoked the use of force against himself. In full, the trial court instructed:

> The defendant is justified in using deadly force in this matter if, and there are four things. Number one, such force was being used to prevent the forcible entry into the defendant's home, and, two, the defendant reasonably believed that the intruder would kill or inflict serious bodily harm to the defendant or others in the home, or intended to commit a felony in the home, and, three, the defendant reasonably believed that the degree of force the defendant used was necessary to prevent a forcible entry into the defendant's home, and, four, the defendant did not initially provoke the use of force against himself, or if the defendant did provoke the use of force, the force used by the person provoked was so serious that the defendant reasonably believed that he was in imminent danger of death or serious bodily harm, and the use

> of force likely to cause death or serious bodily harm to the person who was provoked was the only way to escape the danger.

When the trial court included the provocation exception in its instruction on the habitation defense, Mr. Copley's counsel did not object. Far from it—he urged the court to add extra language on the aggressor doctrine into its instructions: "We would ask if the jury is going to be given instruction on provocation, that they be informed on the law of initiation aggression which is intended and designed to calculate this inspiring a fight[.]" The trial court agreed. At Mr. Copley's request, the *self-defense* instruction included specific language on the aggressor doctrine.[2] The *defense of habitation* instruction included the substance of footnote 4—the court did not tell jurors that the habitation defense was unavailable to an "aggressor," as Mr. Copley contends. Nor did Mr. Copley object to either instruction—not at the charge conference, not during the jury charge, and not after the trial court delivered the instructions.

Because Mr. Copley specifically and expressly asked for the "aggressor" language he now attacks, any flaw was of his own device. We discern no reversible prejudice in the "jury instruction given in response to [Mr. Copley's] own request," and decline to award relief for an error so patently invited by Mr. Copley himself. *See State v. McPhail*, 329 N.C. 636, 643 (1991); *State v. Wilkinson*, 344 N.C. 198, 214 (1996) ("Since defendant asked for the exact instruction that he now contends was prejudicial, any error was invited error." (cleaned up)).

B. First-Degree Murder by Lying in Wait

[3] Finally, Mr. Copley challenges the jury instruction on first-degree murder by lying in wait. He argues that the trial court's instruction failed to properly reflect his right to defend the home, a right enshrined in N.C.G.S. § 14-51.2. That provision—the statutory incarnation of the castle doctrine—allows the lawful occupant of a dwelling to defend it from a trespasser's unlawful or forcible entry. When the statute controls and the State does not dislodge it, a defendant who uses deadly force to protect the home is excused "from criminal culpability." *State v. Coley*,

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2. On self-defense, the trial court instructed jurors: "If the State fails to prove that the defendant did not act in self-defense or was the aggressor with intent to kill or to inflict serious bodily harm, you may not convict the defendant of either first- or second-degree murder. However, you may convict the defendant of voluntary manslaughter if the State proves the defendant was the aggressor without murderous intent in provoking the fight in which the deceased was killed, or that the defendant used excessive force."

375 N.C. 156, 160 (2020). At trial, Mr. Copley invoked the statutory castle doctrine, and the trial court instructed on that defense.

But in Mr. Copley's view, the court did not go far enough. In charging jurors on murder by lying in wait, the court suggested that jurors could convict Mr. Copley of that offense even if they deemed his actions covered by the castle doctrine. That instruction was error, Mr. Copley contends, as it distorted the law and allowed the jury to attach a "guilty" verdict to justified defensive force. We agree and hold that if an occupant inside his home uses lawful defensive force as permitted by section 14-51.2, the statutory castle doctrine vitiates essential elements of lying in wait and precludes criminal culpability for that offense. The instruction delivered in Mr. Copley's case mistakenly suggested otherwise.

Lying in wait is a species of first-degree murder derived from the common law. *See* N.C.G.S. § 14-17(a) (2023); *State v. Leroux*, 326 N.C. 368, 375 (1990). It denotes a precise "method employed to kill," *State v. Baldwin*, 330 N.C. 446, 462 (1992), one typified by "waiting, watching, and secrecy," *State v. Gause*, 227 N.C. 26, 29 (1946). A person lies in wait by "plac[ing] himself in a position to make a private attack," and then striking "when the victim does not know of the assassin's presence" or lethal purpose. *Leroux*, 326 N.C. at 375 (quoting *State v. Allison*, 298 N.C. 135, 147 (1979)). At its core, then, the crime entails "some sort of ambush and surprise of the victim." *State v. Lynch*, 327 N.C. 210, 217 (1990).

But lying in wait does not require a "specific intent to kill" or premeditation and deliberation. *Lynch*, 327 N.C. at 217. The act instead "speaks for itself." *Allison*, 298 N.C. at 149 (quoting *State v. Dunheen*, 224 N.C. 738, 740 (1944)). By concealing his presence or purpose, the assailant betrays the "actual intent to participate in conduct that results in a homicide." *State v. Jones*, 353 N.C. 159, 166 (2000). And because of that subterfuge, the victim—perched in "the most opportune place for annihilation" and yet "unaware of the threat"—has no chance to flee, fight, or plead for his life. *See State v. Brown*, 320 N.C. 179, 232 (1987). That is why lying in wait murder is uniquely "heinous" and punishable as first-degree murder. *State v. Davis*, 305 N.C. 400, 422 (1982).

In most cases, the crime is not location specific. A person may "lie in wait in a crowd as well as behind a log or a hedge." *Allison*, 298 N.C. at 148. So too on a golf course, *Leroux*, 326 N.C. 368, in a nightclub, *State v. Hamlet*, 312 N.C. 162 (1984), and at a train station, *State v. Wiseman*, 178 N.C. 785 (1919). In each of those settings, the assailant launched a private attack "without any warning of his presence" or purpose. *State v. Bridges*, 178 N.C. 733, 738 (1919). The site of the killings did not change

the bottom line: Each victim had no reason to suspect the "impending assault." *See Brown*, 320 N.C. at 190.

But things change at the home's front steps. When a person inside their dwelling uses lawful force to fend off another's illicit invasion, the setting makes all the difference. After all, the home is a special place with special rules. The "sanctity" of a dwelling is a "revered tenet of Anglo-American jurisprudence." *Brown*, 320 N.C. at 231; *see also State v. Sparrow*, 276 N.C. 499, 512 (1970) (grounding "the constitutional principle that a person's home is his castle" in "the ancient rules of the common law"). This Court has agreed. The home, we have explained, is an "especially private place" where "a person has a right to feel secure." *Brown*, 320 N.C. at 231. And "the special status" of that space vests its lawful occupants with "the right to defend it." *Id.* That principle—called the castle doctrine—draws its name from its canonical formulation: "A man's house, however humble, is his castle, and his castle he is entitled to protect against invasion." *State v. Gray*, 162 N.C. 608, 613 (1913) (cleaned up). Thus, "when a person who is free from fault in bringing on a difficulty[ ] is attacked in his own home or on his own premises, the law imposes on him no duty to retreat before he can justify his fighting in self defense, regardless of the character of the assault." *State v. Johnson*, 261 N.C. 727, 729 (1964). In those circumstances, the castle doctrine allows the occupant "to repel force with force, and to increase his force, so as not only to resist, but also to overcome the assault and secure himself from all harm." *Id.* at 730; *accord State v. Bryson*, 200 N.C. 50, 52 (1930) ("The defendant being in his own home and acting in defense of himself, his family and his habitation—the deceased having called him from his sleep in the middle of the night—was not required to retreat regardless of the character of the assault.").

Today, the castle doctrine is codified in section 14-51.2. To protect the home's sanctity, the statute uses "a burden-shifting provision, creating a presumption in favor of the defendant" that the State may rebut. *See State v. Austin*, 279 N.C. App. 377, 384 (2021). On the front-end, a trespasser "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) (2023). If the lawful occupant of that home knows or has reason to know of the trespasser's invasion, he is presumed to have a "reasonable fear of imminent death or serious bodily harm" to himself or another. N.C.G.S. § 14-51.2(b). Because the occupant is presumed to reasonably fear death or grave harm, he may repel the trespasser's invasion with deadly force and has no "duty to retreat." N.C.G.S. § 14-51.2(f). In the settings and

circumstances embraced by section 14-51.2, then, an occupant's use of deadly force is "justified" and "immune from civil or criminal liability." N.C.G.S. § 14-51.2(e).

Though the castle doctrine enshrines the right to use lawful defensive force, it is not a license to kill. The State may rebut the presumption of reasonableness—and thus an occupant's resort to deadly force—by proving certain facts. For instance, the castle doctrine may not apply if the "person against whom the defensive force is used has the right to be in or is a lawful resident of the home." N.C.G.S. § 14-51.2(c)(1). Moreover, a homeowner could not claim the doctrine's protections if he invites the victim to his house and shoots them as they enter the front gate. So too is the doctrine inapplicable if an occupant "knew or reasonably should have known that the person entering or attempting to enter was a law enforcement officer" in "the lawful performance of his or her official duties." N.C.G.S. § 14-51.2(c)(4). Importantly, section 14-51.2 does not declare open season on Girl Scouts and trick-or-treaters, as "there is an implicit license that typically permits the visitor to approach the home by the front path." *State v. Grice*, 367 N.C. 753, 757 (2015) (cleaned up) (citing *Florida v. Jardines*, 569 U.S. 1, 8 (2013)); *see also id.* at 762 ("The implicit license enjoyed by law enforcement and citizens alike to approach the front doors of homes may be limited or rescinded by clear demonstrations by the homeowners and is already limited by our social customs."). In some circumstances, then, a person may lie in wait in their own home. *See Bridges*, 178 N.C. at 738 (explaining that defendants who shot police officer lay in wait inside their home by "waiting in the dark for [the officer], as much concealed as if they had been hidden in ambush, prepared to slay without a moment's warning to their victim").

But as Mr. Copley argues, a defendant duly shielded by section 14-15.2 cannot be convicted of first-degree murder by lying in wait because the statutory castle doctrine foreswears the crime's essential elements. For one, a person lawfully inside their home is not an "assassin," "ambush[er]," or "private attack[er]" lying in wait for a victim. *Allison*, 298 N.C. at 147. Those terms—like the crime itself—"impl[y] a hiding or secreting of one's self." *State v. Gause*, 227 N.C. 26, 29 (1946). But there is nothing cloak-and-dagger about a person's lawful presence in their abode. Just the opposite—one within their dwelling is, in fact, precisely where they are expected to be. And once inside their castle, an occupant is entitled to the security and safety of its walls. *See*, *e.g.*, *State v. Stevenson*, 81 N.C. App. 409, 412 (1986) ("[I]f a person is bound to become a fugitive from her own home, there would be no refuge for her anywhere in the world.").

Lying in wait also involves a fundamentally different type of force than the castle doctrine. As our precedent makes plain, murder by lying in wait entails an offensive attack from an advantaged perch. But the force sanctioned by the castle doctrine is, by its nature, a defensive response to a "reasonable fear of imminent death or serious bodily harm." N.C.G.S. § 14-51.2(b). Put differently, a person lying in wait *acts* by disguising their presence or purpose and striking their victim "unawares." *Wiseman*, 178 N.C. at 790. But a lawful occupant under the aegis of the castle doctrine reasonably *reacts* to another's unlawful conduct.

Which upends another key facet of lying in wait—unfair "surprise." *See Lynch*, 327 N.C. at 218. When an assailant lies in wait, the victim is clueless "of the impending assault" and "without opportunity to defend himself." *See id.* (quoting *Leroux*, 326 N.C. at 376). Not so when the castle doctrine is in play. Section 14-51.2 presumes that a trespasser breaching the castle walls intends to commit an "unlawful" and "violen[t]" act inside. N.C.G.S. § 14-51.2. Faced with that invasion and the danger it spells, an occupant may use deadly force to defend themselves and their home.

In short, defensive conduct embraced by the castle doctrine is not the sort of underhanded sneak attack typified by lying in wait. When a defendant lawfully defends his home in line with section 14-51.2 and the State does not rebut the statutory presumption of reasonableness, his force is a justified defensive measure immune from criminal culpability. For that reason, section 14-51.2 cannot coexist in the same case with the common-law crime of murder by lying in wait. If the statutory castle doctrine applies, it disclaims the elements of lying in wait and displaces that offense. When the legislature has withdrawn criminal culpability, the common law may not attach it. *See State v. McLymore*, 380 N.C. 185, 190 (2022) ("[T]he General Assembly possesses the authority to displace the common law through legislative action.").

Measured in that light, Mr. Copley raises valid objections to the trial court's instruction on murder by lying in wait. For that theory of first-degree murder, the trial court explained:

> The defendant has also been charged with first-degree murder perpetrated while lying in wait. For you to find the defendant guilty of this offense, the State must prove three things beyond a reasonable doubt. First, that the defendant lay in wait for the victim; that is, waited and watched for the victim in ambush for a private attack on him. Second, that the

> defendant intentionally assaulted the victim. And, third, that the defendant's act was a proximate cause of the victim's death . . . . If you find from the facts in this case beyond a reasonable doubt the existence of these three elements listed above on this page, you would also find beyond a reasonable doubt that the defendant did not act in self-defense but acted by lying in wait.

As delivered, the instruction ignored the home's unique status and an occupant's unique right to defend it. The last sentence is particularly troubling. It suggests that the castle doctrine can run in parallel with murder by lying in wait—in other words, that defensive measures sanctioned by section 14-51.2 can, at the same time, qualify as murder by lying in wait. The instruction thus implies that the crime eclipses the castle doctrine—that if Mr. Copley's actions meet the elements of lying in wait, jurors *must* find him guilty, even if they deem the same actions to be lawful defensive force embraced by section 14-51.2.

Therefore, the lying-in-wait instruction was "an inaccurate and misleading statement of the law." *See State v. Lee*, 370 N.C. 671, 671 (2018). It diluted the castle doctrine's protections and created an undue risk that jurors would convict Mr. Copley for justified defensive force. *See State v. Spruill*, 225 N.C. 356, 358 (1945); *see also State v. Francis*, 252 N.C. 57, 59–60 (1960); *State v. Miller*, 267 N.C. 409, 411–12 (1966). But as this Court has affirmed (and reaffirmed), a "defendant entitled to *any* self-defense instruction is entitled to a *complete* self-defense instruction." *State v. Coley*, 375 N.C. 156, 159 (2020) (quoting *Bass*, 371 N.C. at 542). Because the trial court's lying-in-wait instruction distorted the interplay between the crime and the castle doctrine, it denied Mr. Copley the "full benefit" of the statutory right to defend his home.[3] *See State v. Bost*, 192 N.C. 1, 5–6 (1926).

Under principles of due process, jury instructions infected with legal error often require a new trial. *See McLymore*, 380 N.C. at 198. But Mr. Copley's case is unique. The trial court instructed on two theories of first-degree murder—by premeditation and deliberation, and by lying in wait. The jury found Mr. Copley guilty on both counts and specified the separate convictions on the verdict sheet. By necessity, then, jurors concluded that the castle doctrine did not shield Mr. Copley's actions from

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3. Given our holding, we suggest that the North Carolina Pattern Jury Instruction Committee review N.C.P.I.–Crim 206.16 and make appropriate changes in line with this opinion.

criminal liability. *See* N.C.G.S. § 14-51.2(e). Also by necessity, jurors reached that conclusion for each count of first-degree murder—they could not have found Mr. Copley "guilty" otherwise. *See id.* So despite the error in the instruction for murder by lying in wait, Mr. Copley's conviction stands for first-degree premeditated and deliberate murder. For that reason, he does not forecast prejudice warranting a new trial. *See State v. Jenrette*, 236 N.C. App. 616, 638 (2014) (finding no prejudicial error in "jury instruction on lying in wait" because "such error would not have affected [d]efendant's conviction of first-degree murder" under "the theories of premeditation and deliberation and felony murder"); *accord State v. Gosnell*, 231 N.C. App. 106, 113 (2013).

IV. Conclusion

In sum, we find no gross impropriety in the prosecutor's closing arguments; only invited error in the trial court's instruction on the habitation defense; and no prejudicial error in the instruction on first-degree murder by lying in wait. We thus modify and affirm the Court of Appeals decision and uphold Mr. Copley's conviction.

MODIFIED AND AFFIRMED.

Justice BARRINGER concurring.

On all three issues presented to this Court, the majority reaches the same result as would I. While I agree with the outcome, I write this concurrence to "call out for clarity" in the pattern jury instructions associated with the various self-defense provisions that are now in place. *State v. Hicks*, 385 N.C. 52, 66–67 (2023) (Dietz, J., concurring). Roughly one year ago, this Court was faced with issues of the interplay between the castle doctrine and N.C.G.S. § 14-51.4. *See Hicks*, 385 N.C. 52. It appears that the state of the pattern jury instructions is still not improved as of today.

It is greatly concerning that our State's pattern jury instructions continue to leave jurors confused on what they may or may not consider in self-defense and castle doctrine circumstances. Further development of a strong underpinning to our State's castle doctrine jurisprudence requires clear jury instructions. Instructions that provide jurors with a clear decision tree are critical for a jury to be able to accurately determine whether the presumptions provided by § 14-51.2 have been rebutted. A jury must intentionally and methodically determine whether

that presumption has been rebutted. Only a measured determination of rebuttal will clear the path for certain other criminal convictions, such as murder by lying in wait.

For these reasons, I concur with my esteemed colleagues.

STATE OF NORTH CAROLINA
v.
WALTER D. GIESE

No. 309PA22

Filed 23 May 2024

Criminal Law—motion to disqualify district attorney's office—actual conflict of interest—victim's role as county manager irrelevant

In a trial for cyberstalking and making harassing phone calls, the trial court improperly granted defendant's motion to disqualify the entire district attorney's (DA's) office from prosecuting him where defendant argued that the victim's position as the county manager—whose duties included superintending county courthouses and proposing the county's annual budget, which included expenses for the DA's office—created a conflict of interest. In the context of criminal prosecutions, an "actual conflict" only exists if a prosecutor in a criminal case once represented the defendant in another matter and, by virtue of that attorney-client relationship, obtained confidential information that could be used to the defendant's detriment at trial. Thus, the trial court's office-wide disqualification of the DA's office was improper where defendant did not offer evidence of such a conflict with the DA or with any of the twenty assistant DAs serving under him.

On writ of certiorari pursuant to N.C.G.S. § 7A-32(b) to review an order denying the State's petition for writ of certiorari entered on 30 June 2022 by Judge Thomas Wilson in Superior Court, Onslow County. Heard in the Supreme Court on 31 October 2023.

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

Mary McCullers Reece and R. Christian Smith for defendant-appellee.

EARLS, Justice.

In early 2022, Walter D. Giese was charged with cyberstalking and making harassing phone calls to Sharon Griffin. At the time, Ms. Griffin was the county manager for Onslow County. Appointed by and responsible to the Board of Commissioners, Ms. Griffin oversaw the county's facilities and public services. Each year she also proposed a county budget to the Board.

As county manager, Ms. Griffin sometimes crossed paths with District Attorney Ernie Lee (DA Lee). The elected chief of the Fifth Prosecutorial District, DA Lee spearheads criminal prosecutions in Onslow County. He and his assistant district attorneys (ADAs) try cases in the county's courthouse and work in county-provided offices. Onslow County also covers some operating expenses for the district attorney's office (DA's office), such as custodial services and furniture. Because county managers superintend county courthouses and propose the annual budget, Ms. Griffin's duties at times overlapped with DA Lee's.

Before trial, Mr. Giese moved to disqualify DA Lee and his staff from prosecuting him. As county manager, Ms. Griffin's decisions could affect the finances and functioning of DA Lee's office. And as the alleged victim, Mr. Giese contended, prosecutors in the Fifth Prosecutorial District had "self-interest" in appeasing Ms. Griffin. That "self-interest" could seep into their decision-making, shaping whether, for what, and how they prosecuted Mr. Giese. Extending that logic, Mr. Giese urged the district court to disqualify DA Lee and his staff because Ms. Griffin's position as county manager triggered a conflict of interest. The district court agreed and barred the Fifth Prosecutorial District from handling the case.

The State challenged that disqualification order by petitioning the superior court for a writ of certiorari. But after a hearing, that court denied the State's petition, found a conflict of interest, and left the disqualification order intact. This Court allowed the State's petition for writ of certiorari to review the superior court's order. We now vacate and remand.

I. Facts and Procedural History

A. The Parties

Mr. Giese is no stranger to local government. As a licensed soil scientist and registered environmental health specialist, he works in

wastewater services. In that sphere, he helps businesses obtain septic tank permits and serves as an on-site wastewater evaluator for the state. Mr. Giese's job brings him in close contact with county and municipal governments. As part of his work, he regularly interacts with Onslow County staff. This case centers on his contacts with a particular employee: Ms. Griffin. According to the State, Mr. Giese made harassing phone calls to and cyberstalked Ms. Griffin. But according to Mr. Giese, he merely criticized Ms. Griffin when requesting county records.

Everyone agrees, however, that Ms. Griffin was county manager at all relevant times. The Board of Commissioners appointed her to that position in 2020. In that role, she worked under the Board's guidance as the "chief administrator of county government." *See* N.C.G.S. § 153A-82(a) (2023). Among her duties, she supervised the county's programs and services and managed its facilities. *See* N.C.G.S. § 153A-82(a)(2). She also played a role in finances. Each year, she proposed a county budget to the Board. *See* N.C.G.S. § 153A-82(a)(5). After the Board adopted a budget, she ensured that the money was properly spent. *See* N.C.G.S. § 153A-82(a)(4).

DA Lee is the State's chief prosecutor for the Fifth Prosecutorial District. As the elected district attorney (DA), he has "exclusive responsibility" for prosecuting crimes in his district. *See State v. Diaz-Tomas*, 382 N.C. 640, 646 (2022) (cleaned up). Four counties are under his jurisdiction, including Onslow County.[1] *See* N.C.G.S. § 7A-60(a1) (2023). Twenty ADAs work under him and share in his duties. *See id.* Because Mr. Giese was charged and slated for trial in Onslow County, DA Lee oversaw his case.

Though county managers and DAs hold different roles with different tasks, their duties sometimes intersect. For one, counties must provide "physical facilities for the judicial system operating within their boundaries." *In re Alamance Cnty. Ct. Facilities*, 329 N.C. 84, 99 (1991); *see also* N.C.G.S. § 7A-302 (2023). That mandate includes office space for DAs. *See id.*; *see also* N.C.G.S. § 7A-304(a)(2) (2023). Counties also cover some expenses for the DA's office, such as custodial services and office furniture. *See id.* As part of their duties, then, county managers supervise the facilities where DAs and their staff work. And when county managers propose the annual budget, their request covers the DA office's expenses.

1. Along with Onslow County, DA Lee's district also includes Duplin, Jones, and Sampson Counties. *See* N.C.G.S. § 7A-60(a1) (2023).

B. The District Court Disqualifies the DA's Office

Mr. Giese worried that Ms. Griffin's dual role as victim and county manager could influence his case. He thus moved to disqualify DA Lee's office from prosecuting him. The State opposed the motion. But after a hearing, the district court granted it, concluding that Ms. Griffin's "inherent authority" as county manager kindled a conflict of interest with the DA's office.

According to the district court, Ms. Griffin's role required her to "rely on the [DA]'s office for the County she supervises to prosecute [Mr. Giese]." The court reasoned that Ms. Griffin was an important government employee whose responsibilities overlap with the DA's interests. The court noted, for instance, that Ms. Griffin "supervises and has control over the county building, services, and furniture provided to the [DA]'s Office." She also made "budget requests that directly impact" DA Lee and his staff. From that, the district court "assume[d]" that Ms. Griffin "has discussions with the [DA]'s office (sic) concerning their (sic) needs for facility (sic) and services before the budget proposal is submitted." And since Ms. Griffin wielded "discretion to make significant decisions that impact the [DA]'s office," the district court found an actual conflict of interest that "could rise to a level of self interest in obtaining [Mr. Giese's] conviction." The court thus disqualified the entire District Attorney's Office for the Fifth Prosecutorial District and assigned Mr. Giese's case "to a conflicts Prosecutor (sic)."

C. The Superior Court Denies the State's Petition for Certiorari

Dissatisfied with that ruling, the State petitioned the superior court for a writ of certiorari. Mr. Giese opposed the State's petition. After a hearing, the superior court, like the district court, found an actual conflict of interest. Relying on *State v. Britt*, 291 N.C. 528 (1977), the superior court maintained that an actual conflict exists if a prosecutor "has any self interest in obtaining the conviction of defendant." That self-interest existed in Mr. Giese's case, the court reasoned, since Ms. Griffin "prepares and submits the annual budget" for Onslow County, including the budget "for the [DA's office] for expenses not including salaries." Because the alleged victim was "directly involved with preparing the budget for" DA Lee's office, the superior court found that an actual conflict of interest barred the entire Fifth Prosecutorial District from prosecuting Mr. Giese. It thus denied the State's petition and sustained the district court's disqualification order.

D. The State Requests Review of the Superior Court's Order

The State sought a writ of certiorari from the Court of Appeals to review the superior court's order. The Court of Appeals denied its petition. Judge Tyson dissented, arguing that the district court made "a gross error of law." The State then petitioned this Court for a writ of certiorari to review the superior court's order. We allowed the petition.

II. Standard of Review

In this case, we review the superior court's grounds for denying the State's petition for writ of certiorari. We thus examine whether, as a matter of law, Ms. Griffin's position as county manager created an actual conflict requiring DA Lee's disqualification. Because that inquiry raises a legal question, we review it de novo. *See State v. Khan*, 366 N.C. 448, 453 (2013).

III. Legal Standard for Disqualifying District Attorneys

A. The Interests at Play

The decision to disqualify a DA is a multifaceted one. This Court has thus rejected a "per se disqualification rule," electing instead to "balance the respective interests of the defendant, the government, and the public." *State v. Camacho*, 329 N.C. 589, 600 (1991) (cleaned up). That course, we have explained, is "constitutionally preferable" and avoids needless disruption of our constitutional system. *Id.* at 599.

On the one hand, DAs are "elected officials whose duty to prosecute is expressly mandated by constitutional provisions."[2] *Id.* They are "chosen for [their districts] by the qualified voters thereof." N.C. Const. art. IV, § 18. And they carry out their "constitutionally and statutorily mandated duties on behalf of the public." *Camacho*, 329 N.C. at 598. Chief among DAs' duties is the "exclusive responsibility" for prosecuting crimes in their district. *Diaz-Tomas*, 382 N.C. at 646 (cleaned up); *see also* N.C.G.S. § 7A-61 (2023).

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2. For economy and clarity, this opinion refers to DAs alone. But the same principles apply to ADAs. By Constitution and statute, DAs wield the exclusive "responsibility and authority to prosecute all criminal actions in the superior courts." *State v. Camacho*, 329 N.C. 589, 593 (1991). But an elected DA "may, in his or her discretion and where otherwise permitted by law, delegate the prosecutorial function to others." *Id.* As "lawful designees" of a DA's power and responsibility, ADAs enjoy the authority of the DA's office and the "constitutional and statutory duties" attached to it. *Id.* at 596. For that reason, the same balancing test governs the disqualification of DAs and ADAs alike.

Because DAs act "on behalf of the State" and its people, N.C. Const. art. IV, § 18, they wield "great power and grave responsibility," *State v. Barefoot*, 241 N.C. 650, 655 (1955). In criminal cases, DAs serve as "advocate[s] of the State's interest." *Britt*, 291 N.C. at 542; *see State v. Smith*, 352 N.C. 531, 559 (2000). But a DA's "first responsibility is not to win at any cost" but "to be a just advocate." *Id.* Because the State has an "elevated responsibility to seek justice above all other ends," a DA—as its mouthpiece—does too. *State v. Hooper*, 358 N.C. 122, 127 (2004). Thus, the State and DAs alike "win[ ] [their] point whenever justice is done." *State v. Williams*, 362 N.C. 628, 638 n.5 (2008) (cleaned up).

When a court disqualifies a DA, it may stymie his role as a fair-minded "representative of the people and zealous advocate for the State." *State v. Britt*, 288 N.C. 699, 714 (1975). From the sidelines, a DA can neither press the State's case nor preserve the cause of justice. An improper disqualification may thus invade the "constitutional and statutory duties" which only a DA and his "lawful designees may perform." *Camacho*, 329 N.C. at 596. And for the same reason, it may "unnecessarily interfere" with "the system established by our Constitution." *Id.* at 600.

Disqualification may also affect the public's interest in a fair and functional justice system. *See id.* When the people elect a DA, they select—and expect—an officer who prosecutes "with energy and skill," while affording just treatment to the accused. *Britt*, 288 N.C. at 710 (cleaned up). Put another way, the public has an interest in seeing defendants "fairly and promptly tried for their alleged crimes." *United States v. Goot*, 894 F.2d 231, 237 (7th Cir.), *cert. denied*, 498 U.S. 811 (1990); *see also Hooper*, 358 N.C. at 127 (underscoring need for the "effective administration of justice"). So when a court ousts a DA from a case, it may impede his elected role. In that way, faulty disqualification may erode a DA's "public protection function" and cheapen the votes that placed him in office. *See Camacho*, 329 N.C. at 600 (quoting *Goot*, 894 F.2d at 236).

All the same, defendants enjoy a constitutionally protected right to due process and fair proceedings. *Id.* We have indeed recognized that life and liberty—the values at stake in a criminal prosecution—are among the "weightiest interests that our state and federal constitutions serve to protect." *State v. Robinson*, 375 N.C. 173, 189–90 (2020); *accord McBride v. McBride*, 334 N.C. 124, 130 (1993) (noting that "the interest in personal liberty" is, "perhaps, the most fundamental interest protected by the Constitution of the United States"). Thus defendants' interests—like those of DAs and the public—are weighty too and must factor into

the calculus. *See Camacho*, 329 N.C. at 600 ("In deciding questions of disqualification we balance the respective interests of the defendant, the government, and the public." (quoting *Goot*, 894 F.2d at 236)).

B. *Camacho*'s Balancing Test

Our decision in *Camacho* remains the key precedent on disqualification. In that case, an ADA worked as a public defender before joining the DA's office. *Id.* at 591. During her tenure as a public defender, some of her colleagues represented the defendant at his first trial. *Id.* The ADA did not see the defendant's files or touch the merits of his case, though she did research some legal issues for a motion. *Id.* When she started as an ADA, the defendant moved to disqualify her and her colleagues from prosecuting him in his second trial. *Id.* The trial court granted the motion, reasoning that flatly disqualifying the DA's office was necessary to "avoid even the possibility or impression of any conflict of interest." *Id.* at 593 (emphasis omitted).

We vacated that decision, holding that a mere risk of impropriety could not oust a DA's office from prosecuting a case. *Id.* at 600–01. To respect our constitutional structure and DAs' role in it, we forbade courts from disqualifying prosecutors unless they find an "actual conflict of interest[ ]." *Id.* at 601. "In this context," we explained, an actual conflict exists if a prosecutor once represented the defendant and—by virtue of that attorney–client relationship—gained "confidential information which may be used to the defendant's detriment at trial." *Id.*

Applying that standard, we deemed disqualification improper because the trial court found—and the "uncontroverted evidence" showed—that "the [DA's office] had no actual conflict of interest[ ]." *Id.* at 596. According to the trial court, the ADA never had "any contact, directly or indirectly, with the merits of the [defendant's] case." *Id.* at 597. She culled "no confidential information about the defendant's case while in the Public Defender's Office." *Id.* And she did not convey "any information of a confidential nature" to the DA's office after she switched jobs. *Id.* The trial court thus concluded what "[a]ll of the evidence" confirmed: That no "actual conflict of interests existed on the part of any member of the District Attorney's Office." *Id.* at 602. And since the court found no actual conflict, it "exceeded its authority" by disqualifying the DA's office. *Id.*

Camacho offers three key lessons. First, "the mere appearance of impropriety" cannot justify disqualification. *Id.* at 599. An actual conflict

requires more than "a *possibility* that an *impression* of a conflict of interest[ ] might arise at some *future* time." *Id.* at 597.[3]

Second, disqualification is off the table "unless and until" the trial court finds "an actual conflict of interest[ ] as that term has been defined in this opinion." *Id.* at 601–02. An actual conflict thus exists when a member of a DA's office once represented a defendant and obtained confidential information that "may be used to the defendant's detriment at trial." *Id.* at 601; *see also id.* at 599. Without that essential ingredient, however, a court's disqualification power lies dormant. *Id.*; *see also State v. Anthony*, 354 N.C. 372, 391–94 (2001) (finding no actual conflict when prosecutors were "initially assigned to be co-counsel for defendant," but joined "the Gaston County District Attorney's Office by the time of trial" because the prosecutors "resigned prior to obtaining any confidential information about the case," did not discuss "the case with other prosecutors at their new employment," and "avoid[ed] all contact with the case after changing jobs"); *accord State v. Reid*, 334 N.C. 551, 561 (1993) ("We caution the trial court on remand for a new trial to insure that there is no conflict of interest, as defined in *Camacho*, on the part of the prosecution and no participation in the case against defendant on the part of [his former attorney].").

Third, even if a court finds an actual conflict, it must balance the competing interests to decide the propriety and extent of disqualification. *Id.* Put another way, the cure should not be worse than the disease—the judiciary must "make every possible effort to avoid unnecessarily interfering" with a DA's "performance of constitutional and statutory duties." *Id.* at 595–96. So in crafting relief, a trial court may not "exceed any steps necessary to protect the interests of the defendant or the courts." *Id.* at 596. A disqualification remedy must thus "be drawn as narrowly as possible," reaching only those prosecutors with an actual conflict. *Id.* at

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3. In his motion to disqualify, Mr. Giese argued that DA Lee had an "apparent conflict of interest" because he and his "staff rel[ied] on the alleged victim for resources and services provided by the County including janitorial and maintenance staff in addition to facilities and furniture." To that, Mr. Giese added another reason to disqualify: the "mere appearance of impropriety based on the professional relationship between the prosecutor and alleged victim erodes the public trust whether or not an actual conflict of interest exist[s]." *Camacho* clearly forecloses that latter rationale. *State v. Camacho*, 329 N.C. 589, 599 (1991); *see also id.* at 597 ("[W]e conclude that the trial court erred by ordering that the [DA] and his staff withdraw from this case because their prosecution of the defendant might create an appearance of a conflict of interest[ ]."). Had the lower courts disqualified the Fifth Prosecutorial District based on "a mere appearance of impropriety," those decisions would be flatly incongruent with our precedent. *See id.* at 599. Because the courts below purported to find an actual conflict between DA Lee and Ms. Griffin, we reach and consider that legal conclusion.

595. When a court embraces an "unnecessarily all-encompassing order," it upsets *Camacho*'s balancing test and distends "the system established by our Constitution." *Id.* at 596.

IV. Application to Mr. Giese's Case

Here, the lower courts found an actual conflict of interest based on the professional overlap between county managers and DAs. That was error. As defined by *Camacho*, an actual conflict exists when a prosecutor once represented a defendant, "obtained confidential information which may be used to the defendant's detriment at trial," and then "participated in the prosecution of the case or divulged any confidential information to other prosecutors." *Id.* at 601 (cleaned up). Measured in that light, the professional nexus between Ms. Griffin and DA Lee falls far short of an actual conflict. No evidence suggests—nor does Mr. Giese allege—that anyone in the Fifth Prosecutorial District ever represented him and either "acquired confidential information" or "betrayed any confidences." *Id.* at 597 (cleaned up). Because a county manager's sway in peripheral administrative and budgetary matters did not raise an actual conflict under *Camacho*, disqualification was off-limits.

In holding the opposite, the superior court seized on *State v. Britt*, 291 N.C. 528 (1977), reading that case to "outline[ ] when a conflict of interest exists for a prosecutor." That reliance was misplaced. In *Britt*—a due process case—the same DA tried a defendant multiple times for the same offense, sometimes overzealously. *Britt*, 291 N.C. at 541. Our decision, however, did not hinge on a conflict of interest. Instead, we resolved the defendant's due process claims by examining the "fairness" of the proceedings and the presence of misfeasance. *Id.* at 542. "[A]t all times," we explained, the DA was "acting as the advocate of the State's interest" and properly "seeking to convict and punish the guilty or seeking acquittal of the innocent." *Id.* Nothing suggested otherwise. The record betrayed no "misconduct in this trial." *Id.* No evidence signaled "that the prosecutor has any conflict of interest, e.g., prior representation of defendant." *Id.* And nothing augured "that the prosecutor has any self-interest in obtaining the conviction of defendant, e.g., revenge." *Id.* On that basis, we discerned no "denial of fairness in permitting [the DA] to prosecute defendant such as would constitute a denial of due process." *Id.*

Camacho—decided over a decade after *Britt*—specifically addressed conflicts of interest. The opinion did not cite *Britt* or import its due process analysis into the realm of disqualification. Most importantly, *Camacho* carefully balanced the interests at play when a court is

asked to disqualify a DA. From that, it coined a rule aligned with fundamental constitutional values and faithful to our constitutional system. *See Camacho*, 329 N.C. at 601. So when Mr. Giese moved to disqualify DA Lee, *Camacho* supplied the standard; the superior court erred in ignoring it.

A second flaw flowed from the first. Recall that the lower courts did not stop at disqualifying DA Lee—they extended that bar to all members of the Fifth Prosecutorial District. Those disqualification orders were "unnecessarily all-encompassing" and incongruent with *Camacho*'s narrow-tailoring requirement. *See id.* at 596. In *Camacho* itself, we admonished courts from automatically diffusing one prosecutor's conflict to each of her colleagues. *See id.* at 601. Instead, disqualification orders must be narrowly drawn to reach only those prosecutors with an actual conflict. *See id.* at 596. And here, Mr. Giese offered no evidence of an actual conflict with DA Lee, much less the twenty ADAs serving under him. By mandating office-wide disqualification without finding an office-wide conflict, the lower courts "swe[pt] much too broadly." *See id.*

That said, *Camacho* does not preclude defendants from raising due process claims. We need not survey every potential breach of due process, but it goes without saying that "punish[ing] a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort." *United States v. Goodwin*, 457 U.S. 368, 372 (1982) (cleaned up). In the same vein, *Britt* expressly contemplates that misconduct or significant self-interest may raise due process concerns. *Britt*, 291 N.C. at 541–42. And of course, prosecutors may not base decisions on an "unjustifiable standard such as race, religion, or other arbitrary classification . . . [or] a defendant's decision to exercise his statutory or constitutional rights." *State v. Garner*, 340 N.C. 573, 588 (1995); *see also Goodwin*, 457 U.S. at 372 (warning of due process violations when a defendant is "punished for exercising a protected statutory or constitutional right"). But this case does not present—and Mr. Giese does not raise—a colorable due process violation.

V. Conclusion

Camacho strikes a necessary balance between fairness, functionality, and faithfulness to constitutional design. Applying that decision, we vacate the superior court's order because it—like the district court—disqualified DA Lee and his staff without finding an actual conflict. As *Camacho* makes clear, a county manager's "inherent authority" does not bar a DA from prosecuting a case in which that county manager is the alleged victim. Instead, an actual conflict of interest exists when the

prosecution—by virtue of a prior attorney-client relationship—obtains confidential information that "has been or is likely to be used to the detriment of the defendant." *Id.* at 598; *see also id.* at 601. Nothing of the sort happened in Mr. Giese's case.

Without an actual conflict of interest or legitimate due process concerns, courts may not "unnecessarily interfere with [DAs'] performance" of their "constitutionally mandated duty." *Camacho*, 329 N.C. at 599. Neither condition is present here. We thus vacate the superior court's order denying the petition for writ of certiorari and remand the case for further proceedings consistent with this opinion.

VACATED AND REMANDED.

STATE OF NORTH CAROLINA
v.
DANIEL RAYMOND JONAS

No. 433PA21

Filed 23 May 2024

Appeal and Error—right to appeal—denial of motion to suppress—entry of guilty plea—no plea agreement—notice of intent to appeal not required

Where defendant entered an open guilty plea—one that was not made as part of a plea agreement—he was not required to provide notice of his intent to appeal the denial of his motion to suppress or his judgment prior to entry of the plea. The Supreme Court declined to expand the scope of the rule stated in *State v. Reynolds*, 298 N.C. 380 (1979) (concluding that a defendant who wants to appeal a suppression motion denial pursuant to N.C.G.S. § 15A-979(b) must give notice of his or her intent to appeal prior to pleading guilty as part of a negotiated plea agreement, or else the right to appeal is waived) to include open pleas.

Chief Justice NEWBY dissenting.

Justice BERGER 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, 280 N.C. App. 511 (2021), reversing and remanding an order entered on 17 December 2019 by Judge Athena Brooks in Cabarrus County Superior Court, Cabarrus County, and remanding the case. Heard in the Supreme Court on 12 September 2023.

Joshua H. Stein, *Attorney General*, *by Kristin Jo Uicker*, *Special Deputy Attorney General*, *for the State-appellant.*

Glenn Gerding, *Appellate Defender*, *by Amanda S. Zimmer*, *Assistant Appellate Defender*, *for defendant-appellee.*

RIGGS, Justice.

Under the General Statutes of North Carolina, a defendant has the right to appeal the denial of a motion to suppress after the entry of a guilty plea. N.C.G.S. § 15A-979(b) (2023). However, to ensure fundamental fairness in the plea negotiation process, this Court ruled in *State v. Reynolds* that the statute did not apply in situations where the State and a defendant had negotiated a plea agreement, holding that a defendant must "give notice of his intention [to appeal the denial of the motion to suppress] to the prosecutor and the court before plea negotiations are finalized or he will waive the appeal of right provisions of the statute." 298 N.C. 380, 397 (1979). In this case, the State asks us to extend *Reynolds* to apply when a defendant pleads guilty without a plea agreement (sometimes referred to as an "open plea" or "straight plea"). Because open pleas do not necessitate the expansion of *Reynolds* we decline to apply the *Reynolds* rule to open pleas. We hold that when a defendant enters a guilty plea without a plea agreement, the defendant does not waive his or her right of appeal by pleading guilty without prior notice of intent to appeal.

I. Factual & Procedural Background

Defendant Daniel Raymond Jonas was indicted for possession of a controlled substance after officers located 0.1 grams of methamphetamine in his car during a traffic stop. Mr. Jonas filed a pre-trial motion to suppress, in which he argued that the officer lacked reasonable articulable suspicion for the stop and subsequent search of Mr. Jonas's vehicle. The trial court denied the motion to suppress the evidence.

Subsequently, Mr. Jonas pleaded guilty as charged during a sentencing hearing. Before accepting Mr. Jonas's guilty plea, the trial court asked

Mr. Jonas if he had agreed to plead guilty as part of a plea arrangement, and Mr. Jonas confirmed that he had not. The State did not object or correct Mr. Jonas's assertion. Mr. Jonas then pleaded guilty. Mr. Jonas did not give notice of his intent to appeal before the entry of his guilty plea, but minutes after sentencing, at the same hearing, Mr. Jonas's counsel gave oral notice of appeal on the record. That is, the guilty plea and the notice of appeal occurred on the same day at the same hearing.

The Court of Appeals, in a unanimous decision, held that Mr. Jonas was not required to give notice of intent to appeal the denial of the motion to suppress prior to entering his guilty plea because he did not plead guilty pursuant to a plea agreement. *State v. Jonas*, 280 N.C. App 511, 516 (2021). The Court of Appeals further held that the stop of Mr. Jonas's vehicle was unconstitutional, and that the trial court erred when it denied Mr. Jonas's motion to suppress. *Id.* at 525.

II. Analysis

In this appeal, the State argues that a defendant who enters a guilty plea without a plea agreement is still obligated to comply with the rule established in *Reynolds*, in order to retain his or her right to appeal. Such defendant, according to the State, must advise the trial court and the prosecutor of the defendant's intent to appeal the denial of a motion to suppress prior to the entry of his or her plea. Because the principles of fundamental fairness that dictated the outcome in *Reynolds* are not implicated when there is no plea agreement, we hold that defendants who plead guilty without a plea agreement are not obligated to provide notice of intent to appeal the denial of a motion to suppress prior to the entry of a guilty plea.

Broadly speaking, the General Assembly established a statutory right to appeal the denial of a motion to suppress even when a defendant enters a guilty plea. N.C.G.S. § 15A-979(b). This Court in *Reynolds* ruled when the defendant enters a guilty plea pursuant to a plea agreement they must give notice of intent to appeal before entering the plea. *Reynolds*, 298 N.C. at 397. However, the reasoning that undergirds the *Reynolds* rule is not implicated when the defendant enters a guilty plea without a plea agreement.

Generally, when a defendant enters a "guilty plea, intelligently and voluntarily [and] with the aid of counsel, [the plea] bars the latter assertion of constitutional challenges to the plea negotiation proceeding." *Id.* at 394 (citing *Brady v. United States*, 397 U.S. 742 (1970); *McMann v. Richardson*, 397 U.S. 759 (1970); *Parker v. North Carolina*, 397 U.S. 790 (1970)). However, in *McMann*, the Supreme Court identified an

exception to this general rule holding that a plea is a waiver of the right to contest the admissibility of any evidence the State might have offered against the defendant "*unless the applicable law otherwise provides*." 397 U.S. at 766 (emphasis added).

Here, similar to the New York statute in *McMann*, the General Assembly has provided the right for a defendant to seek appellate review of "[a]n order finally denying a motion to suppress evidence may be reviewed upon an appeal from a judgment of conviction, *including a judgment entered upon a plea of guilty*." N.C.G.S. § 15A-979(b) (emphasis added). The General Assembly enacted the statute with the intention of "prevent[ing] a defendant whose only real defense is the motion to suppress from going through a trial simply to preserve his right of appeal." N.C.G.S. § 15A-979, Official Commentary.

In *Reynolds*, this Court considered whether a defendant should be able to avail himself of the right of appeal under N.C.G.S. § 15A-979(b) after receiving the benefit of a negotiated plea agreement when he did not disclose his intent to appeal during the plea negotiations. 298 N.C. at 397. In the arena of plea bargaining, the Court noted that it was "entirely inappropriate for either side to keep secret any attempt to appeal the conviction." *Id*. The Court held that when a defendant intends to appeal from a suppression order, "he must give notice of his intention to the prosecutor and the court before plea negotiations are finalized or he will waive the appeal of right provisions of the statute." *Id*.

Both parties in *Reynolds* benefited from the negotiated plea. The State made a significant concession in the *Reynolds* plea agreement. The defendant was charged with first-degree murder, first-degree rape, and first-degree burglary. *Id*. at 381. After the court denied the defendant's motion to suppress evidence, the State agreed to a plea arrangement where the defendant pleaded guilty to the lesser charge of second-degree murder, in addition to first-degree rape, and first-degree burglary, and he received two consecutive life sentences. *Id*. at 381-82. Through the bargain, the defendant avoided conviction on more serious charges and the State avoided having to conduct a trial. Only after the court accepted the negotiated plea and several months later imposed the agreed-upon sentence did the defendant give notice of appeal of the denial of his motion to suppress. *Id*. at 388. In holding that the defendant had waived his right to appeal by failing to disclose his intent to appeal, this Court reasoned that neither "our statute, nor the holding in *Lefkowitz*[1]

1. In *Lefkowitz v. Newsome*, the United States Supreme Court held, in the context of a federal habeas corpus proceeding, "that when state law permits a defendant to plead

contemplates a factual pattern such as that disclosed here—one which would cause the State to be trapped into agreeing to a plea bargain in a case as gruesome as this and then have the defendant contest that bargain." *Id.* at 397. The *Reynolds* rule was necessary to advance the interest of fundamental fairness: both parties received a benefit of the bargain and the defendant's nondisclosure of his intent to appeal upended one of the State's benefits—an expectation of finality—after it made a concession on charges. *See id.* at 396–97.

In contrast to *Reynolds*, this case turns on the significance of an open plea—a guilty plea entered without the benefit of an agreement with the State. In North Carolina, there is no system that tracks when charges are resolved through an open plea other than the plea transcript form (which includes a place where it can be designated there was no plea agreement) and the transcript of the plea hearing (including the colloquy). However, North Carolina does track the percentage of charges that are resolved through pleas rather than trials, which was 98% of all felony charges in 2022. N.C. Sent'g & Pol'y Advisory Comm'n, *Structured Sentencing Statistical Report for Felonies and Misdemeanors: Fiscal Year 2022*, at 4 (2023), https://www.nccourts.gov/assets/documents/publications/SPAC-FY-2022-Statistical-Report-web-v2.pdf?VersionId=5JR2.GZTlun8tyouDZHNniXDWrmyM._w. The State has not advanced the argument that notwithstanding the plea transcript form and whatever answers a defendant may give in response to a plea colloquy, the State always engages in some form of plea negotiation.

While it appears that this Court has never addressed open pleas, the Court of Appeals has repeatedly acknowledged the existence of open pleas. *See*, *e.g.*, *State v. Frink*, 158 N.C. App. 581, 588 (2003) ("[A co-conspirator's] guilty plea was an open plea of guilty, and not a plea agreement with the State."); *State v. Ellerbe*, No. COA23-60, slip op. at 2-3 (N.C. Ct. App. Dec. 5, 2023) (unpublished) ("The prosecutor indicated that there was no plea arrangement—this was 'a completely open plea' in which the trial court would determine the sentence."); *State v. Lail*, No. COA19-596, slip op.at 1-2 (N.C. Ct. App. June 2, 2020) (unpublished) (reviewing an *Anders* brief after the defendant entered an open plea); *State v. Nevills*, 158 N.C. App. 733, 736 (2003) (discussing whether it was error for the trial court to refer to an open plea as an agreement). There are some scholarly examinations about the prevalence of open pleas,

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guilty without forfeiting his [or her] right to judicial review of specified constitutional issues, the defendant is not foreclosed from pursing those constitutional claims." 420 U.S. 283, 293 (1975).

and at least in some geographic areas, the prevalence may be related to local policies and preferences of prosecutors for reaching plea bargains. *See* Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 Stan. L. Rev. 29, 74 (2002) (presenting evidence showing the "open plea" rate is much higher in New Orleans than in other jurisdictions because New Orleans has implemented hard screening practices coupled with restrictions on plea bargaining); Russell D. Covey, *Plea Bargaining and Price Theory*, 84 Geo. Wash. L. Rev. 920, 948 (2016) (discussing that even when Alaska temporarily prohibited prosecutors from engaging in plea bargaining, defendants still pled guilty in approximately eighty percent of all criminal cases by entering open pleas). During an oral argument before the Supreme Court of the United States, the Office of the United States Solicitor General estimated that twenty-five percent of pleas in the federal system are "open pleas" that do not involve promises from the government in exchange for the defendant's guilty plea. Oral Argument at 55:02, *Class v. United States*, 583 U.S. 174 (2018) (No. 16-424), https://www.oyez.org/cases/2017/16-424.[2] Thus, it seems uncontested that open pleas are a phenomenon, and now we turn to whether the *Reynolds* rule applies to them.

This Court has not expressly applied the *Reynolds* rule to an open plea; however, *Reynolds* was invoked in *State v. Tew*, 326 N.C. 732 (1990), a case in which it was not clear whether the defendant entered a negotiated or open guilty plea. That case does not answer the question here, to the best we can ascertain. In *Tew*, the defendant was charged with a misdemeanor, driving while impaired, and was found guilty in district court. *Id.* at 734. The defendant appealed to the superior court and after the court denied his motion to suppress, he entered a plea of guilty, specifically reserving his right to appeal the denial of his motion to suppress. *Id.* On appeal, this Court considered whether the defendant had properly preserved the right to appeal. *Id.* Citing *Reynolds*, the Court simply said the "defendant did in fact specifically reserve his right to appeal upon entering his plea of guilty." *Id.* at 735. Having so found, the majority in *Tew* focused on the merits of the preserved appeal. *Id.*

Neither the opinion nor the trial court's judgment in *Tew* indicates whether the guilty plea was pursuant to a negotiated plea agreement or an open plea. According to the record in *Tew*, the defendant received the minimum punishment of seven days in custody, but the length of

2. In *Class v. United States*, the United States Supreme Court held that a guilty plea does not waive a defendant's right to challenge the constitutionality of the statute under which he was convicted. 583 U.S. 174, 176 (2018).

the sentence does not provide any clarity as to whether it followed a plea agreement or an open plea. The Court's analysis of the application of *Reynolds* is short—only one sentence—and does not state that the Court was expanding the scope of the *Reynolds* rule to include open plea agreements. *Id.* at 735. The opinion simply states that the defendant in *Tew* preserved his right to appeal. *Id.* The record in *Tew*, which dates back almost thirty-five years, does not include a plea transcript, and so nothing in the record clarifies whether the State and the defendant entered into a plea agreement. Because the judgment in *Tew* is silent on whether the defendant had a plea agreement and the decision did not explicitly expand the rule established in *Reynolds*, we read *Tew* as simply reciting the current state of the law related to *Reynolds* without expanding its scope.[3]

Significantly, in the context of an open plea, the statutory right to appeal cannot operate to undermine the fundamental fairness of a negotiated agreement because there are no concessions or negotiated benefits. In an open plea scenario, both sides are operating without any promise or benefit of a bargain from the other side. From the State's perspective, there are many reasons why the prosecutor may prefer not to engage in plea negotiation, from the time it takes to negotiate to the political ramifications of accepting plea agreements. From the defendant's perspective, a quick guilty plea, freed from the time it may take to negotiate with the prosecutor, may secure the speedier release of a defendant who cannot afford bail and does not face a long sentence. *Structured Sentencing Statistical Report*, at 3, 9, & 13 (highlighting that 60% to 70% of all charged felonies are low-level and eligible for community punishment or an active sentence shorter than the time spent in custody awaiting trial). The reason for the entry of an open plea matters less than the fact that without any negotiation or concessions made by both sides, there can be no trickery or unfair dealing.

We do not worry that the State may be trapped into accepting unfair open pleas because of the safeguards that current plea negotiation procedures already supply. When the State and a defendant enter into a plea agreement, there are statutory requirements to document the agreement. During sentencing, the trial court must ask the prosecutor,

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3. *See Howard v. Boyce*, 254 N.C. 255, 265 (1961) (noting, in reconciliation of arguably conflicting North Carolina Supreme Court precedents, that "decided cases should be examined more from the standpoint of the total factual situations presented than the exact language used. A decision of the Supreme Court must be interpreted within the framework of the facts of that particular case.").

defense counsel, and the defendant personally "whether there were any prior plea discussions [and] whether the parties have entered into any arrangement with respect to [a] plea." N.C.G.S. § 15A-1022(b) (2023). The prosecutor can indicate on the record if there was, in fact, a plea agreement and an expected benefit for the State. Moreover, our statutes and case law provide clear direction that plea agreements are not final until they are approved by the court and finalized in the judgment of the court. *See*, *e.g.*, *State v. Marlow*, 334 N.C. 273, 281 (1993) (recognizing that the State can rescind a plea agreement prior to approval by the court so long as the defendant did not detrimentally rely upon the agreement); N.C.G.S. § 15A-1023(b) (2023) (stating that a plea agreement containing a sentencing recommendation must have judicial approval before becoming effective). These established requirements for plea agreements and the *Reynolds* rule for plea agreements provide guardrails sufficient to ensure that a defendant cannot trap the State in an unfair agreement while retaining his or her right to appeal.

In this case, Mr. Jonas did not receive any benefit from the State for entering a guilty plea to the charge. Mr. Jonas was charged with possession of 0.1 grams of methamphetamine, a class I felony. At the time of the sentencing hearing, the court asked Mr. Jonas if the plea was subject to any agreement with the State, and Mr. Jonas indicated that it was not. The court then stated, "I understand this is an open plea, meaning it will be up to me what the sentence is." The State entered no objection to the accuracy of that statement. Based upon his prior record level, Mr. Jonas was sentenced to a minimum of six months and a maximum of seventeen months in custody, in the presumptive range for a class I felony. The sentence was suspended, and Mr. Jonas was placed on thirty months of supervised probation. Before entering his guilty plea, Mr. Jonas served 101 days in custody, and he was given credit for that time served toward his sentence. While the trial court did suspend the sentence, it was not at the recommendation of the State, and by entering an open guilty plea, Mr. Jonas secured his immediate release from incarceration. At the sentencing hearing, the State knew that the trial court had previously denied the motion to suppress—the State emphasized that it was ready to go to trial, that the plea was being entered on the eve of trial, and the State made no objection when the court explained that it was an open plea and sentencing was entirely within the court's discretion. The sentencing hearing began at 2:53 p.m. and concluded at 3:07 p.m. In the course of that fourteen minutes, Mr. Jonas pleaded guilty and verbally noticed his appeal of the denial of his motion to suppress. In short, nothing about the facts of this case suggest that the concerns implicated in *Reynolds* dictate the same outcome here—there were no

negotiations, no surprise, and no belabored extensions of the proceedings as in *Reynolds*.

Even beyond the facts of this case, there is no justification to expand the application of *Reynolds* to abrogate the statute's application to open pleas. The legislature enacted N.C.G.S. § 15A-979 to allow a defendant whose only real defense is a motion to suppress to preserve his right of appeal without compelling the State to go through a trial. N.C.G.S. § 15A-979, Official Commentary. While this Court ruled in *Reynolds* that the statute did not apply to cases where a plea arrangement had been negotiated, because the principles of fundamental fairness in the justice system required it, we do not treat lightly the impact of expanding the *Reynolds* rule would have here. Criminal defendants are not required by any statute to engage in plea negotiations with the State, and both the State and any defendant remain free to negotiate a plea agreement that would create a final resolution and invoke the *Reynolds* rule. We hold today that when defendants enter a guilty plea without any plea agreement, they do not need to provide notice of intent to appeal before the entry of a guilty plea to retain their statutory right to appeal under N.C.G.S. § 15A-979.

Our holding today does not disturb the rule set forth in *Reynolds* and referenced in *Tew*: when a defendant enters a plea in accordance with a plea agreement and intends to appeal from the denial of a suppression motion pursuant to N.C.G.S. § 15A-979(b), he or she must give notice of his or her intent to appeal before the court accepts the plea or he or she will waive the appeal of right provision of the statute. *See Reynolds*, 298 N.C. at 397.

III. Conclusion

We hold that a defendant who pleads guilty without a plea agreement is not required to provide notice of intent to appeal prior to entry of the guilty plea to retain his right to appeal both the denial of the suppression motion and the judgment pursuant to N.C.G.S. § 15A-979. Accordingly, we affirm the decision of the Court of Appeals.

AFFIRMED.

Chief Justice NEWBY, dissenting.

The sole issue presented in the State's petition for discretionary review is whether a criminal defendant has preserved his statutory right to appeal a denied motion to suppress when he fails to give notice of his

intent to appeal before he pleads guilty without a plea agreement. This Court answered this question in the negative in *State v. Tew*, 326 N.C. 732, 392 S.E.2d 603 (1990). Because the majority silently overturns that thirty-four-year-old precedent and disrupts criminal procedure in this State, I respectfully dissent.

Defendant was indicted for Possession of a Schedule II Controlled Substance on 28 June 2019. On 31 October 2019, defendant moved to suppress the evidence, arguing it was seized in violation of his rights under the United States Constitution and the North Carolina Constitution. On 19 November 2019, the trial court denied his motion. The State was fully prepared for trial.

On 3 March 2020, defendant personally pled guilty at a plea hearing, and he did not couch his guilt as an "*Alford* plea" pursuant to *North Carolina v. Alford*, 400 U.S. 25, 91 S. Ct. 160 (1970), or as a no-contest plea.[1] When the trial court asked defendant if he was in fact guilty, defendant responded, "Yes, sir." The Plea Transcript reflects defendant's acknowledgment of guilt.

When the trial court asked defendant if he was pleading guilty as part of a plea agreement, defendant answered, "No, sir." The trial court responded, "No. There's not [a plea agreement] listed here. I understand this is an open plea . . . ?" Defendant responded, "Yes, sir." The Plea Transcript reflects that defendant pled guilty but that his plea was not part of a plea agreement.

Throughout the plea colloquy, defendant did not give the prosecutor or the trial court notice of his intent to appeal the denied motion to suppress. Accordingly, the Plea Transcript also does not contain a statement reserving defendant's right to appeal the denied motion.

Defendant, defense counsel, the prosecutor, and the trial court signed the Plea Transcript, and the trial court accepted defendant's unilateral guilty plea. The trial court then sentenced defendant to a suspended sentence of six to seventeen months and placed defendant on

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1. *See generally State v. Taylor*, 374 N.C. 710, 719 n.3, 843 S.E.2d 46, 52 n.3 (2020) ("An *Alford* plea is a type of guilty plea recognized by North Carolina's General Court of Justice in which a criminal defendant accepts that the State has sufficient evidence to convict him, but the defendant does not actually admit his guilt."); *State v. Norman*, 276 N.C. 75, 79, 170 S.E.2d 923, 926 (1969) ("A plea of nolo contendere [(no contest)] is a formal declaration on [the] defendant's part that he will not contend with the State in respect to the charge and is tantamount to a plea of guilty for purposes of the particular criminal action in which it is tendered and accepted.").

supervised probation for thirty months. Only thereafter did defendant orally give notice of appeal "with regard to the motion to suppress."

On appeal, the Court of Appeals considered whether this Court's decision in *State v. Reynolds* required defendant to give notice of his intent to appeal before unilaterally pleading guilty without a plea agreement. *State v. Jonas*, 280 N.C. App. 511, 515–16, 867 S.E.2d 563, 566 (2021). *See generally State v. Reynolds*, 298 N.C. 380, 397, 259 S.E.2d 843, 853 (1979) ("[W]hen a defendant intends to appeal from a suppression motion denial pursuant to [N.C.]G.S. [§] 15A-979(b), he must give notice of his intention to the prosecutor and the court before plea negotiations are finalized or he will waive the appeal of right provisions of the statute."), *cert. denied*, 446 U.S. 941, 100 S. Ct. 2164 (1980). The Court of Appeals distinguished *Reynolds* because that case involved a negotiated plea, whereas defendant in the present case entered a unilateral plea without a plea agreement. *Jonas*, 280 N.C. App. at 516, 867 S.E.2d at 567. Accordingly, the Court of Appeals held that defendant was not required to give notice of his intent to appeal the denied suppression motion. *Id.* The court reasoned that because defendant did not negotiate his plea, the State was "not 'trapped into agreeing to a plea bargain' only to later 'have[ ] [d]efendant contest that bargain.' " *Id.* (first alteration in original) (quoting *Reynolds*, 298 N.C. at 397, 259 S.E.2d at 853). The Court of Appeals therefore concluded it had appellate jurisdiction. *Id.* at 517, 867 S.E.2d at 567. On the merits, the Court of Appeals reversed the trial court's suppression order and remanded the case. *Id.* at 525, 867 S.E.2d at 571.

The State sought discretionary review only as to whether defendant was required to provide notice of his intent to appeal. This Court allowed the State's petition on 17 August 2022.

This Court must decide whether defendant preserved his statutory right of appeal when he did not give notice of his intent to appeal a denied motion to suppress before he unilaterally pled guilty. This is a question of law. Questions of law are reviewed de novo. *State v. Khan*, 366 N.C. 448, 453, 738 S.E.2d 167, 171 (2013).

A defendant does not have a constitutional right to appeal a criminal conviction. *State v. Berryman*, 360 N.C. 209, 212–14, 624 S.E.2d 350, 353–54 (2006). Rather, a "criminal defendant's right to appeal a conviction is provided entirely by statute." *Id.* at 214, 624 S.E.2d at 354. The General Statutes provide a broad right of appeal to defendants who enter pleas of not guilty and are subsequently convicted. N.C.G.S. § 15A-1444(a) (2023) ("A defendant who has entered a plea of not guilty to

a criminal charge, and who has been found guilty of a crime, is entitled to appeal as a matter of right when final judgment has been entered.").

The General Statutes are not so generous, however, towards defendants who plead guilty or no contest. Indeed, a defendant who enters a plea of guilty or no contest "is not entitled to appellate review [of his conviction] as a matter of right" except in a few statutorily prescribed circumstances. *Id.* § 15A-1444(e).

Relevant here, subsection 15A-979(b) provides that "[a]n order finally denying a motion to suppress evidence *may be* reviewed upon an appeal from a judgment of conviction, including a judgment entered upon a plea of guilty." *Id.* § 15A-979(b) (emphasis added). Accordingly, "[although] generally a defendant who pleads guilty to criminal charges may not appeal from the resulting conviction, a trial court's order denying a motion to suppress evidence may be reviewed upon an appeal from a guilty plea." *State v. Robinson*, 383 N.C. 512, 518 n.1, 881 S.E.2d 260, 264 n.1 (2022) (citations omitted) (first citing N.C.G.S. § 15A-1444(a1) (2021); and then citing *id.* § 15A-979(b)).

As a matter of issue preservation, however, this Court requires a defendant to be forthright with both the trial court and the prosecutor if he wishes to pursue an appeal under subsection 15A-979(b). *Reynolds*, 298 N.C. at 397, 259 S.E.2d at 853; *Tew*, 326 N.C. at 735, 392 S.E.2d at 605; *cf.* N.C. R. App. P. 10(a) (requiring parties to raise issues at the trial court, thereby inhibiting their ability to conceal issues until appeal). *See generally* N.C. Const. art. IV, § 13, cl. 2 ("The Supreme Court shall have exclusive authority to make rules of procedure and practice for the Appellate Division."). Gamesmanship with criminal justice is not tolerated, and a defendant must disclose his intent to appeal a denied motion to suppress before plea negotiations are finalized or terminated and the plea is accepted. *See Reynolds*, 298 N.C. at 397, 259 S.E.2d at 853; *see also Tew*, 326 N.C. at 735, 392 S.E.2d at 605. If the defendant does not, he has failed to preserve his right to appeal, and the appellate courts may not hear his appeal.

This fundamentally fair rule originated in this Court's opinion in *State v. Reynolds*. There, the defendant negotiated plea agreements with the State after the trial court denied his motion to suppress evidence. 298 N.C. at 388, 259 S.E.2d at 848. The defendant then appealed the denied suppression motion "[i]mmediately after the sentence was imposed." *Id.* The trial court, however, determined that the defendant had waived his right to appeal because he did not disclose his intention to appeal before entry of the pleas. *Id.* at 389, 259 S.E.2d at 848. This Court agreed with

the trial court. *See id.* at 394–97, 259 S.E.2d at 852–53. We held that to preserve subsection 15A-979(b)'s statutory right to appeal, a defendant must give notice of his intent to appeal the denial of a motion to suppress to the prosecutor and the trial court "before plea negotiations are finalized." *Id.* at 397, 259 S.E.2d at 853. We reasoned that notice of intent to appeal a denied suppression motion prior to pleading guilty is necessary because "the State acquires a legitimate expectation of finality" when a "defendant chooses to bypass the orderly procedure for litigating" a criminal case. *Id.* (quoting *Lefkowitz v. Newsome*, 420 U.S. 283, 289, 95 S. Ct. 886, 889 (1975)); *see also id.* ("The plea bargaining table does not encircle a high stakes poker game. It is the nearest thing to arm's length bargaining the criminal justice system confronts. As such, it is entirely inappropriate for either side to keep secret any attempt to appeal the conviction."). Ultimately, *Reynolds* turned on fairness to the State—and, inherently, the victims it represents.

Eleven years later, this Court decided *Tew* and extended *Reynolds*'s holding to cases in which the defendant does not plead guilty in exchange for promises from the State. In *Tew* the defendant moved to suppress evidence discovered during his arrest. 326 N.C. at 734, 392 S.E.2d at 604. The trial court denied the defendant's motion to suppress. *Id.* The defendant then immediately pled guilty while "specifically reserving his right to appeal the denial of his motion to suppress." *Id.* Even though it did not appear that the defendant entered his plea pursuant to a plea agreement,[2] this Court still applied the notice requirement from *Reynolds*. *Id.* We stated, in full,

> This Court has held that when a defendant intends to appeal from the denial of a suppression motion pursuant to [subsection § 15A-979(b)], he must give notice of his intention to the prosecutor and to the court before plea negotiations are finalized; otherwise, he will waive the appeal of right provisions of the statute. *State v. Reynolds*, 298 N.C. 380, 259 S.E.2d 843 (1979), *cert. denied*, 446 U.S. 941, 64 L. Ed. 2d 795 (1980). In the case *sub judice*, defendant did in fact specifically reserve his right to appeal upon entering his plea of guilty. *Consequently, the path has been paved for us now to address the substantive issue presented.*

2. The majority acknowledges that the record in *Tew* is bereft of *any* evidence suggesting that the defendant's plea was pursuant to a plea agreement.

Id. at 735, 392 S.E.2d at 605 (emphasis added). This Court then addressed the merits of the defendant's appeal. *Tew* therefore extended the *Reynolds* rule to situations in which defendants unilaterally plead guilty without plea agreements.

According to these long-standing precedents, a defendant must give notice to the trial court and the prosecutor of his intent to appeal the denial of a motion to suppress before the trial court accepts the guilty plea—regardless of whether the plea is pursuant to a plea agreement. As this Court recently summarized,

> a defendant who wishes to maintain a right to appeal from the denial of a motion to suppress despite pleading guilty after the denial of the motion must either include in the plea transcript a statement reserving the right to appeal the motion to suppress or orally advise the trial court and the prosecutor before the conclusion of plea negotiations that the defendant intends to appeal the denial of the motion to suppress.

Robinson, 383 N.C. at 518 n.1, 881 S.E.2d at 264 n.1.

Here defendant gave neither the trial court nor the prosecutor notice that he intended to appeal the denied suppression motion prior to the trial court's acceptance of his guilty plea. Indeed, defendant did not even mention the prospect of appealing the denied suppression motion until after the trial court conducted the plea colloquy, accepted his plea, and pronounced a sentence. Therefore, defendant failed to abide by the rule set forth in *Reynolds* and *Tew*. Accordingly, he did not preserve his statutory right to appeal.

The majority, however, holds that criminal defendants need not give notice of their intent to appeal a denied motion to suppress to the prosecutor or the trial court before unilaterally pleading guilty. By so holding, the majority dismisses *Tew* as irrelevant because the Court did not expressly state that *Reynolds* applies to unnegotiated, unilateral plea deals. This conclusion is wrong because it ignores the fact that *Tew* plainly applied the *Reynolds* rule in a situation in which the defendant did not plead pursuant to a plea agreement. If the Court in *Tew* had not intended to extend *Reynolds* to situations in which a defendant unilaterally pleads guilty without a plea agreement, we would have simply addressed the defendant's appeal without first considering if he satisfied the rule in *Reynolds*. Indeed, we would not have said the "path has been paved" to consider defendant's appeal unless a path needed paving. *Tew*, 326 N.C. at 735, 392 S.E.2d at 605. This Court therefore recognized

a consequential relationship between the defendant's actions at the trial court and this Court's willingness to consider his appeal. *See id.* ("*Consequently*, the path has been paved for us now to address the substantive issue presented." (emphasis added)).

Tew's extension of *Reynolds*'s holding makes sense. As this Court has held, "there is no absolute right to have a guilty plea accepted." *State v. Collins*, 300 N.C. 142, 148, 265 S.E.2d 172, 176 (1980). Accordingly, in virtually all criminal cases, the defendant and the prosecutor are in an ongoing dialogue—that is, negotiations—about potential plea agreements. These discussions often continue right up until the very moment a plea is entered. And even assuming those talks do not culminate in a plea agreement and the defendant instead pleads in an open plea, the prosecutor is under no obligation to assent to that plea. Rather, a prosecutor may reject the defendant's unilateral plea. Therefore, *any* time a plea is entered and a prosecutor signs a plea transcript, the concerns espoused in *Reynolds* are implicated. A defendant should not be able to take the State by surprise and subsequently renege on his guilty plea if he did not give fair notice of his intent to appeal a denied motion to suppress.

The majority's attempt to distinguish between negotiated pleas and open pleas also falls flat. The majority artificially reduces *Reynolds*'s justifications and oversimplifies the downstream effects of an open plea. Undeniably, there is no risk of the State being duped or "trapped" in a bad bargain when the defendant does not plead pursuant to a plea agreement. *Reynolds*, 298 N.C. at 397, 259 S.E.2d at 853. That, however, was not *Reynolds*'s sole concern. Rather, this Court also highlighted that when a defendant chooses to plead guilty and "bypass the orderly procedure" of the trial, "the State acquires *a legitimate expectation of finality* in the conviction thereby obtained." *Id.* (emphasis added) (quoting *Lefkowitz*, 420 U.S. at 289, 95 S. Ct. at 889). This expectation of finality does not disappear simply because the State did not negotiate the ultimate plea with the defendant.

Indeed, in many cases guilty pleas are entered on the verge of trial—after weeks or months of trial preparation. And as this case well illustrates, a case can take several years to wind its way through the appellate courts. During that time, many factors can undermine the State's readiness for trial—witnesses' memories may fade; witnesses may die or become unavailable; evidence may be accidentally lost or destroyed; the prosecutor's office may experience drastic turnover; et cetera. These concerns are present in all pleas, whether entered under an plea agreement or not. Accordingly, any time a defendant pleads

guilty without giving notice of his intent to appeal a denied motion to suppress, the State rightfully obtains a legitimate expectation that the guilty plea is the end of that case.

And in many cases, guilty pleas also affect another person: the victim. If a defendant admits his guilt without sharing his intent to appeal the conviction, the victim and the victim's family and friends are left to believe that the case is over. If the defendant is then able to appeal the conviction despite giving no indication of his plan to do so, the victim and the victim's family and friends are robbed of their sense of closure. The lack of finality for victims and their family and friends is especially troubling in cases in which the defendant admits his guilt.

For all these reasons, I would reaffirm *Tew*'s holding and reiterate this Court's bright-line rule: for *all* pleas, in order to preserve his statutory right to appeal, a criminal defendant must give notice of his intent to appeal a denied motion to suppress to the prosecutor and the trial court before he pleads guilty.[3] That requirement was not met here. Accordingly, I would reverse the decision of the Court of Appeals. Because the majority unjustifiably departs from our longstanding precedent and thereby alters criminal procedure in this State, I respectfully dissent.

Justice BERGER joins in this dissenting opinion.

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3. Rather than overturning *Tew*, any error at the trial court would best be addressed via an ineffective assistance of counsel claim. *See generally State v. Thompson*, 359 N.C. 77, 115, 604 S.E.2d 850, 876 (2004) ("[To prevail on an ineffective assistance of counsel claim,] [a] defendant must first show that his defense counsel's performance was deficient and, second, that counsel's deficient performance prejudiced his defense. Deficient performance may be established by showing that 'counsel's representation "fell below an objective standard of reasonableness." ' Generally, 'to establish prejudice, a "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ' " (citations omitted) (first citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984), and then quoting *Wiggins v. Smith*, 539 U.S. 510, 521, 534, 123 S. Ct. 2527, 2535, 2542 (2003))).

STATE v. REBER

[386 N.C. 153 (2024)]

STATE OF NORTH CAROLINA
v.
JOSHUA DAVID REBER

No. 138A23

Filed 23 May 2024

1. Evidence—other bad acts—child rape trial—plain error analysis—standard for determining prejudice—probable impact

In evaluating whether the admission of portions of defendant's cross-examination testimony—regarding text messages and sexual encounters with an adult girlfriend—during his trial for rape and sexual abuse of a child constituted plain error, the Supreme Court reaffirmed that the prejudice prong of the three-factor test for plain error requires an evaluation of whether there is a reasonable probability that, but for the errors complained of, the jury would have returned a different result. In this case, which hinged mostly on witness credibility, where the victim recounted specific details of abuse perpetrated by defendant and where there were issues with defendant's credibility, defendant failed to demonstrate that a different outcome probably would have been reached if the challenged evidence was excluded; therefore, defendant did not meet the standard for showing prejudice and was not entitled to a new trial.

2. Criminal Law—prosecutor's closing argument—child rape trial—defendant's sexual history—not grossly improper

In defendant's trial for multiple counts each of rape of a child and sex offense with a child, a prosecutor's closing argument was not so grossly improper as to require the trial court to intervene ex mero motu. First, the prosecutor's reference to a sexual encounter defendant had with an adult girlfriend was based on evidence that the Supreme Court held, under a separate analysis, had not been impermissibly admitted. Second, where the prosecutor insinuated that, based on defendant's statements that he did not use a condom during sex with adult partners, defendant could have gotten the child victim pregnant or infected her with a sexually transmitted disease, although the statement constituted an improper appeal to the jury's emotions, it was an isolated statement that was not so egregious as to require the trial court's intervention on its own initiative.

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, 289 N.C. App. 66 (2023), reversing a judgment entered on 9 August 2021 by Judge Forrest D. Bridges in Superior Court, Ashe County, and remanding the case. Heard in the Supreme Court on 13 February 2024.

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

Daniel M. Blau for defendant-appellee.

DIETZ, Justice.

Defendant Joshua Reber appeals his convictions for raping and sexually abusing a young child. A divided panel of the Court of Appeals held that the trial court committed plain error by admitting certain evidence from the State's cross-examination of Reber and erred by failing to intervene on its own initiative when the State made improper remarks during closing argument.

As explained below, the Court of Appeals majority did not properly apply the exacting standards of review for these unpreserved issues. Applying those standards, Reber failed to satisfy the prejudice prong of plain error review and failed to show that the State's remarks were so grossly improper that they compelled the trial court to intervene *ex mero motu*. We therefore reverse the decision of the Court of Appeals and remand for consideration of Reber's remaining arguments.

Facts and Procedural History

In 2015, eleven-year-old K.W.[1] became close with a boy from school that she considered her boyfriend. This relationship made K.W. feel guilty because she worried she was "cheating on him." For several years, Reber, a friend of K.W.'s family, had been taking K.W. to isolated locations, such as a deer blind in the woods near her house, and sexually abusing her.

1. Under Rule 42(b) of the North Carolina Rules of Appellate Procedure, the parties agreed to use the initials "K.W." to refer to the juvenile. We use the initials agreed to by the parties.

Ultimately, K.W. confided in her school-age boyfriend, who insisted that she tell her mother about Reber's abuse. K.W.'s mother contacted law enforcement, who immediately began an investigation. The State later charged Reber with multiple counts of rape of a child and sexual offense with a child. The case went to trial in 2021.

At trial, K.W. recounted in excruciating detail how, beginning when she was eight years old, Reber took her into the woods without telling her family, often late at night, where he sexually abused her.

Reber took the stand in his own defense and acknowledged taking K.W. into the woods alone at night without telling anyone. But he denied that he ever raped or sexually abused K.W. During his testimony, Reber described normal sexual relationships he had with adult women, including a woman named Danielle. He explained that his romantic relationship with Danielle started in the fall of 2015, and before that, Danielle was "just a friend."

On cross-examination, the prosecutor pursued a series of questions that were based on Reber's testimony about his relationship with Danielle. The prosecutor first asked about text messages recovered from Reber's phone during the time period when he claimed Danielle was "just a friend."

In the first series of text messages, Reber told Danielle that he remembered seeing her bare breasts when they had a previous romantic encounter. After Danielle stated that she did not remember that event, Reber replied, "You did get drunk pretty fast." Reber did not object to this question and answer.

Later in the questioning, the prosecutor asked Reber about another text exchange with Danielle. These text messages concerned Reber's attempts to find a place to have sex with Danielle.

In the messages, Reber expressed concern about getting a motel room to have sex because he would need to take his daughter with him, and she might tell his grandparents that he was having sex. Reber's grandparents had strong religious beliefs and insisted that he not engage in sexual activity outside of marriage.

In the text exchange with Danielle, Reber acknowledged that if they went to a hotel to have sex, he could ask his daughter not to say anything to his grandparents. The prosecutor then asked Reber, "So you would encourage a child, if asked, not to tell on you?" Reber responded, "Well, on that set of circumstance[s], yes." Reber also did not object to this line of questioning.

The prosecutor also established without objection that Reber had sex with a number of women using a method that Reber referred to as the "pull-out" method, during which he did not use a condom or any form of contraception.

During closing argument, the prosecutor made two statements that referenced Reber's testimony described above. The first statement referenced Reber's sexual history with Danielle:

> Danielle, a woman who when he was developing a friendship, his first sexual encounter with her involved taking her boobs out of her shirt and having intercourse with her and you've seen the text messages to show that she was too drunk to even remember it to even remember taking her shirt off.

The second statement regarded Reber's use of the "pull-out" method of contraception during sexual intercourse:

> An eight- to 11-year-old child having sex with a man 16 years her senior who by his own testimony is sleeping with other women in this community with no protection. You think about that. You think about an eight- or nine-year-old walking around pregnant. You think about an eight- or nine-year-old poking around with herpes or gonorrhea or syphilis or Aids [sic].

Reber did not object to these statements during closing argument.

The jury found Reber guilty of four counts of rape of a child and six counts of sex offense with a child. The trial court sentenced Reber to two consecutive terms of 300 to 420 months in prison.

Reber appealed and argued that it was plain error to admit the cross-examination testimony described above. Reber also argued that it was reversible error to permit the prosecutor to make the statements during closing argument that are quoted above.

A divided Court of Appeals reversed Reber's convictions and ordered a new trial. *State v. Reber*, 289 N.C. App. 66, 83 (2023). The majority held that the introduction of the challenged evidence on cross-examination amounted to plain error and that the prosecutor's statements during closing argument were so grossly improper that the trial court should have intervened on its own initiative. *Id.* at 74, 82. The dissent asserted that "even assuming" there were evidentiary errors, Reber could not meet the prejudice prong of plain error review because he failed to show

"that the jury's verdict *probably* would have been different had the jury not heard this testimony." *Id.* at 83–84 (Dillon, J., dissenting). The dissent also concluded that the statements during closing argument were not grossly improper and therefore not reversible error. *Id.*

The State filed a timely notice of appeal based on the dissent. *See* N.C.G.S. § 7A-30(2) (2023).

Analysis

I. Evidentiary challenges

[1] We begin with the Court of Appeals' analysis of Reber's evidentiary challenges. Reber's appeal from the admission of his cross-examination testimony turns on the application of a standard of review known as "plain error." Ordinarily, to preserve an issue for appellate review, a litigant must raise the issue and secure a ruling from the trial court. N.C. R. App. P. 10(a)(1). For evidentiary and instructional errors, this typically requires the party challenging the evidence or jury instruction to make a timely objection. *Id.* Without an objection, that error is deemed unpreserved, and the issue is therefore waived on appeal. *State v. Lawrence*, 365 N.C. 506, 512 (2012).

This preservation rule serves crucial functions in our justice system. First, and most obviously, it promotes the efficiency of a justice system with limited resources. *State v. Odom*, 307 N.C. 655, 660 (1983). When a party alerts the trial court of a potential error, the court can correct it. For example, with an evidentiary objection, the trial court can refuse to admit the evidence or offer a limiting instruction to the jury. If the error is not identified until after the trial, the only option is to set aside the judgment and order a new trial. *See id.* This is an incredibly costly alternative.

Second, this preservation rule reduces the risk of "gamesmanship" in the appellate process. *State v. Bursell*, 372 N.C. 196, 199 (2019). As noted above, when there is a reversible evidentiary or instructional error in a criminal trial, the remedy on appeal is to vacate the judgment and remand for a new trial. A preservation requirement "prevents parties from allowing evidence to be introduced or other things to happen during a trial as a matter of trial strategy and then assigning error to them if the strategy does not work." *Id.* (cleaned up).

Despite the important functions of this preservation rule, its application can be harsh. There will be times when the lack of preservation means the trial court committed a reversible error but the aggrieved party cannot raise that error on appeal.

Plain error exists for the rare cases where the harshness of this preservation rule vastly outweighs its benefits. When we first recognized the rule in *Odom*, we emphasized that it was available only in extraordinary cases. 307 N.C. at 660. We explained that it should be "applied cautiously and only in the exceptional case," that it is reserved for "grave error which amounts to a denial of a fundamental right of the accused," and that it focuses on error that has "resulted in a miscarriage of justice" or the denial of a "fair trial." *Lawrence*, 365 N.C. at 516–17 (quoting *Odom*, 307 N.C. at 660).

When we issued our "doctrinal statement" on plain error in *Lawrence*, we incorporated these principles into a three-factor test: First, the defendant must show that a fundamental error occurred at trial. 365 N.C. at 518. Second, the defendant must show that the error had a "probable impact" on the outcome, meaning that "absent the error, the jury probably would have returned a different verdict." *Id.* at 518–19. Finally, the defendant must show that the error is an "exceptional case" that warrants plain error review, typically by showing that the error seriously affects "the fairness, integrity or public reputation of judicial proceedings." *Id.* at 518.[2]

In the years since *Lawrence*, the Court of Appeals consistently has struggled with the application of the second prong of this test. *See*, *e.g.*, *State v. Towe*, 366 N.C. 56, 61–62 (2012) (rejecting Court of Appeals' plain error analysis); *State v. Juarez*, 369 N.C. 351, 358 (2016) (same); *State v. Maddux*, 371 N.C. 558, 565 (2018) (same).

This struggle appears to stem from the word choice in *Lawrence*. When initially describing this second prong (which we will refer to as the "prejudice" prong), *Lawrence* stated that "a defendant must establish prejudice—that, after examination of the entire record, the error

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2. The reasoning of our dissenting colleagues relies entirely on the premise that plain error does not have a multi-factor test and instead is a sort of holistic analysis. This reasoning is inconsistent with how *Lawrence* articulated the test. Moreover, in *Lawrence* we explained that "this Court relied heavily on the federal standard when it adopted plain error review." *Id.* at 515. We then examined in detail the "four-factor test" for plain error in federal doctrine, evaluating each "prong" of that analysis before condensing it into our own three-factor test for state doctrine (combining the "error" and "plain" factors into one "fundamental error" factor). *Id.* at 515–18. No decision of this Court has ever suggested that the multiple factors in *Lawrence* (inspired by the multiple factors in the federal test) are not, in fact, multiple factors. The dissent's new theory of plain error—that it involves one holistic analysis—is an invention not from our precedent, but from necessity. It is necessary both to justify the dissent's disagreement with our prejudice analysis and to justify the dissent's lengthy analysis of issues that were not the basis of the Court of Appeals dissent. *See post*, footnote 3.

had a *probable impact* on the jury's finding that the defendant was guilty." *Lawrence*, 365 N.C. at 518 (cleaned up) (emphasis added).

In isolation, this standard appears similar to other standards used to measure prejudice. For example, when an evidentiary error is preserved in our state system, the harmless error test asks whether the defendant has shown a "reasonable possibility" that, but for the error, the jury would have reached a different result. *State v. Brichikov*, 383 N.C. 543, 557 (2022). As we have explained, this is "a non-exacting inquiry." *Id.* After all, there can be a reasonable possibility of some event occurring even if it is not the most likely outcome.

Similarly, in claims for ineffective assistance of counsel, the test for prejudice asks whether there is a "reasonable probability" that, absent the errors, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 695 (1984). To satisfy this test, the defendant "need not show that counsel's deficient conduct *more likely than not* altered the outcome in the case." *Id.* at 693 (emphasis added). This is so because, as with a "reasonable possibility," there can be a "reasonable probability" of some event occurring even if a different outcome is even more probable.

Although the phrase "probable impact" in the plain error test might appear similar to these other standards, *Lawrence* further articulated the test in a way that makes it far more exacting. When the Court described the test for showing a "probable impact," it quoted language from *State v. Walker* examining whether "absent the error the jury *probably would have* reached a different verdict." *Lawrence*, 365 N.C. at 518 (emphasis added) (quoting *State v. Walker*, 316 N.C. 33, 39 (1986)). When we then applied the "probable impact" test to the facts in *Lawrence*, we followed *Walker*'s language and examined whether absent the error, the jury *probably would have* returned a different verdict. *Id.* at 519.

This wording is important because this standard—showing that a jury *probably would have* reached a different result—requires a showing that the outcome is significantly more likely than not. In ordinary English usage, an event will "probably" occur if it is "almost certainly" the expected outcome; it is treated as synonymous with words such as "presumably" and "doubtless." *Probably*, New Oxford American Dictionary (3d ed. 2010); *Probably*, Merriam-Webster's Collegiate Dictionary (11th ed. 2007).

Since *Lawrence*, this Court has repeatedly disavowed approaches to the prejudice analysis that weaken this exacting standard. For example,

in *Towe*, we rejected a Court of Appeals decision that held there was a "probable impact" because it was "highly plausible that the jury could have reached a different result." 366 N.C. at 61–62. We reiterated that "the plain error standard requires a determination that the jury *probably would have* returned a different result." *Id.* at 57.

In *Maddux*, we rejected a Court of Appeals holding that a "lack of overwhelming and uncontroverted evidence against defendant required the conclusion that a jury probably would have reached a different result." 371 N.C. at 564–65. We emphasized that the proper consideration was not the strength of the State's evidence, but whether, "absent the error, the jury probably would have reached a different result." *Id.* at 564. Similarly, in *Juarez*, we rejected the Court of Appeals' plain error analysis and again emphasized that the standard requires a showing that it is "probable, not just possible," that the outcome would have been different absent the error. 369 N.C. at 358.

The Court of Appeals majority in this case again failed to apply the exacting prejudice standard required for plain error review. The majority concluded that the plain error test was satisfied because the challenged evidence from Reber's cross-examination was "highly prejudicial" and therefore "made it more likely that the jury would convict Defendant based on his character, rather than the facts presented." *Reber*, 289 N.C. App. at 78. Thus, the Court of Appeals reasoned, the challenged evidence had a probable impact on the outcome. *Id.* at 79.

This analysis is not consistent with our precedent. The question is not whether the challenged evidence made it more likely that the jury would reach the *same* result. Instead, the analysis is whether, without that evidence, the jury probably would have reached a *different* result. This is a crucial distinction because something can become more likely to occur yet still be far from *probably* going to occur.

This case serves as an example of this principle. Although the State's only direct evidence of Reber's crimes was K.W.'s own testimony, there was plenty of surrounding evidence that supported K.W.'s credibility. K.W. described her sexual abuse using details that an eleven-year-old child otherwise would not be expected to know. Reber provided no explanation for how K.W. could have known these details of sexual activity.

Reber denied K.W.'s allegations in his own testimony, but there were a number of credibility issues with that testimony. First, Reber conceded that he was alone with K.W. during many of the times when K.W. alleged that the abuse occurred. For example, K.W. testified that Reber repeatedly sexually abused her in a deer blind near her house. Reber admitted

that he took K.W. to that deer blind or a nearby picnic table without telling K.W.'s parents. When the prosecutor asked Reber about taking an "8- to 11-year-old, out into the dark with a man 16 years older than her" without telling her parents or anyone else, Reber simply responded that he "didn't really see nothing wrong with it."

K.W. also testified that she used Snapchat to communicate and send nude photos back and forth with Reber. K.W. explained that they used Snapchat to exchange the nude photographs, rather than other social media applications, because photographs "disappear on Snapchat."

In his trial testimony, Reber insisted that he never used Snapchat, explaining that he "couldn't figure it out" and "didn't understand how to really mess with that too much." But the prosecutor established with Reber that he was "really tech savvy" and would often fix computer issues for his girlfriend, grandmother, and for residents of a nearby group home. The prosecutor also established that he regularly played sophisticated video games. This line of questioning led to the following exchange:

> Q. But you couldn't figure out how to use Snapchat?
>
> A. Well, I'm not real big on pictures and stuff so I really didn't even try.
>
> Q. So you've gone from not being able to figure it out to not really trying?
>
> A. Well, I didn't — couldn't figure it out anyways, but I didn't even try to figure it out even if I wanted. I mean, there was no need to.

When investigators seized Reber's cell phone, they discovered that all of the social media applications had an installation date in May 2015, the month after K.W. alleged that the abuse ended. There was no data on the phone concerning Reber's social media use before that time.

To be sure, K.W. also had some potential credibility issues. For example, K.W. told her mother that Reber had a "straight" mole either on his pubic line or where his leg "meets the butt." Law enforcement took photographs of Reber's genital area that did not reveal a mole. But, to be fair, the officer who conducted the forensic inspection testified at trial that he did not take photographs of Reber's backside where his leg connects to his buttocks. The officer also acknowledged that he had never seen a "straight" mole before and that Reber had some dark veins on his genitals.

In addition, although K.W. testified that most of the sexual abuse with Reber occurred in the deer blind or at the picnic table in the woods behind her home, she testified that there were a few times when the abuse occurred at Reber's home. She described one instance in which she remained at home with Reber while members of his family went to church. Reber's grandmother contradicted this testimony, explaining that she could not recall any time that K.W. stayed behind with Reber while others went to church.

All of this is to say that, disregarding the challenged evidence, this was a fairly close case for the jury, based mostly on witness credibility. But a close case is not enough to prevail on the prejudice prong of plain error. The Court of Appeals majority focused on the "highly prejudicial" impact of the challenged evidence and how that evidence "made it more likely" that the jury would convict. *Reber*, 289 N.C. App. at 78.

As explained above, the question on plain error is not whether the challenged evidence increased the likelihood of the jury reaching the *same* verdict. It examines the opposite question—whether, absent that evidence, the jury probably would have returned a *different* verdict. *Lawrence*, 365 N.C. at 519. In other words, the test examines the state of all the evidence except for the challenged evidence and asks whether, in light of that remaining evidence, the jury probably would have done something different.

Reber has not met that burden here. As the Court of Appeals dissent correctly acknowledged, it is certainly *possible* that the jury would have acquitted Reber. Likewise, it is certainly *possible* that the jury would have deadlocked and been unable to return any verdict. But Reber has not shown that the jury *probably* would have done so. K.W. told a compelling account of life-altering sexual abuse. She acknowledged that there were gaps in her memory but recounted specific details of the abuse on the witness stand that matched her initial descriptions with child abuse counselors many years earlier.

Reber denied the allegations in his own testimony, but the jury may have questioned his credibility, particularly in light of his admission that he took K.W. to isolated locations late at night without telling anyone and his shifting answers concerning Snapchat.

In short, viewing all the remaining evidence, this was not a particularly strong case for the State, but it also was not a case where the jury probably would have reached a different result. Accordingly, Reber

failed to satisfy the exacting standard to show plain error, and the Court of Appeals erred by holding that he did so.[3]

II. Statements during closing argument

[2] We next turn to the prosecutor's statements during closing argument. As with Reber's evidentiary challenges, this issue was not preserved by a timely objection at trial. Thus, under the general preservation rules applicable to criminal trials, this issue is waived and cannot be raised on appeal. *See* N.C. R. App. P. 10(a)(1). Moreover, plain error review does not apply to this issue because plain error is reserved for evidentiary or instructional errors. *Lawrence*, 365 N.C. at 516. Closing arguments are not evidence. *State v. Jaynes*, 353 N.C. 534, 558 (2001).

Nevertheless, this Court created a narrow exception to the preservation rules for statements during closing argument so "grossly improper" that the trial court was compelled to intervene on its own initiative. *State v. Tart*, 372 N.C. 73, 81 (2019). This is an exceedingly high bar. It applies only when the prosecutor's statements went so far beyond the "parameters of propriety" that the trial court is forced to intervene to "protect the rights of the parties and the sanctity of the proceedings." *State v. Jones*, 355 N.C. 117, 133 (2002).

Reber argues that two separate statements during the State's closing argument satisfy this "grossly improper" standard and compelled the trial court to intervene. These arguments fail for separate reasons.

Reber first points to the prosecutor's statement that he told his ex-girlfriend Danielle that he touched her bare breasts when she was too heavily intoxicated to remember.

This statement references evidence that is the subject of Reber's plain error argument discussed above. The Court of Appeals majority held that this statement was "based on improperly admitted evidence"—a

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3. Our dissenting colleagues spend considerable time addressing why Rule 404(b) of the Rules of Evidence prohibits certain character evidence, why the challenged evidence in this case was inadmissible under Rule 404(b), and why Reber did not open the door to admission of that evidence through his own testimony on direct examination. Even Reber acknowledges in his briefing that "the Rule 404(b) question is not before this Court" because that issue "was not the basis of the dissenting opinion." Indeed, the Court of Appeals dissent expressly declined to address the Rule 404(b) issue, instead explaining that "assuming" there was an error, there was no resulting prejudice. *Reber*, 289 N.C. App. at 83 (Dillon, J., dissenting). Because this case is before us solely based on the reasoning in that dissent, we lack jurisdiction to examine issues that the dissent chose not to address. *See Cryan v. Nat'l Council of YMCA*, 384 N.C. 569, 574 (2023); *Morris v. Rodeberg*, 385 N.C. 405, 415 (2023).

conclusion that followed from the majority's earlier holding that it was plain error to admit that evidence. *Reber*, 289 N.C. App. at 82.

As explained above, we reject that determination; the admission of that cross-examination testimony was not plain error. Our holding on this issue invalidates the reasoning of the Court of Appeals. It is proper for a prosecutor during closing argument to describe testimony or other evidence that was introduced during the trial. *Jaynes*, 353 N.C. at 560–61. Having determined that the introduction of this evidence was not plain error, referring to that evidence during closing argument cannot meet the "grossly improper" standard. When evidence is introduced without objection at trial and does not meet the criteria for plain error, it is well within the "parameters of propriety" for a trial court to permit that evidence to be described in closing arguments. *See Jones*, 355 N.C. at 133.

Reber next points to statements by the prosecutor that he did not use a condom when having sex with his adult partners. Relying on this evidence, the prosecutor then told the jury: "You think about that. You think about an eight- or nine-year-old walking around pregnant. You think about an eight- or nine-year-old poking around with herpes or gonorrhea or syphilis or Aids [sic]."

The Court of Appeals majority held that this remark was a "thinly veiled attempt to appeal to the jury's emotions" and was an improper attempt to portray Reber as "sexually manipulative, promiscuous, and a carrier of sexually transmitted diseases." *Reber*, 289 N.C. App. at 82.

We agree with the Court of Appeals majority that these statements were an improper appeal to the jury's emotions, rather than an appeal to reason. If Reber had timely objected, this might be a different case. But our case law has emphasized that these sorts of inflammatory statements appealing to the jury's emotions—ones that might be reversible error if preserved—still often fail to meet the much higher standard requiring the trial court to intervene on its own.

In *State v. Hamlet*, for example, the prosecutor referred to the defendant as an "animal" who was "the baddest on the block and everybody knows it." 312 N.C. 162, 172–73 (1984). We noted that it was error for a prosecutor to make "comparisons of criminal defendants to members of the animal kingdom" but held that doing so "was not so improper as to require action by the trial court *ex mero motu* given the defendant's failure to object." *Id.* at 173.

Similarly, in *State v. Murillo*, the prosecutor discredited the defendant's expert witness by telling the jury that it is the "sad state of our

legal system, that when you need someone to say something, you can find them. You can pay them enough and they'll say it." 349 N.C. 573, 604 (1998). We cited past case law holding that this type of statement was error, but ultimately held that "we cannot conclude that the prosecutor's arguments were so grossly improper as to require the trial court to intervene *ex mero motu* when, at trial, defense counsel apparently did not believe the argument was prejudicial." *Id.* at 605–06.

Here, too, we do not condone a prosecutor's request for the jury to imagine a young child becoming pregnant or suffering from various sexually transmitted diseases when there was no evidence that any of these things occurred in this case. But this isolated statement during closing argument simply does not meet the "grossly improper" standard as it has developed in our case law. As we explained in *Murillo*, unless the challenged statements meet this high bar, we cannot fault the trial court for failing to intervene when "defense counsel apparently did not believe the argument was prejudicial." *Id.* at 606. We therefore agree with the Court of Appeals dissent that this statement during closing argument, although likely objectionable, is not so egregious that it is reversible error when unpreserved.

We conclude with an observation about Reber's arguments on appeal. Every one of these arguments—the arguments on which the Court of Appeals relied for its ruling and a number of arguments that the Court of Appeals did not address—involve issues not preserved at trial. But this is hardly a case of trial counsel asleep at the switch. Reber's counsel put on a robust defense that included witnesses who contradicted the State's evidence and testimony that cast doubt on the thoroughness of the State's investigation. Reber's counsel also made copious objections to the State's evidence. The trial court sustained many of those objections.

From the perspective of the trial court, Reber and his counsel had a strategy to obtain an acquittal and were acting on it—meaning this is precisely the sort of case where the trial court may have been particularly cautious of intervening on its own initiative when defense counsel was silent, worried that doing so may undermine the defendant's strategy at trial.

In his briefing to this Court, Reber criticized the State for pointing out that his counsel's "lack of objection may have been a strategic decision." Reber's premise is correct—whether the failure to object was part of a strategic decision is irrelevant for both plain error review and the "grossly improper" standard for unpreserved objections during closing argument.

But this highlights a crucial point about these two exceptional standards of review: the bar is set exceedingly high because whenever these claims exist on direct appeal, there will be a corresponding claim of ineffective assistance of counsel that can be pursued in a motion for appropriate relief. There are several reasons why that ineffective assistance claim will often be a better vehicle to raise these issues.

First, as explained above and as the Court of Appeals dissent correctly observed, the prejudice standard for ineffective assistance claims is lower—the defendant need only show a "reasonable probability" that absent the error the jury would have reached a different result. *Strickland*, 466 U.S. at 693, 695. This means a defendant might prevail on an ineffective assistance claim even when unable to prevail on plain error review.

Second, an ineffective assistance claim brought in a motion for appropriate relief avoids the gamesmanship concern we discussed above; it provides a forum where a fact-finder can determine whether the failure to object was indeed a reasonable strategic decision, or instead a deficiency on the part of counsel. *See*, *e.g.*, *State v. Todd*, 369 N.C. 707, 712 (2017).

The record in this case does not indicate whether Reber has pursued corresponding ineffective assistance claims in a motion for appropriate relief. Nothing in our holding today precludes him from doing so.

Conclusion

We reverse the decision of the Court of Appeals and remand for consideration of Reber's remaining arguments on appeal.

REVERSED AND REMANDED.

Justice EARLS dissenting.

This case involves the introduction of Rule 404(b) evidence in a case where there is no physical or medical evidence and the only evidence that a criminal offense occurred is the testimony of the complaining witness. The outcome of this case was based solely on the jury's perception of each witnesses' credibility, including the defendant's. While the majority neglects to mention the type of evidence at issue in this case, namely that it was 404(b) character evidence, this fact is necessary to determining whether the error in Mr. Reber's case meets North Carolina's

plain error standard. In all cases, the risk of improperly admitted 404(b) evidence is that it will diminish the defendant's credibility, inflame the passions of the jury, and lead to a verdict based on an improper basis, such as emotion. *See State v. Kimbrell*, 320 N.C. 762, 768–69 (1987). However, this risk is at its highest in cases where the jury's decision is based entirely on the perceived truthfulness of witnesses.

We recently noted in a similar case where we found prejudicial plain error in the admission of testimony bearing on a witness's credibility, "where, as here, the sole direct evidence of sexual abuse is testimony from the victim, the case necessarily 'turn[s] on the credibility of the victim.' " *State v. Clark*, 380 N.C. 204, 213 (2022) (alteration in original) (quoting *State v. Towe*, 366 N.C. 56, 63 (2012)). In *Clark*, the disputed testimony related to the victim's credibility; here, the disputed testimony relates to the defendant's credibility. But in both instances, the legal issue is the same and the legal analysis should be applied in the same way. This is not in any way to diminish the severity of the offense at issue here or to ignore the implications of a new trial for the victim. Our task is to ensure that equal justice prevails, that trials are fair, and that verdicts are untainted by improper appeals to irrelevant considerations. *See*, *e.g.*, *State v. Cain*, 175 N.C. 825, 828 (1918) ("The object of a trial expressed in the oath of a juror to '[d]o equal and impartial justice between the State and the prisoner at the bar,' . . . to acquit the innocent and to convict the guilty.").

Based on our precedents, the 404(b) evidence in this case was improperly admitted and its introduction into evidence was plain error. Additionally, while Mr. Reber did not object to the prosecutor's remarks during closing arguments, those statements were based, in part, on the improperly admitted evidence and were "so grossly improper" that the trial court should have intervened *ex mero motu*. *See State v. Trull*, 349 N.C. 428, 451 (1998). By neglecting to intervene, the trial court failed to protect Mr. Reber's rights and the sanctity of the proceedings. *State v. Jones*, 355 N.C. 117, 133 (2002).

Accordingly, I dissent.

I. Background

Mr. Reber and his one-year-old daughter moved to North Carolina in 2009 to live with Mr. Reber's grandparents. After moving to the state, Mr. Reber began working in a group home where he met K.W.'s parents, Troy and Sherry. He soon began hunting with Troy and became friends with the whole family, including Troy and Sherry's five children.

In October 2015, K.W. told her mother that Mr. Reber had been "messing with her." Sherry reported the allegations to the Ashe County Sheriff's Office, and K.W. was interviewed and received a medical exam. In the interview, K.W. disclosed that Mr. Reber had been touching her sexually since she was eight years old and that the first time was one night in the deer blind after the two had been hunting. K.W. alleged that Mr. Reber abused her in multiple locations over three years: the deer blind, K.W.'s couch, K.W.'s bedroom, the bathroom in K.W.'s home, Mr. Reber's bedroom, and in the woods and a smoking spot outside Mr. Reber's home. According to K.W., the abuse ended just before her eleventh birthday in April 2015.

K.W.'s medical exam produced no physical evidence that she had been sexually abused. And while K.W. told her mother that Mr. Reber had a mole near his pubic line, no mole was found upon examination of the area by the examining nurse and Detective Lewis. Furthermore, K.W.'s allegations that she and Mr. Reber sent nude photos on Snapchat were never corroborated. Police also never found any text messages between K.W. and Mr. Reber on Mr. Reber's phone or on K.W.'s tablet.

No witness, aside from K.W., testified to any inappropriate behavior between K.W. and Mr. Reber. K.W.'s mother testified that she trusted Mr. Reber to be alone with her daughter, and Mr. Reber's grandmother, Dorothy, disputed that any abuse could have occurred in her home. Dorothy explained that she was always home when K.W. was present and the door to Mr. Reber's room always remained open when K.W. was there. Moreover, although K.W. indicated that some of the abuse occurred one morning while Mr. Reber's family was at church, Dorothy testified that this was not possible. Namely because on the day of the alleged incident, K.W. was at church with Mr. Reber's family and not home alone with Mr. Reber.

Moreover, Mr. Reber denied having any sexual contact with K.W. He testified that he only spent the night at Troy and Sherry's house when Troy invited him to and that on those nights, he slept on the couch where Troy stayed up late watching television. Mr. Reber also noted that even though he and K.W. sometimes hunted together at night, the two had never been alone in the deer blind.

II. Rule 404 of the North Carolina Rules of Evidence

Because the plain error standard is based, in part, on the prejudice a defendant suffers when evidence is improperly admitted, *State v. Lawrence*, 365 N.C. 506, 518 (2012), it is necessary to begin with

a discussion of Rule 404(b) and a review of the Rule 404(b) evidence offered in Mr. Reber's case. *See* N.C.G.S. § 8C-1, Rule 404(b) (2023).

Under Rule 404, "[e]vidence of a person's character or a trait of his character is not admissible" to show that the person "acted in conformity therewith on a particular occasion." N.C.G.S. § 8C-1, Rule 404(a). However, evidence of a defendant's "other crimes, wrongs, or acts" may be "admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident." N.C.G.S. § 8C-1, Rule 404(b). In all cases however, the rule of relevancy applies, and the evidence sought to be introduced must be "relevant to any fact or issue other than the character of the accused." *State v. Jones*, 322 N.C. 585, 588 (1988) (cleaned up). 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 (2023).

Any relevant evidence of a defendant's prior bad acts "must be closely scrutinized" because its introduction can "distract" the jury and "confuse their consideration of issues at trial." *Jones*, 322 N.C. at 588–89. Namely because "proof that a defendant has been guilty of another . . . equally heinous" act can prompt the jury to readily accept the "prosecution's theory that [the defendant] is guilty of the crime charged." *Id.* at 589 (cleaned up). The effect of this evidence "is to predispose the mind of the juror to believe the [defendant] is guilty, and thus effectually to strip him of the presumption of innocence." *Id.* (cleaned up).

Accordingly, Rule 404(b) evidence is "constrained by the requirements of similarity and temporal proximity." *State v. Al-Bayyinah*, 356 N.C. 150, 154 (2002); *see also State v. Boyd*, 321 N.C. 574, 577 (1988) ("[T]he ultimate test for determining whether such evidence is admissible is whether the incidents are sufficiently similar and not so remote in time as to be more probative than prejudicial . . . ."). We have said that a prior bad act or crime is sufficiently similar when there are "some unusual facts present in both crimes or particularly similar acts which would indicate that the same person committed both." *State v. Stager*, 329 N.C. 278, 304 (1991) (quoting *State v. Green*, 321 N.C. 594, 603 (1988)). While these similarities do not need to "rise to the level of the unique and bizarre," *Green*, 321 N.C. at 604, the State must show a "common *modus operandi* or 'signature' " between the prior bad act and the crime charged, *State v. Scott*, 318 N.C. 237, 244 (1986).

In cases where an adult defendant is charged with sexually abusing a child and the State seeks to introduce evidence of the defendant's prior bad acts pursuant to Rule 404(b), our Court has required that there be a strong factual similarity between the prior bad act and the crime currently charged. For example, in *Scott*, the defendant had been charged with committing a first-degree sexual act, cunnilingus with his sister's two daughters, who were three and four years old at the time of the offense. *Id.* at 239. There, our Court determined that the evidence the State sought to introduce, alleged sexual contacts by defendant against his sister after threatening her with a knife when he was thirteen years old, was not sufficiently similar because it lacked a common "*modus operandi* or 'signature' " with the presently-charged crime. *Id.* at 244. Likewise, the Court of Appeals has also insisted on a high degree of similarity between a prior bad act and the currently charged crime in child sexual assault cases. *See State v. Doisey*, 138 N.C. App. 620, 626 (2000) (holding that evidence a defendant had recorded children in the bathroom was not admissible to prove the defendant had sexually assaulted his girlfriend's twelve-year-old daughter).

Rule 404(b)'s similarity requirement is particularly important when the prior bad act sought to be introduced involves sex acts with adults. The Court of Appeals has repeatedly found that evidence of a defendant's sexual acts with other adults is inadmissible to prove child sexual abuse. *See*, *e.g.*, *State v. Davis*, 222 N.C. App. 562, 566–70 (2012) (finding that evidence the defendant had written a story about nonconsensual anal sex with an adult woman was not admissible to prove he had anal sex with a male child); *State v. Bush*, 164 N.C. App. 254, 260–62 (2004) (holding that evidence the defendant bought and owned pornography was not admissible to prove he sexually abused a female child); *State v. Dunston*, 161 N.C. App. 468, 473 (2003) (concluding that evidence that the defendant "engaged in and liked" anal sex with his wife was not admissible to prove he had anal sex with a female child).

The challenged evidence here includes certain text messages. The first text message exchange involved a conversation between Mr. Reber and Danielle, an adult, and relates to a prior sexual encounter between the two involving alcohol. The second text message exchange referenced Mr. Reber and Danielle's discussion of their plan to meet at a motel for sex and Mr. Reber's subsequent mention of asking his daughter not to share this plan with Mr. Reber's grandparents.

While these text messages discuss sexual acts, that is where the similarities between the crimes Mr. Reber was accused of and the text messages he exchanged with Danielle, an adult woman, end. The conduct

K.W. alleges occurred over the span of three years and involved a child between the ages of eight and eleven. While the sexual act discussed in the first text message occurred after Danielle had been drinking, there is no evidence that Mr. Reber ever gave K.W. alcohol or that K.W. was impaired during the alleged offenses. Moreover, although K.W. stated the alleged abuse had occurred in the deer blind and at her home, there is no evidence that Mr. Reber and Danielle ever had sex in those places. There is also no evidence Danielle and Mr. Reber exchanged nude photos, despite K.W. alleging that she and Mr. Reber had engaged in that act. Accordingly, there is nothing similar about the abuse K.W. alleged and the acts referenced in the wrongfully admitted text messages between Mr. Reber and Danielle.

Furthermore, during its closing argument, the State all but confessed that it wanted these text messages admitted for the impermissible purpose of character evidence. In closing, the State asked the jury: "Who is Joshua Reber?" The prosecutor then attacked Mr. Reber's character, describing him as someone whose first sexual encounter with Danielle "involved taking her boobs out of her shirt and having intercourse with her" when "she was too drunk to even remember it." Yet Rule 404 expressly forbids the introduction of evidence for this reason, stating that evidence of a prior bad act is not admissible to "prov[e] that [the defendant] acted in conformity therewith on a particular occasion." N.C.G.S. § 8C-1, Rule 404(a). Admission of this evidence allowed the jury to convict Mr. Reber based on the kind of person they think he is, "rather than because the evidence discloses, beyond a reasonable doubt, that he committed the offense charged." *Jones*, 322 N.C. at 590.

III. Door Opening

While the majority does not address whether Mr. Reber may have opened the door to the challenged evidence by testifying regarding his relationship with Danielle because it assumes that admission of the challenged evidence was erroneous, I do not read the dissent in the Court of Appeals as narrowly as the majority does. *See State v. Reber*, 289 N.C. App. 66, 83 (2023) (Dillon, J., dissenting) ("Arguably, the questioning was not error, as the defense opened the door to the questioning by asking Defendant on direct about his relationship with this adult woman."). In my view, under our precedent, it was impermissible for the prosecutor to question Mr. Reber about the details of his sexual relationship with Danielle.

"Where one party introduces evidence as to a particular fact or transaction, 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) (first citing *State v. Patterson*, 284 N.C. 190 (1973), then citing *State v. Black*, 230 N.C. 448 (1949)). However, while "[s]uch cross-examination is permissible," it cannot be used "to expose an entirely new line of inquiry otherwise impermissible under [our] Rules." *State v. Lynch*, 334 N.C. 402, 412 (1993). Instead, it can "*only*" be used "to correct inaccuracies or misleading omissions in the defendant's testimony or to dispel favorable inferences arising therefrom." *Id.* (emphasis added).

On direct examination, the evidence Mr. Reber offered was in response to the State's case-in-chief. First, K.W.'s testimony provided that she and Mr. Reber had exchanged nude photos through Snapchat. To establish that Mr. Reber was familiar with Snapchat, the State introduced text messages between Danielle and Mr. Reber that discussed the Snapchat application. In response, and to establish who Danielle was and that he was not familiar with the Snapchat application, Mr. Reber testified that Danielle was an ex-girlfriend and that he was not familiar with Snapchat, nor did he use it to communicate with K.W.

Next, Mr. Reber's testimony regarding his sexual partners and condom use was also in direct response to the State's evidence. Namely, K.W.'s testimony that Mr. Reber did not use condoms and that he used the "pull-out" method of contraception during sex. On direct examination, and to rebut K.W.'s testimony, Mr. Reber testified that he frequently used condoms. While defense counsel asked Mr. Reber if he had adult sexual partners, this questioning was used to inquire about Mr. Reber's condom use in direct response to K.W.'s testimony. Additionally, Mr. Reber was entitled to offer that evidence to rebut K.W.'s allegation that he was attracted to and engaged in sexual acts with an underage girl.

In sum, the "particular fact[s] or transaction[s]," *see Albert*, 303 N.C. at 177, that Mr. Reber testified to on direct examination were (1) that he had adult girlfriends, and (2) that he regularly used condoms. His testimony did not recount the details of his sexual relationship with Danielle or any other adult woman. Mr. Reber also did not mention whether he and Danielle had sexual relations under the influence of alcohol or before they began dating. His direct examination testimony also did not discuss whether he and Danielle had difficulty finding a location for sex or if they wanted to conceal their sexual relationship from Mr. Reber's grandparents. Importantly, Mr. Reber's testimony about having an adult girlfriend did not give the State carte blanche to ask about the details of Mr. Reber's sexual relationship with Danielle. This testimony was

both irrelevant and inadmissible. *See* N.C.G.S. § 8C-1, Rule 401; N.C.G.S. § 8C-1, Rule 404.

IV. Plain Error Standard

Under Rule 10 of the North Carolina Rules of Appellate Procedure, "[i]n order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." N.C. R. App. P. 10(a)(1). However, in cases where there are "plain errors or defects affecting substantial rights," these errors "may be noticed although they were not brought to the attention of the court." *State v. Odom*, 307 N.C. 655, 660 (1983) (cleaned up). While this standard "is normally limited to instructional and evidentiary error[s]" that are unpreserved, *Lawrence*, 365 N.C. at 516, "the term plain error" is not limited only to those errors that are "obvious or apparent," *Odom*, 307 N.C. at 660 (cleaned up).

This Court adopted the plain error standard in *Odom* and provided a comprehensive explanation of the rule's scope and purpose. There, this Court explained, that while the plain error standard's protections are only applicable in "exceptional" cases, where "it can be said . . . a fundamental error" has occurred, what constitutes a fundamental error is broad and has been defined as: (1) "something so basic, so prejudicial, so lacking in its elements that justice cannot have been done"; or (2) "the error is grave error which amounts to a denial of a fundamental right of the accused"; or (3) "the error has resulted in" either "a miscarriage of justice or in the denial . . . of a fair trial" for the accused; or (4) the error "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings"; or (5) where "the instructional mistake had a probable impact on the jury's finding that the defendant was guilty." *Id.* (cleaned up) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982)).

Moreover, this standard cannot be applied in isolation and requires review of "the entire record" in a case. *Id.* (quoting *McCaskill*, 676 F.2d at 1002). This Court affirmed this and the above principles first in *State v. Black*, 308 N.C. 736, 740–41 (1983), and then again in *State v. Walker*, 316 N.C. 33, 39 (1986). This mandate exists, in part, because the question a reviewing court must answer is whether "the error . . . 'tilted the scales' and caused the jury to reach its verdict convicting the defendant." *Walker*, 316 N.C. at 39 (quoting *Black*, 308 N.C. at 741). Indeed, as both the *Black* and *Walker* Courts explained, the strength and volume of the evidence against the defendant plays a role in the plain error

analysis.[1] *Black*, 308 N.C. at 741; *Walker*, 316 N.C. at 40; *see also Maddux*, 371 N.C. at 567; *see also Lawrence*, 365 N.C at 519. Namely, when there is "overwhelming evidence against the defendant" it may "prevent[ ] the error complained of from rising to the level of 'plain error.' " *Walker*, 316 N.C. at 40. Without examining the entire record, this analysis cannot be properly achieved.

In *Lawrence*, this Court reaffirmed the "probable impact" standard from *Odom*, *Black*, and *Walker*, stating that "a criminal defendant is entitled to a new trial if the defendant demonstrates that the jury *probably* would have returned a different verdict had the error not occurred." *Lawrence*, 365 N.C. at 507 (emphasis added). This premise was reiterated again in *Maddux*, where this Court stated that a "[d]efendant must demonstrate that absent the error, the jury probably would have reached a different result." 371 N.C. at 565 (cleaned up). Thus, while the majority's interpretation of the plain error standard in *Lawrence* makes it virtually impossible to meet, that is not what this Court intended. Instead, because the term "different result" includes a hung jury the real inquiry is whether absent the error, one juror probably would have concluded that there is reasonable doubt as to any element of the crime. *See id.* Because if one juror has reasonable doubt, the jury would be unable to reach consensus and there would be a different result in the case. *See id.*

Moreover, while it is true that in *Lawrence*, this Court clarified the plain error standard, this Court also clearly stated it was "reaffirm[ing] [its] holding in *Odom*." *Lawrence*, 365 N.C at 518. In doing so, this Court quoted directly from the *Odom* opinion to explain that (1) "[f]or error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial"; (2) "[t]o show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error 'had a probable impact on the jury's finding that the defendant was guilty' "; and (3) "because plain error is to be 'applied cautiously and only in the exceptional case,' the error will often be one that 'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.' " *Id.* (third alteration in original) (quoting *Odom*, 307 N.C. at 660).

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1. It is important to note that while the majority cites *State v. Maddux*, 371 N.C. 558, 564 (2018), for the proposition that it is improper to consider "the strength of the State's evidence" when conducting a plain error analysis, *Maddux* does not state this. Instead, *Maddux* reiterates the directive in *Lawrence*, 365 N.C. at 519, which requires the reviewing Court to consider whether the State has presented "overwhelming and uncontroverted evidence" against the defendant. *Id.*

Later, in *State v. Towe*, 366 N.C. 56 (2012), *State v. Juarez*, 369 N.C. 351 (2016), and *Maddux*, 371 N.C. 558, this Court stated that it was following the standard first articulated in *Odom* and reaffirmed in *Lawrence*. In all three of these cases, this Court's opinions quote from and provide citations to the opinions in both *Lawrence* and *Odom*. The standard articulated in *Lawrence*, *Towe*, *Juarez*, and *Maddux*, while focusing in part on the "probable impact" of the error on the jury's finding that the defendant was guilty, also emphasizes the need to analyze an error to determine if a fundamental error exists, which is dependent on whether prejudice is established, and whether the error is one "that seriously affects the fairness, integrity or public reputation of judicial proceedings." *Lawrence*, 365 N.C. at 518 (cleaned up); *see Towe*, 366 N.C. at 62; *Juarez*, 369 N.C. at 358; *Maddux*, 371 N.C at 564. Moreover, in *Towe*, this Court provided additional context for applying the plain error standard. There, this Court stated it was "apply[ing] the test set out in *Lawrence* and *Odom*" and explained that as part of its plain error analysis, it must consider whether the erroneously admitted testimony in Mr. Towe's case "impermissibly bolstered the victim's credibility" such that it had "the prejudicial effect necessary to establish that the error was a fundamental error." *Towe*, 366 N.C. at 62–63 (cleaned up).

The majority evades the entirety of the plain error analysis, through a type of appellate gerrymandering, which slices and dices the issues this Court may review when an appeal is based on a dissent. This is based, in part, on the majority's narrow reading of the dissent as only addressing the "prejudice prong" of plain error review. This approach is a misapplication of this Court's decision in *Cryan v. Nat'l Council of YMCAs*, 384 N.C. 569 (2023). In *Cryan*, this Court reiterated the standard set out in Rule 16 of the North Carolina Rules of Appellate Procedure, which states that when an appeal is based solely upon a dissent in the Court of Appeals, review in this Court is "limited to a consideration of those *issues* that are . . . specifically set out in the dissenting opinion as the basis for that dissent." 384 N.C. at 574 (emphasis added) (quoting N.C. R. App. P. 16(b)).

In Mr. Reber's case, the dissent at the Court of Appeals included two issues: whether "the prosecution's cross examination of Defendant" and the admission of that "testimony" and the "prosecutor's statements during closing" were "error." *Reber*, 289 N.C. App. at 83 (Dillon, J., dissenting). Accordingly, those are the two *issues* before this Court. The directive that this Court only review the issues set out in the dissenting opinion does not mandate this Court to only consider one portion of the plain error standard while ignoring all others. Moreover, the plain

error standard does not contain "prongs" that are as separate and distinct as the majority suggests. Instead, all three portions of this standard are interrelated.[2] The interrelatedness of the first two prongs is clearly articulated in *Lawrence*, which provides that

> [f]or error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty.

Lawrence, 365 N.C. at 518 (cleaned up); *see also Maddux*, 371 N.C. at 564; *Juarez*, 369 N.C. at 358. Additionally, *Juarez* focused on the interrelatedness of the last two portions of the plain error test and admonished the Court of Appeals for "fail[ing] to analyze whether [the] error [in that case] had the type of prejudicial impact that seriously affected the fairness, integrity or public reputation of the judicial proceeding." 369 N.C. at 358 (cleaned up). Importantly, this Court explained that without answering this question, a plain error analysis is "insufficient." *Id.* Thus, on appeal, the proper review requires an analysis of the entire plain error standard.

The improperly admitted text messages in this case meet the plain error standard. Rule 404(b) evidence is inherently prejudicial because it tempts the jury to convict the defendant based on what they think of his character. *Jones*, 322 N.C. at 590. Put another way, the jury might convict the defendant because they believe he is the kind of person who would commit the charged offense and not because the State has proved the defendant committed the crime beyond a reasonable doubt. *Id.* The risk of this is even greater in cases like this one where there is no medical or physical evidence and no eyewitness to the alleged abuse and thus the jury is tasked with evaluating only the credibility and truthfulness of each witness. *See Kimbrell*, 320 N.C. at 767. Accordingly, the outcome

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2. The majority mischaracterizes our plain error analysis as being a "holistic" test that disregards the plain error standard's three prongs. But what the majority fails to consider is that two things can be true. Namely, that the plain error standard is composed of three factors, and those three factors are interrelated. The majority suggests this premise sets forth a "new theory of plain error," but our precedent in *Lawrence*, *Maddux*, and *Juarez* shows the opposite is true. Indeed, our decisions in those cases exemplify the interrelatedness of the plain error test's three parts. *See Lawrence*, 365 N.C. at 518; *see also Maddux*, 371 N.C. at 564; *Juarez*, 369 N.C. at 358.

of Mr. Reber's trial "depended [only] on the jury's perception of the relative veracity of the witnesses." *Id.*

The situations in both *Black* and *Walker* stand in stark contrast to Mr. Reber's case. In *Black*, the "[e]vidence presented by the State was very convincing," 308 N.C. at 741, while the evidence against the defendant in *Walker* was said to be "overwhelming," 316 N.C. at 40. Here, the evidence against Mr. Reber only consisted of the complaining witness's testimony and there was no medical or physical evidence to corroborate those statements. Even the majority admits this "was not a particularly strong case for the State."

Additionally, in its brief to this Court, the State argues that the jury believed K.W.'s testimony over that of Mr. Reber's and that accordingly, the improperly admitted evidence cannot rise to the level of plain error. This argument overlooks the very reason 404(b) evidence is inherently prejudicial and ignores this Court's directive in *Towe*. Namely that when the alleged error challenges erroneously admitted testimony, the reviewing court must consider whether that testimony "impermissibly bolstered the victim's credibility" such that it had "the prejudicial effect necessary to establish that the error was a fundamental error." *Towe*, 366 N.C. at 62–63 (cleaned up). This is especially pertinent in Mr. Reber's case, where the only evidence against him was the testimony of the complaining witness. Consequently, the introduction of Rule 404(b) evidence, which portrayed Mr. Reber as "a sexual deviant," *see State v. Maxwell*, 96 N.C. App. 19, 25 (1989), undoubtedly "impermissibly bolstered [K.W.'s] credibility," while simultaneously destroying Mr. Reber's, *see Towe*, 366 N.C. at 62-63. Taking all of this together, the admission of the improperly admitted Rule 404(b) evidence probably impacted the jury's finding that Mr. Reber was guilty and thus meets North Carolina's plain error standard. Accordingly, Mr. Reber should be granted a new trial. *See id.* at 64.

V. Prosecutor's Statements During Closing Arguments

In *State v. Jones*, this Court "[r]egrettably" expressed its concern regarding the growing number of claims alleging that improper arguments had occurred. 355 N.C. at 127. The Court also voiced a concern that "it appear[ed] . . . that some attorneys intentionally 'push the envelope' with their jury arguments in the belief that there will be no consequences for doing so." *Id.* This is particularly concerning in criminal cases that involve the State's attorney, "whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Id.* at 130 (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)). Thus, the

United States Supreme Court has stated that while a prosecutor may "strike hard blows, he is not at liberty to strike foul ones." *Id.* (quoting *Berger*, 295 U.S. at 88). "If verdicts cannot be carried without appealing to prejudice or resorting to unwanted denunciation, they ought not to be carried at all." *State v. Tucker*, 190 N.C. 708, 714 (1925).

The State's responsibility to adhere to these mandates is a weighty one. Particularly because the "average jur[or] . . . has confidence that these obligations . . . will be faithfully observed." *State v. Smith*, 279 N.C. 163, 167 (1971) (quoting *Berger*, 295 U.S. at 88). Accordingly, "improper suggestions, insinuations and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none." *Id.* (quoting *Berger*, 295 U.S. at 88).

Similarly, trial judges have a responsibility as "overseers of our courts" to intervene when attorneys violate "courtroom protocol." *Jones*, 355 N.C. at 128 (citing *Couch v. Priv. Diagnostic Clinic*, 351 N.C. 92 (1999)). This is particularly true during closing arguments, where defense counsel may be reluctant to interrupt the State's closing remarks "for fear of incurring jury disfavor." *Id.* at 129. Moreover, intervention by the trial court becomes "especially proper" in cases where "the State is prosecuting one of its citizens" to ensure "the jury [will not be] unfairly prejudiced against [the defendant]." *State v. Miller*, 271 N.C. 646, 659 (1967). Accordingly, during closing arguments the trial court must "monitor vigilantly" what is said and "intervene as warranted." *Jones*, 355 N.C. at 129.

In cases where an alleged improper closing argument is not followed by a timely objection, the correct standard of review asks, "whether the [remarks were] so grossly improper that the trial court erred in failing to intervene *ex mero motu*." *Trull*, 349 N.C. at 451. Stated differently, was the argument so improper that the trial court was required to intervene, stop the attorney from making "similar remarks," "and/or . . . instruct[ ] the jury to disregard the improper comments already made," "in order to protect the rights of the parties and the sanctity of the proceedings"? *Jones*, 355 N.C. at 133. In Mr. Reber's case, the answer to this question is, "yes."

To constitute reversible error, the prosecutor's statements must be "both improper and prejudicial." *Id.* A remark is improper if it is "calculated to lead the jury astray" and includes "references to matters outside the record and statements of personal opinion." *Id.* These statements are prejudicial "either because of individual stigma or because of the general tenor of the argument as a whole." *Id.*

In *Jones*, this Court reviewed a prosecutor's statements during closing arguments, which included name calling and were not objected to during trial. There, the prosecutor said the following about the defendant: "You got this quitter, this loser, this worthless piece of—who's mean. . . . He's as mean as they come. He's lower than the dirt on a snake's belly." *Id.* (alteration in original). This Court found that the prosecutor's remarks "incorporated personal conclusions," which "amounted to little more than name calling," and accordingly, the prosecutor had "exceed[ed] the boundaries of proper argument." *Id.* at 133–34. Furthermore, this Court explained that the prosecutor's tactics during trial prejudiced the defendant "by improperly leading the jury to base its decision not on the evidence relat[ed] to the issues submitted, but on misleading characterizations, crafted by counsel, that [were] intended to undermine reason in favor of visceral appeal." *Id.* at 134.

Similarly in *Miller*, the prosecutor "defiled" the character of the defendants during closing. 271 N.C. at 657. There too, this Court reviewed statements that were not objected to at trial. *Id.* These remarks "inferred" that the defendants, who were charged with breaking and entering into a jewelry store, "were habitual store[ ] breakers," had broken into buildings prior to the incident they were charged with, and were "involved in a big[-]time business" *Id.* at 653, 657. None of these statements were supported by the record. *See id.* Because "[d]efendants in criminal prosecutions should be convicted upon the evidence in the case, and not upon prejudice" created by an "abus[ive] . . . solicitor," this Court granted a new trial. *Id.* at 657, 661; *see also Smith*, 279 N.C. at 165, 167 (holding that the prosecutor's statements during closing arguments, which referred to the defendant as "lower than the bone belly of a cur dog," were prejudicial and the trial judge who "failed to intervene on his own motion[ ] was derelict in his duty").

The prosecutor's statements in Mr. Reber's case are similar to those in *Jones* and *Miller*; namely because the comments the prosecutor made relate to matters outside the record and are more properly characterized as the prosecutor's personal opinion. *See Jones*, 355 N.C. at 133. Like in *Jones*, the prosecutor in Mr. Reber's case made unsupported comments about the defendant's character. This included insinuations that Mr. Reber was the kind of man whose "first sexual encounter" with a woman would "involve[ ] taking her boobs out of her shirt and having intercourse with her . . . [when] she was too drunk to even remember it."

While the majority concludes that these statements were properly admitted evidence and thus, it was proper for the State to reference them during closing arguments, this conclusion is incorrect. First, as

explained above, this evidence was not only improperly admitted, but its admission into evidence also meets the plain error standard and thus, should be excluded. Accordingly, this evidence must be disregarded and cannot be referenced during closing arguments. Moreover, the prosecutor's only reason for making these remarks was to persuade the jury to convict Mr. Reber based on what the jury thought of Mr. Reber's character and not because the State had proved that Mr. Reber committed the crime beyond a reasonable doubt. *See Jones*, 322 N.C. at 590. This deprived Mr. Reber of a fair and impartial trial. *See Miller*, 271 N.C. at 660–61.

Moreover, like in *Miller*, the prosecutor in Mr. Reber's case also made comments that were wholly extraneous to the record. Those remarks included references to Mr. Reber's condom use and sexually transmitted diseases. While it is true that some of the improperly admitted evidence involved Mr. Reber's condom use, none of the evidence supported the prosecutor's claim that Mr. Reber contracted herpes, gonorrhea, syphilis, or AIDS. Accordingly, although the statements about Mr. Reber's condom use were improperly admitted, meet our plain error standard, and should be disregarded, the prosecutor also made statements that were not part of the record at all. These statements deprived Mr. Reber of a fair and impartial trial. *See id.*

"Arguments to a jury should be fair and based on the evidence or on that which may be properly inferred from the case." *Id.* at 659. In this case, "prejudice to the cause of the accused is so highly probable that we are not justified in assuming its non-existence." *Smith*, 279 N.C. at 166 (quoting *Berger*, 295 U.S. at 89). This prejudice is based on both "individual stigma" and "the general tenor of the argument as a whole," which sought to portray Mr. Reber as a sexual deviant. *See Jones*, 355 N.C. at 133. Because the remarks made by the prosecutor impaired Mr. Reber's right to a "fair and impartial trial," I would affirm the Court of Appeals' holding and grant Mr. Reber a new trial "where passion and prejudice and facts not in evidence have no part." *See Miller*, 271 N.C. at 660–61.

Lastly, while the majority suggests that an ineffective assistance of counsel (IAC) claim "will often be a better vehicle to raise these issues," that is a hollow and disingenuous promise. The opposite is true. *See* Eve Brensike Primus, *Structural Reform in Criminal Defense: Relocating Ineffective Assistance of Counsel Claims*, 92 Cornell L. Rev. 679, 680–81 (2007) [hereinafter *Ineffective Assistance of Counsel Claims*]. In many cases, even defendants with meritorious claims may experience serious delays in filing an IAC claim or be precluded from bringing their

claim altogether. *Id.* For example, a defendant rarely is able to bring an IAC claim on direct appeal because the claim is not "apparent on the face of the record" and thus requires "further development of the facts." *See State v. Allen*, 360 N.C. 297, 316 (2006). This means that IAC claims will usually be brought by way of a motion for appropriate relief. By this stage in the proceedings, years may have passed between the defendant's conviction and the filing of their IAC claim, which makes it more difficult to find witnesses and gather evidence to support a claim. *See Ineffective Assistance of Counsel Claims* at 680. It is also not uncommon that a defendant has fully served their term of incarceration by the time a motion for appropriate relief can be filed. *Id.* at 680–81. Moreover, because there is no constitutional right to an attorney past a defendant's first appeal, many defendants are financially precluded from filing an IAC claim. *See id.* at 681; *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987).

Additionally, the legal standard required to show an IAC claim is challenging to meet. To succeed on an IAC claim, "the defendant must satisfy a two-part test" (the *Strickland* test). *State v. Banks*, 367 N.C. 652, 655 (2014) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)).

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Id. (quoting *Strickland*, 466 U.S. at 687).

The first prong of the *Strickland* test requires a showing that the attorney's conduct "fell below an objective standard of reasonableness." *State v. Oglesby*, 382 N.C. 235, 243 (2022) (quoting *Strickland*, 466 U.S. at 688). Embedded within this test is a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* (quoting *Strickland*, 466 U.S. at 689). Furthermore, this Court has explained that because "counsel is given wide latitude in matters of strategy," the defendant's "burden to show that counsel's performance fell short of the required standard is a heavy one for [the] defendant to bear." *State v. McNeill*, 371 N.C. 198, 218–19 (2018) (cleaned up).

The defendant must also show that "counsel's deficient performance prejudiced the defense." *Oglesby*, 382 N.C. at 246 (cleaned up). This

requires the defendant to show "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* (cleaned up). To prove prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

The majority's discussion regarding the strategic decisions Mr. Reber's counsel may have made, while based only on assumption, illustrates the difficulty of proving IAC claims. Namely, that it can be challenging for a reviewing Court to decipher if the conduct complained of was a tactical decision, where counsel has "wide latitude." *See id.* at 689; *see also State v. Fair*, 354 N.C. 131, 167 (2001) (holding that counsel's actions were "a matter of reasonable trial strategy"). While strict guidelines determining what might constitute "reasonable trial strategy," *see Fair*, 354 N.C. at 167, would be helpful to a reviewing Court, those guidelines "would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions," *Strickland*, 466 U.S. at 689. Thus, while the majority focuses on the second prong of an IAC claim, the first prong, which requires a showing that "counsel's performance was deficient," *see Banks*, 367 N.C. at 655, is also a very hard prong to meet.

An IAC claim, even if available to a defendant, should not be a substitute for adjudicating claims involving prejudicial errors. Here, the circumstances of Mr. Reber's trial support that he suffered prejudice, both by the improperly admitted 404(b) evidence and the prosecutor's statements during closing. I would hold that (1) the improperly admitted 404(b) evidence meets our plain error standard, and (2) the prosecutor's challenged statements during closing "were so grossly improper" that the trial court should have intervened *ex mero motu*. Accordingly, under North Carolina law, Mr. Reber is entitled to a new trial.

Justice RIGGS joins in this dissenting opinion.

STATE OF NORTH CAROLINA
v.
CHARLES SINGLETON

No. 318PA22

Filed 23 May 2024

Indictment and Information—second-degree rape—short-form indictment—sufficiency—effect on trial court's jurisdiction—abrogation of common law pleading rules

A short-form indictment charging defendant with second-degree rape neither contained a fatal defect nor deprived the trial court of subject matter jurisdiction to convict defendant, even though the indictment did not allege that the defendant knew or should have known that the victim was physically helpless during the rape. The Criminal Procedure Act abrogated the common law rule that a court's subject matter jurisdiction in a criminal case depends on the sufficiency of the underlying indictment, as well as the strict common law requirement that an indictment specifically allege every element of an offense—a requirement that the legislature loosened even further by enacting short-form indictments by statute. Instead, a defective indictment only raises jurisdictional concerns when it alleges conduct that does not constitute a crime; meanwhile, indictments containing merely technical, non-jurisdictional defects will not be set aside so long as they give defendants sufficient notice of the crimes charged to prepare a defense and to protect against double jeopardy. Here, the indictment against defendant did allege an actual crime under North Carolina law while also meeting the short-form pleading requirements for second-degree rape (codified in N.C.G.S. § 15-144.1(c)).

Justice EARLS concurring in part and dissenting in part.

Justice RIGGS joins in this concurring and dissenting opinion.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 285 N.C. App. 630 (2022), holding that the indictment charging defendant with second-degree forcible rape failed to confer jurisdiction upon the trial court and vacating the portion of the judgment convicting defendant of this crime entered on 5 August 2021 by Judge Jeffery B. Foster in Superior Court, Wake County. Heard in the Supreme Court on 19 September 2023.

Joshua H. Stein, Attorney General, by Benjamin Szany, Assistant Attorney General, for the State-appellant.

Danielle Blass for defendant-appellee.

BERGER, Justice.

Since 1811, the plain language and intent of the law has been to move away from common law pleading requirements in criminal cases which were overwrought with technicalities. But old habits die hard in the legal profession. More than two hundred years ago, the legislature eliminated strict common law pleading requirements for criminal indictments. But lawyers and judges continued to grasp at "shadowy nothings" that permitted criminals to escape merited punishment. *State v. Hester*, 122 N.C. 1047, 1050 (1898). Despite recognition by this Court in 1898 that "[t]he practical sense of the age demand[ed]" that technicalities should not carry the day for defendants who argue form over substance in our indictment jurisprudence, *id.*, some continued to scour pleadings for procedural niceties long after guilty pleas had been entered or jury verdicts handed down.

Just as the pragmatic spirit of the 19th century disfavored this practice, functional wisdom and legal reality is that defendants were seldom prejudiced by mistakes in pleadings. Inconsistent application of the law led again to frustration and concern by the courts and the legislature—so much so that almost fifty years ago, the people through their elected representatives once again attempted to rid the criminal justice system of any remnants of the common law as it related to criminal pleadings.

To be sure, where a criminal indictment suffers from a jurisdictional defect, courts lack the ability to act. But jurisdictional defects are rare, only arising where an indictment wholly fails to allege a crime against the laws or people of this State. Where a court has no power to act in the first instance, jurisdictional defects can be raised at any time.

A mere pleading deficiency, however, is different. The people sought to end the superficial practice of vacating convictions and arresting judgment based on non-jurisdictional pleading deficiencies when Madison was president and Napoleon was waging war in Europe. But for more than two centuries, our courts have inconsistently applied the statutory law of indictments to illusory harms.

Consistent with the federal courts and the majority of jurisdictions, we end this centuries old saga and hold that an indictment raises

jurisdictional concerns only when it wholly fails to charge a crime against the laws or people of this State.[1] Further, and in accord with directives from the General Assembly, bills of indictment that contain non-jurisdictional deficiencies will not be quashed or cast aside "by reason of any informality" when they express the crime charged "in a plain, intelligible, and explicit manner," N.C.G.S. § 15-153 (2023), such that the defendant has "notice sufficient to prepare a defense and to protect against double jeopardy." *State v. Lancaster*, 385 N.C. 459, 462 (2023) (quoting *In re J.U.*, 384 N.C. 618, 623 (2023)). Both classes of indictment defects rely on a common sense approach to the law, and we, therefore, reverse the Court of Appeals.

I. Factual and Procedural Background

On 25 November 2017, Jane, a college freshman visiting home on Thanksgiving break, spent the evening in downtown Raleigh with friends.[2] Jane consumed alcoholic beverages throughout the day, and she was significantly impaired by the early morning hours of 26 November. The last thing Jane remembered from her night out in Raleigh was "[d]ancing with [her] sister and a family friend" at a bar around 2:00 a.m.

At 2:15 a.m., Jane's father received a call from one of Jane's friends who informed him that Jane had given her phone to a friend and walked away from the group alone. Jane's parents drove downtown, retrieved Jane's phone and began searching for their daughter.

At 5:25 a.m., Jane's mother noticed a missed call from an unknown number on Jane's phone. She called the number and a "strange man" answered the phone. The man, who said his name was "Chuck," informed Jane's mother that he was "helping a girl find her phone." When Jane's mother asked to speak with Jane to ensure her safety, the man said Jane ran away and that he was looking for her.

Jane's mother then called 911, hoping that the call with "Chuck" would lead police to her daughter. Raleigh Police Officer Mark Brodd called the unknown number and spoke with "Chuck," who informed Officer Brodd that he met Jane after she left a downtown club and "asked [him] to take care of her." According to "Chuck," he and Jane

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1. *See United States v. Cotton*, 535 U.S. 625, 630 (2002) ("[D]efects in an indictment do not deprive a court of its power to adjudicate a case."); *see also State v. Dunn*, 375 P.3d 332, 355 (Kan. 2016) ("Indeed, the view that a failure to include an essential element in the charging document is a jurisdictional defect ha[s] quickly become the minority view in state and federal jurisdictions.").

2. A pseudonym is used to protect the victim's identity.

sat on a flower planter near an old post office, where Jane slept for an hour. When Jane woke up, she asked "Chuck" to help locate her phone. "Chuck" called her phone and began looking for it, and "when [he] turned [his] head, [and] looked back, she was gone."

Officer Brodd later identified "Chuck" as Charles Singleton. After "Chuck" provided a false date of birth, the increasing number of discrepancies in "Chuck's" statements led Officer Brodd to suspect that defendant had kidnapped Jane. Around 6:00 a.m., Officer Brodd began calling defendant repeatedly, but defendant did not answer.

During this time, Jane's sister received a phone call from Jane on an unknown number. Jane was at a gas station and asked her sister to pick her up. Jane's sister drove to pick up Jane, who was "[d]isheveled and in fear." Jane's "underwear was hanging out the side of her pants." Jane was taken to a police station where she reported that a man matching defendant's description had raped her.

Jane stated that she had "blacked out" after leaving her friends early that morning and woke up in defendant's vehicle with him on top of her. She told defendant to get off, and when she could not locate her phone, she ran until she found the gas station. Jane, who was suffering memory loss and nausea, underwent a physical examination during which she seemed "hazy and still intoxicated." At noon, detectives noted that Jane still seemed impaired as she was "very woozy and unsteady on her feet" and almost fell over when she got up to leave the room.

Officers subsequently located defendant based off a GPS ping of his phone and a description of his vehicle. Defendant provided officers a different version of his story, stating that he had driven up and down Capital Boulevard with Jane "in an attempt to wake her up." He told police that Jane "was very intoxicated during this time and he was trying to sober her up in order to help her." Defendant, who did not appear to be impaired in any way, stated that his DNA would not be located inside of Jane because he did not have sexual intercourse with her.

Police obtained DNA samples from defendant pursuant to a search warrant. Samples were also taken from Jane during her physical examination. Forensic testing revealed the presence of sperm on the vaginal, rectal, and external genitalia swabs, and on the tampon Jane was using that night. The DNA samples were consistent with defendant's DNA profile.

Defendant was arrested and subsequently indicted for second-degree forcible rape. On 19 March 2018, the grand jury returned a

superseding indictment against defendant for second-degree forcible rape, first-degree kidnapping, and felonious restraint. As is relevant here, the superseding indictment against defendant for second-degree forcible rape alleged

> that on or about November 26, 2017, in Wake County, the defendant named above unlawfully, willfully, and feloniously did engage in vaginal intercourse with [Jane], who was at the time, physically helpless. This act was done in violation of NCGS § 14-27.22.

Defendant did not move to quash the indictment, object at trial to the language in the indictment, or otherwise contest the trial court's jurisdiction over him or the charged offense. Further, defendant did not argue that the indictment failed to put him on notice of the crime charged or failed to protect him from double jeopardy.

At the conclusion of trial, the jury found defendant guilty of all charges, and he was sentenced to consecutive prison terms of seventy-three to one hundred forty-eight months for the second-degree forcible rape conviction and seventy-three to one hundred months for first-degree kidnapping. The trial court arrested judgment for defendant's felonious restraint conviction. Defendant timely appealed.

At the Court of Appeals, defendant argued for the first time that the superior court "lacked jurisdiction to try him" for the crime of second-degree forcible rape. *State v. Singleton*, 285 N.C. App. 630, 632 (2022).[3] Specifically, defendant contended that the trial court lacked jurisdiction because the indictment charging him with this crime failed to allege the element "that he knew or reasonably should have known that Jane was physically helpless when he engaged in sexual intercourse with her." *Id.*

The Court of Appeals noted that in most jurisdictions, "the failure to allege an essential element of a crime in the indictment is not jurisdictional and can be waived" and that treating such alleged defects "as non-jurisdictional," and therefore waivable, "appears to be the majority view." *Id.* at 633 (citing *United States v. Cotton*, 535 U.S. 625, 631 (2002) and *State v. Dunn*, 375 P.3d 332, 355 (Kan. 2016)). However, the Court of Appeals rejected the State's argument that the short-form indictment language was sufficient pursuant to statute and this Court's precedent, *id.*; *see also* N.C.G.S. § 15-144.1 (2021); *State v. Tart*, 372 N.C. 73, 77 (2019), and the Court of Appeals ultimately concluded that the

3. As jurisdiction is the relevant issue on appeal to this Court, we do not address additional arguments raised by defendant at the Court of Appeals.

indictment "simply fails to allege the crime" even when compared to the relevant short-form indictment language. *Singleton*, 285 N.C. App. at 634. Based on this reasoning, the Court of Appeals vacated the portion of the judgment convicting defendant of second-degree rape and dismissed the indictment charging him with that crime. *Id.* at 636.

The State filed a petition for discretionary review, which this Court allowed on 3 March 2023. The State urges us to take this opportunity to examine our indictment jurisprudence and argues that the Court of Appeals erred in concluding the indictment failed to conform to the relevant short-form indictment language.[4]

II. Analysis

A. The Common Law Jurisdictional Indictment Rule

1. The Origin of the Rule

At the time of this State's founding, "many of our laws were derived from the British common law," and "[i]ndictments were no exception; some of our earliest cases on indictments drew their rules from English common law." *State v. Rankin*, 371 N.C. 885, 906 (2018) (Martin, C.J., dissenting). Indictment cases historically "imposed rigid technical requirements on indictments" that appear inconsistent with the modern criminal justice system. *Id.* For example, in one case, judgment was arrested following a conviction for murder where the description of the

4. Our dissenting colleague asserts that we should avoid an examination of our indictment jurisprudence and "wait for a case that presents the issue" of whether the common law jurisdictional indictment rule remains in force. In fact, this Court has already done just that by declining the State's recent invitations to address this issue in both *In re J.U.* and *State v. Lancaster*. *See* No. 263PA21, Appellant Brief p. 16; No. 240A22, Appellant Brief p. 18 and (Oral Arg. 14:20). The arguments in these cases demonstrate that issues surrounding the common law rule will not dissipate, and we choose to fulfill our duty to declare what the law is rather than allowing continued uncertainty among judges, prosecutors, and defense attorneys. After all, as we state elsewhere herein, cases in which an indictment wholly fails to charge a crime are rare, and under our dissenting colleague's reasoning, could never be reached.

Further, the State's couching of its jurisdictional argument as an alternative argument has no bearing on the force or validity of our holding on that issue. Even if the State had not presented this argument (and the defendant had not responded to it), the issue of jurisdiction can be addressed *sua sponte*—just as the Court of Appeals did in *State v. Lancaster*, 284 N.C. App. 465 (2022), *rev'd*, 385 N.C. 459 (2023). Our dissenting colleague's characterization of our analysis and holding on this issue as "largely dicta" is especially perplexing as the issue we address—the common law jurisdictional indictment rule—permits defendants to raise this jurisdictional argument at any time. As the merits of this issue have been fully briefed and argued by both parties in this case, and by others previously, we prudently undertake our duty to resolve this matter.

wound omitted the letter "a" from the word "breast." *State v. Carter*, 1 N.C. (Cam. & Nor.) 406, 407 (1801); *see also State v. Owen*, 5 N.C. (1 Mur.) 452, 461 (1810) (homicide indictment held invalid for failing to adequately describe the dimensions of the wound inflicted by defendant upon the victim).

This Court's predecessors considered these types of strict common law constraints on indictments unduly burdensome even in its earliest days but continued to enforce them, insisting that the problem could only be addressed by action of the legislative branch. *See State v. Adams*, 1 N.C. (Mart.) 56, 58 (1793) ("The niceties required in ancient times in law proceedings became a grievance and the statutes of *Jeofails* remedied the abuse in civil cases, but not in criminal."); *Harrington v. McFarland*, 1 N.C. (Cam. & Nor.) 543, 546–47 (1802) ("In penal actions precision in the charge is indispensable for the same reason that it is required in indictments; and none of the statutes of jeofail, nor even the Act of 1790 intends to them."); *Owen*, 5 N.C. (1 Mur.) at 458 ("But we must follow in the footsteps of those who have preceded us until the Legislature think fit to interfere; though we have no wish to extend the particularity further.").

This adherence to ancient common law indictment rules was necessary because the common law had not been abrogated. *See Lancaster*, 385 N.C. at 463; *see also* N.C.G.S. § 4-1 (2023). But many, including jurists, viewed objections to superficial indictment defects under the common law as "a disease of the law, and a reproach to the bench" which were "reluctantly[ ] entertained." *State v. Moses*, 13 N.C. (2 Dev.) 452, 463 (1830). Still, our courts were confined to a formalistic approach while they waited for the General Assembly to modernize indictment requirements. *See Owen*, 5 N.C. (1 Mur.) at 458.

Thus, in 1811, the General Assembly eliminated the technical common law rules of pleading that elevated form over substance in criminal cases. According to this Court, the move away from the common law may have been prompted by our decision in *Owen*. *See Moses*, 13 N.C. (2 Dev.) at 463 ("The act of 1811 [was] passed the year after Owen's case was decided, and we have reason to believe was caused by it.").

The law, entitled "An act to regulate the proceedings on presentments or indictments, in the superior courts of law of this state," proclaimed that

> Whereas exceptions, in themselves merely formal, are frequently taken against bills of indictment or presentment, and they are either quashed or judgment

> arrested; in consequence of which, the execution of justice is delayed, and many offenders escape punishment: For remedy whereof,
>
> *Be it enacted*, [t]hat from and after the first day of March next, in all criminal prosecutions, which may be had by indictment or presentment, in any of the superior courts of law, it shall be sufficient to all intents and purposes, that the bill shall contain the charge against the criminal, expressed in a plain, intelligible, and explicit manner; and that no bill of indictment or presentment shall be quashed or judgment arrested, for or by reason of any informalities or refinements, when there appears to the court sufficient in the face of the indictment to induce them to proceed to judgment.

Potter's Revisal of 1819, Laws of 1811, Ch. 809.[5]

The preamble to this new law explicitly states the problem the statute sought to address: setting aside indictments on the basis of technicalities that delayed or prevented justice. This Court understood that the new law "was certainly designed to uphold the execution of public justice, by freeing the Courts from those fetters of *form*, *technicality* and *refinement*," i.e., common law pleading requirements, "which do not concern the substance of the charge, and the proof to support it." *Moses*, 13 N.C. (2 Dev.) at 464.

In 1854, the legislature further emphasized its distaste for the common law rule's rationale and consequences by enacting another similar law, now codified as N.C.G.S. § 15-155 (2023). The law, entitled "Certain defects in indictments not to vitiate," proclaimed:

> No judgment upon any indictment for felony or misdemeanor, whether after verdict, or by confession, or otherwise, shall be stayed or reversed for the want of the averment of any matter unnecessary to be proved, nor for omission of the words "as appears by the record," or of the words "with force and arms," nor for the insertion of the words "against the form of the Statutes" instead of the words "against the form

5. This law remains in force over two hundred years after its enactment, with only minor changes made to bring other charging documents within its scope. *See* N.C.G.S. § 15-153 (2023).

> of the Statute," or vice versa; nor for omitting to state the time at which the offence was committed, in any case where time is not of the essence of the offence, nor for stating the time imperfectly, nor for stating the offence to have been committed on a day subsequent to the finding of the indictment, or on an impossible day, or on a day that never happened; nor for want of a proper and perfect venue, when the court shall appear by the indictment to have had jurisdiction of the offence.

Ch. 35, § 20, Revised Code of 1854.

"It is not astonishing that defendants who have no meritorious ground of exception should clutch at shadowy nothings . . . ." *Hester*, 122 N.C. at 1050. But, even in the 19th century, this Court understood that "[t]he practical sense of the age demands that . . . immaterial variances and refinements and technicalities shall not avail defendants when they are not in truth prejudiced thereby." *Id.* After all, the judicial system "favors trials upon the merits." *Id.* Indeed, allowing a criminal defendant to escape merited punishment on such technicalities "brought the administration of justice into disrepute," especially where indictments are "so explicit that the defendants could not pretend . . . that they did not know [w]hat they were charged with." *State v. Leeper*, 146 N.C. 655, 659 (1908), *overruled on other grounds by In re Alamance Cnty. Ct. Facilities*, 329 N.C. 84 (1991).

Thus, this Court recognized that the rule's consequences, which do not benefit the public or the justice system, were offensive to such an extent that the legislature abrogated the common law's rigid technical requirements. *See Moses*, 13 N.C. (2 Dev.) at 464 ("We think the legislature meant to disallow the whole of them, and only require the substance, that is a direct averment of those facts and circumstances which constitute the crime, to be set forth."); *see also State v. Hedgecock*, 185 N.C. 714, 717 (1923) ("[T]he highly technical common–law procedure [is] . . . now almost entirely, if not altogether abolished here."); *State v. Switzer*, 187 N.C. 88, 96 (1924) ("Form, technicality, and refinement have given way to substance, and it is sufficient if the indictment contains the charge in a plain, intelligent, and explicit manner."); *State v. Linney*, 212 N.C. 739, 742 (1938) ("[E]ver since the Act of 1811 . . . informalities and refinements in the language of the bill may be properly disregarded, if the criminal offense be sufficiently described to inform the defendant of the charge against him, and to enable him to make his defense, and protect him from another prosecution for the same

criminal act."); *State v. Nugent*, 243 N.C. 100, 101 (1955) ("G.S. 15-153 has abolished the requirement that the detailed particulars of a crime must be stated in the meticulous manner prescribed by the common law . . . ."); *State v. Sturdivant*, 304 N.C. 293, 311 (1981) (holding that where the "indictment reasonably notified defendant of the crime for which he was being charged by plainly describing *who did what and when* and by indicating which statute was violated by such conduct[,] . . . it would not favor justice to allow defendant to escape merited punishment upon a minor matter of form").

The operative portion of the 1811 law impacting criminal pleadings had two main provisions. First, it contained a declaration that an indictment must charge a crime. *See* Potter's Revisal of 1819, Laws of 1811, Ch. 809 ("[I]t shall be sufficient to all intents and purposes, that the bill shall contain the charge against the criminal . . . ."); *see also* N.C.G.S. § 15-155 ("No judgment upon any indictment for felony or misdemeanor, whether after verdict, or by confession, or otherwise, shall be stayed or reversed for the want of the averment of any matter unnecessary to be proved . . . when the court shall appear by the indictment to have had jurisdiction *of the offense*." (emphasis added)). Thus, failure to charge a crime was a barrier to the court's ability to act. Second, however, and contrary to the common law, bills of indictment in which a crime was charged "in a plain, intelligible, and explicit manner," N.C.G.S. § 15-153, shall not be set aside for technical deficiencies if the indictment was sufficient for the court to render judgment. When read alone or *in pari materia* with N.C.G.S. § 15-155, it is plainly apparent that the formalistic practice of the common law was to end, except where no crime at all was charged.

Despite the plain directive of the General Assembly and proclamations from this Court that we were no longer bound by "the rhetorical flourish of some ancient and forgotten pleader," *State v. Kirkman*, 104 N.C. 911, 911 (1889), entrenched ideas yield reluctantly. Thus, it was clear to our predecessors that since "[c]ourts have looked with no favor upon technical objections[,] and the legislature has been moving in the same direction[,] [t]he current is all one way," *State v. Smith*, 63 N.C. 234, 236 (1869), i.e., away from the technicalities of the common law. Despite this recognition, our indictment jurisprudence was inconsistent at best.[6]

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6. This Court even observed vacillations in application of indictment statutes by the same Court. *See Kirkman*, 104 N.C. at 913 ("We are not unaware that a contrary view to ours has been held in *State v. Joyner*, 81 N.C. 534; but, in view of the broad and clear expressions of the statute, we cannot hold that case as authority, and deem the reasoning

Then Justice Clark (later Chief Justice) appeared frustrated with the contradictory application of the law in this area when he stated that

> These technicalities and refinements doubtless originated in the humanity of the courts at a time when defendants on trial for the gravest offenses were not permitted the benefit of counsel, not allowed to have witnesses sworn in their behalf. 4 Bl., 459. They are an anachronism now. Their survival and occasional reappearance, after so many statutes and so many decisions, and when the reason for them and a knowledge of their origin even has passed away, is without a parallel, unless it is in the fact that our time-pieces still mark the fourth hour with IIII, which we are told, is due to the fact that the King of France, to whom the first watch was carried, unable to understand its mechanism, criticised the IV and ordered it replaced by the letters which, with Chinese exactness of imitation, are used by us today.
>
> They do no harm. But to sustain obsolete technicalities in indictments will be to waste the time of the courts, needlessly increase their expense to the public, multiply trials, and, in some instances, would permit defendants to evade punishment who could not escape upon a trial on the merits. If it has not the last mentioned result, it is no advantage to defendants to resort to technicalities, and, if it has such effect, the courts should repress, as they do, a reliance upon them.
>
> There are cases where defects in an indictment or a civil pleading are matters of substance, and objection should be insisted on by the parties and sustained by the courts. But the letter and the spirit of legislation, both as to criminal and civil pleading, require only a plain and clear statement of the matters alleged, and when the objection to such statement is not substantial, but rests upon mere technicalities and refinements, it would be better for the party to disregard

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used and the conclusion reached in . . . *State v. Parker*, in the same volume, more consonant with the expressed will of the legislative power.").

> them, and go to trial upon the merits, if he has any to set up and rely on.

State v. Harris, 106 N.C. 682, 689–90 (1890).

The persistent focus on "obsolete technicalities," *id.*, by advocates and judges led the legislature to once again address deficient indictments, and any doubt regarding the continued application of the common law rule's technical requirements should have been dispelled by the General Assembly's enactment of the Criminal Procedure Act in 1975. *See* An Act to Amend the Laws Relating to Pretrial Criminal Procedure, ch. 1286, § 28, 1974 N.C. Sess. Laws 490, 557 ("None of the provisions of [the] [A]ct providing for repeal of certain sections of the General Statutes shall constitute a reenactment of the common law."). The Act was the result of a legislative proposal developed by the Criminal Code Commission between 1970–73, which recognized that "the statutory language of Chapter 15 of the General Statutes had become antiquated and inappropriate through the passage of time." *Legislative Program and Report to the General Assembly of North Carolina by the Criminal Code Commission*, at i (1973). "The goal of the Commission [was] . . . to prepare a balanced legislative reform that would eliminate from our law, where desirable, those practices which frustrate the effective and efficient administration of justice without regard for which side might benefit from the practice in question." *Id.* at ii.

The Commission described its proposed bill as "a 'citizen oriented' bill." *Id.* at iii. The Commission specifically stated:

> We believe this bill is properly called a 'citizens bill' in that it is designed to serve the general public by saving the citizen's time as a juror, his time as a witness, and his time as a prosecuting victim even though it will require some departure from the more traditional ways of handling criminal cases in our courts.

Id.

The General Assembly thereafter left intact various provisions of Chapter 15, including sections 15-153 and 15-155, and enacted the Commission's proposed bill as the Criminal Procedure Act. *See* An Act to Amend the Laws Relating to Pretrial Criminal Procedure, ch. 1286, § 28, 1974 N.C. Sess. Laws 490. Among other things, the new Act was intended to "statutorily modernize[ ]the requirements of a valid indictment" and "shift away from the technical rules of pleading." *State v. Oldroyd*, 380 N.C. 613, 619 (2022) (cleaned up).

There can be little question that the Criminal Procedure Act removed any vestiges of the archaic, hyper-technical common law requirement that a valid indictment contain a rote recitation of elements. *See* N.C.G.S. § 15A-924(a)(5) (2023) (stating a valid indictment requires the State to "assert[ ] *facts supporting* every element of a criminal offense" (emphasis added)); *see also Lancaster*, 385 N.C. at 469 ("[A]ll 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." (cleaned up)); *In re J.U.*, 384 N.C. at 624 ("Consistent with a proper understanding of indictment jurisprudence . . . a juvenile petition does not have to state every element . . . so long as the elements are clearly inferable from the facts, duly alleged." (cleaned up)).

The Criminal Procedure Act was itself preceded by the legislature's enactment of short-form indictments, which "relieve[d] the State of the common law requirement that every element of [certain] offense[s] be alleged," and this Court has repeatedly upheld such action because "within constitutionally mandated parameters the legislature has the power to prescribe the form of a bill of indictment." *State v. Lowe*, 295 N.C. 596, 603 (1978) (citing *State v. Harris*, 145 N.C. 456 (1907) and *State v. Holder*, 153 N.C. 606 (1910)). "This action is within the legislature's prerogative so long as the newly prescribed indictment still complies with the constitutional requirement that the defendant be informed of the accusation against him." *Id.* Put another way, pleading deficiencies in short-form indictments go to notice, not jurisdiction, because short-form indictments unquestionably charge a crime.[7]

But this Court recently commented on this subject, demonstrating a similar misunderstanding of the issue that led to the inconsistent results our predecessors lamented. *See Rankin*, 371 N.C. at 895. Although the majority in *Rankin* stated that "statutory interpretation reveals that the legislature intentionally left the common law remedy for invalid indictments intact," *id.*, this statement directly contradicts the plain language of legislative enactments dating back to 1811 and decisions from our Court cited above. At a minimum, the discussion in *Rankin* concerning our indictment jurisprudence is self-acknowledged dicta as the majority correctly noted that "discussion of this issue [was] outside the scope of

7. Contrary to our dissenting colleague's assertion that our decision today "reverses [the] course" of indictment jurisprudence, this Court stated over one hundred and fifty years ago that "[c]ourts have looked with no favor upon technical objections[,] and the legislature has been moving in the same direction[,] [t]he current is all one way." *Smith*, 63 N.C. at 236. Our holding today simply follows this current.

review applicable to this case." *Id.* Our dissenting colleague somehow misses this clear-throated pronouncement. But even if not dicta, the majority's position that we should still cling to these shadowy nothings was met with a well-reasoned and vigorous dissent, significantly diminishing its authority.[8] *See State v. Walker*, 898 S.E.2d 661, 665 (N.C. 2024) (Berger, J., concurring).

Even if the Criminal Procedure Act could be said not to directly address the jurisdictional aspect of the common law rule, it defies reason to argue that, when read together with N.C.G.S. §§ 15-153 and 15-155, a bill designed to "eliminate . . . those practices which frustrate the effective and efficient administration of justice" and "sav[e] the citizen's time as a juror, his time as a witness, and his time as a prosecuting witness" carried forward a common law rule that produces results directly contrary to these goals. *Legislative Program and Report to the General Assembly of North Carolina by the Criminal Code Commission*, at ii–iii (1973). Nonetheless, that is defendant's argument, which he contends is supported by our Constitution and the Criminal Procedure Act itself.

We begin with an overview of the two distinct species of indictment deficiencies, jurisdictional and non-jurisdictional, which the common law rule conflates. We then address defendant's specific constitutional and statutory arguments.

2. The Common Law Rule Conflicts with our Constitution and General Statutes

a. The Power to Decide a Case

The term "jurisdiction" refers to a "court's power to decide a case or issue a decree." *Jurisdiction*, *Black's Law Dictionary* (11th ed. 2019). Such power is granted by the people who speak through their constitutions and statutes, not by an indictment drafted by a prosecutor.

> Rules of jurisdiction are addressed, so to speak, from a position outside the court system and prescribe the authority of the courts within the system. They are to a large extent constitutional rules. The provisions of the United States Constitution specify the outer limits of the jurisdiction of the federal courts and authorize Congress, within those limits, to establish by statute the organization and jurisdiction of the

8. Unlike in this case, the parties in *Rankin* never presented arguments regarding the continued application of the common law jurisdictional indictment rule.

> federal courts. . . . Within each state, the court system is established by state constitutional provisions or by a combination of such provisions and implementing legislation, which together define the authority of the various courts within the system.

Fleming James Jr. & Geoffrey C. Hazard Jr., *Civil Procedure* § 2.1, at 55 (3d ed. 1985).

"While the federal constitution limits the federal 'judicial Power' . . . our Constitution, in contrast, has no such case or controversy limitation to the 'judicial power.' " *Comm. to Elect Dan Forest v. Emp.'s Pol. Action Comm.*, 376 N.C. 558, 591 (2021). We reference federal case law for illustrative purposes, mindful that these holdings are not binding upon this Court's consideration of the North Carolina Constitution.

The common law rule, which proclaims that a court's subject-matter jurisdiction hinges on a pleading's sufficiency, is based on an outdated and " 'expansive notion of "jurisdiction," ' . . . which was 'more a fiction than anything else.' " *U.S. v. Cotton*, 535 U.S. 625, 630 (2002) (first quoting *Custis v. United States*, 511 U.S. 485, 494 (1994), then quoting *Wainwright v. Sykes*, 433 U.S. 72, 79 (1977)). The common law rule'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.' " *Id.* (quoting *Steel Co. v. Citizens for Better Environment*, 523 U.S. 83, 89 (1998)).

"Jurisdiction is a matter of power, and covers wrong as well as right decisions." *Lamar v. U.S.*, 240 U.S. 60, 64 (1916). "[N]othing can be clearer than that the [trial court], which has jurisdiction of all crimes cognizable under the authority of the United States, acts equally within its jurisdiction whether it decides a man to be guilty or innocent . . . ." *Id.* at 65 (citation omitted). Thus, in the federal courts "a ruling 'that the indictment is defective does not affect the jurisdiction of the trial court to determine the case presented by the indictment.' " *Cotton*, 535 U.S. at 631 (quoting *U.S. v. Williams*, 341 U.S. 58, 66 (1951)).

However, because federal courts' authority over criminal matters extends only to "offenses against the laws of the United States," *Williams*, 341 U.S. at 65–66, "if the charged conduct itself is not criminal, then an offense against the United States has not been pled and the [trial] court lacks subject matter jurisdiction." *U.S. v. Moore*, 954 F.3d 1322, 1333 (11th Cir. 2020). As the "absence of an element of an offense in an indictment is not tantamount to failing to charge a criminal

offense against the United States," these types of indictment defects do not affect federal courts' jurisdiction. *Id.*

> The lynchpin for a defect that implicates jurisdiction is whether the indictment charged the defendant with a criminal offense against the laws of the United States. . . . In other words, when the indictment itself fails to charge a crime, the [trial] court lacks jurisdiction. However, while the omission of an element may render the indictment insufficient, it does not strip the [trial] court of jurisdiction over the case.

Id. at 1334 (cleaned up). "Since Congress has provided the [trial] courts with jurisdiction," if an indictment "charg[es] [a defendant] with violating laws of the United States, the [trial] court [is] empowered to hear the case." *Id.* at 1335 (cleaned up).

This reasoning is highly persuasive and aligns with N.C.G.S. §§ 15-153 and 15-155. In simple terms, a court's jurisdiction to decide criminal cases flows directly from the people speaking through their constitution and statutes and cannot be destroyed by other means. This concept is not unfamiliar to our courts, as we have held that where an indictment fails to charge a crime falling within the scope of the court's jurisdiction, the matter is a nullity.[9] *See State v. Beasley*, 208 N.C. 318, 320 (1935) (reversing conviction for a kidnapping charge as the crime was committed beyond "[t]he territorial jurisdiction of the superior court"); *State v. Rawls*, 203 N.C. 436, 438 (1932) (dismissing action against the defendant because the crime charged was not "within the original jurisdiction

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9. Our dissenting colleague conflates this concept with the notion of personal jurisdiction, stating that if an indictment fails to allege all essential elements of a crime "there is no personal jurisdiction because . . . the defendant did not violate a criminal law." This argument goes to the merits of the case, not jurisdiction. Any person who commits a crime against the people or laws of this State within the boundaries of this State is subject to the jurisdiction of our general courts of justice. The muddying of jurisdictional waters reveals a deeper flaw in the dissent's reasoning. According to our dissenting colleague, an indictment that fails to assert the "essential elements" of a crime would fail to allege that the defendant "violate[d] a criminal law." The federal courts, most jurisdictions in this nation, and our own criminal statutes and precedents disagree. *See Moore*, 954 F.3d at 1333 (concluding that the "absence of an element of an offense in an indictment is not tantamount to failing to charge a criminal offense against the United States"); *State v. Dunn*, 375 P.3d 332, 355 (Kan. 2016) ("Indeed, the view that a failure to include an essential element in the charging document is a jurisdictional defect ha[s] quickly become the minority view in state and federal jurisdictions"); N.C.G.S. § 15-144.1(a) ("In indictments for rape it is not necessary to allege every matter to be proved at trial"); *Lowe*, 295 N.C. at 603–04 (stating short-form statutes "relieve the State of the common law requirement that every element of the offense be alleged").

of the county court of Pitt county"). This reasoning is also consistent with N.C.G.S. § 15-153—an indictment must charge a crime to be valid, but superficial errors in the manner or form of the charge shall not impact the validity of the indictment and cannot affect the court's jurisdiction over the charged crime. *See also* N.C.G.S. § 15-155 ("No judgment upon any indictment . . . shall be stayed or reversed for [superficial errors] . . . when the court shall appear by the indictment to have had jurisdiction over the offense.").

The legislature's command that an indictment "*shall not* be quashed, nor the judgment thereon stayed" because of such errors, N.C.G.S. § 15-153 (emphasis added), is an explicit legislative statement that mere pleading deficiencies are not jurisdictional concerns. The common law rule's archaic notion of "jurisdiction" muddies the distinction between these two types of indictment defects—failure to charge a crime on the one hand, and failure to allege with sufficient precision facts and elements of a crime thereby permitting the defendant to prepare a defense and the court to render judgment on the other. "It is the allegation of criminal conduct . . . that activates a court's jurisdiction," *Bennington v. Com.*, 348 S.W.3d 613, 622 (Ky. 2011), not a recitation of elements with perfection.

With this distinction in mind, we now consider defendant's arguments that the common law rule, which treats the latter defect as if it were the former, aligns with the North Carolina Constitution and the Criminal Procedure Act.

b. Our Constitution

We begin with our Constitution, which provides that "[e]xcept 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. Defendant argues that this provision, coupled with the declaration that "every person charged with crime has the right to be informed of the accusation," N.C. Const. art. I, § 23, conclusively demonstrates that a valid indictment must allege all elements of an offense and is necessary to confer jurisdiction over criminal proceedings. We disagree.

First, it does not follow that because our Constitution guarantees criminal defendants the right to be informed of the charge against them, such right can only be vindicated by alleging all elements of a crime with precision. If that were so, we would not have sanctioned short-form indictments that "relieve the State of the *common law requirement* that every element of [certain] offense[s] be alleged," *Lowe*, 295 N.C. at 603

(emphasis added), nor could we have upheld a statute requiring indictments to "assert[ ] *facts supporting* every element of a criminal offense." N.C.G.S. § 15A-924(a)(5) (emphasis added); *see also Lancaster*, 385 N.C. at 469 ("[A]ll 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." (cleaned up)); *In re J.U.*, 384 N.C. at 624 ("Consistent with a proper understanding of indictment jurisprudence . . . a juvenile petition does not have to state every element . . . so long as the elements are clearly inferable from the facts, duly alleged." (cleaned up)); *State v. Jordan*, 75 N.C. App. 637, 639, *cert. denied*, 314 N.C. 544 (1985) ("Contrary to defendant's contention, a criminal pleading does not have to state every element of the offense charged . . . .").[10] Moreover, as discussed above, both N.C.G.S. §§ 15-153 and 15-155 plainly recognize that these formal shortcomings are not jurisdictional. Thus, a rote recitation of elements is not required to confer jurisdiction by our Constitution, statutes, or case law.

Second, presuming arguendo that failure to allege an element equates to lack of notice, it does not follow that a violation of a defendant's constitutional right to be informed of the charge against him reflexively implicates jurisdictional concerns. Criminal defendants possess many constitutional rights—such as the right to be free from unreasonable searches and seizures, the right to remain silent, the right to effective counsel, the right to a speedy trial, the right to confront the witnesses against them, the right against excessive bail—yet violations of these rights do not deprive a court of jurisdiction. *See Cotton*, 535 U.S. at 630 (concluding that such an "elastic concept of jurisdiction is not what the term 'jurisdiction' means today, i.e., the courts' statutory or constitutional *power* to adjudicate the case" (cleaned up)).

Finally, defendant's argument ignores the remainder of Article I, Section 22, which provides that "any person, when represented by counsel, may, under such regulations as the General Assembly shall prescribe, *waive indictment* in noncapital cases." N.C. Const. art. I, § 22 (emphasis

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10. Notably, our dissenting colleague agrees that short-form indictments are permissible despite their failure to allege every element of an offense. This is so, apparently, because short-form indictments still fulfill their constitutional purpose of providing notice *without alleging every element*. Why is it that we should measure short-form indictments against their ability to provide notice, but not engage in such an analysis of an allegedly deficient indictment just because it is not a short-form indictment? Under the dissent's reasoning, failing to allege every element is equivalent to failing to charge a crime *regardless of whether notice is provided*—but short-form indictments, which do not allege every element, properly charge a crime and provide notice.

added). Defendant's contention that Article I, Section 22's indictment requirement implicates jurisdictional concerns conflicts with the fundamental maxim that "[j]urisdiction over the subject-matter of an action cannot be waived or conferred by consent." *Dees v. Apple*, 207 N.C. 763, 766 (1935); *see also Cotton*, 535 U.S. at 630 ("[S]ubject-matter jurisdiction, because it involves a court's power to hear a case, can never be forfeited or waived."); *Moore*, 954 F.3d at 1336 ("Ultimately, the law is clear: the omission of an element in an indictment does not deprive the [trial] court of subject matter jurisdiction. . . . This principle is buttressed by the fact that defendants can waive their right to indictment by a grand jury . . . . In contrast, subject matter jurisdiction can *never* be waived, and a court can raise that issue *sua sponte* at any time." (cleaned up)).[11]

Article I, Section 22 contains no language regarding jurisdiction. Yet defendant and our dissenting colleague would have this Court inject jurisdiction into a provision that is silent on the matter, and on which the legislature has spoken, while simultaneously interpreting such provision to allow waiver of jurisdiction. Flexible as the common law may be, it cannot be contorted to rewrite our Constitution, which provides the source of superior court jurisdiction over violations of North Carolina laws. "Except as otherwise provided by the General Assembly, the Superior Court shall have original general jurisdiction throughout the State." N.C. Const. art. IV, § 12(3). Thus, defendant's contention that Article I, Section 22 supports his argument is without merit.

Our Constitution is clear. Where it discusses indictments, it does not discuss jurisdiction—where it discusses jurisdiction, it does not discuss indictments. The common law rule that indictments are jurisdictional and must allege each element of an offense with precision has no

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11. Defendant's argument, and our prior indictment jurisprudence on which both he and our dissenting colleague rely, may stand on firmer footing were our Constitution of 1868 still in force. *Compare* N.C. Const. art. I, § 22 ("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. *But any person, when represented by counsel, may, under such regulations as the General Assembly shall prescribe, waive indictment in noncapital cases*." (emphasis added)); *with* N.C. Const. of 1868, art. I, § 12 ("No person shall be put to answer any criminal charge except as hereinafter allowed, but by indictment, presentment, or impeachment."). This subtle change has meaning which escapes our dissenting colleague's analysis, an error that is just one contributing factor to the dissent's flawed reasoning. It is fundamental that one cannot consent to jurisdiction, *see Dees*, 207 N.C. at 766 ("Jurisdiction over the subject-matter of an action cannot be waived or conferred by consent"), and a bill of information that is properly consented to by all parties and filed in the superior court division may lack jurisdiction if it fails to allege a crime against the people or laws of this State. It will not, however, fail to confer jurisdiction for mere technical deficiencies.

support in the plain text of our Constitution.[12] Nevertheless, defendant contends that even if the rule is not rooted in our Constitution, it is codified by our General Statutes. We disagree.

c. Our General Statutes

Defendant argues that multiple provisions of the Criminal Procedure Act support his contention that the Act codified, rather than abrogated, the common law rule.[13] Specifically, defendant relies on subsections 15A-924(a)(5) and (6), 15A-924(e), 15A-952(d), 15A-1442(2)(b), 15A-1446(d)(4), and 15A-1447(b). Before addressing each provision, we again point to the two-hundred-year history of legislative enactments and judicial declarations contrary to his position and note that "[g]eneral jurisdiction for the trial of criminal actions is vested in the superior court and the district court divisions of the General Court of Justice." N.C.G.S. § 7A-270 (2023).

Defendant's first argument concerns the mandate in subsection 15A-924(a)(5) that a statutorily sufficient criminal pleading contain "[a] plain and concise factual statement in each count which, without allegations of an evidentiary nature, asserts facts supporting every element of a criminal offense." N.C.G.S. § 15A-924(a)(5). This Court has held that unlike the common law rule, this subsection does not require " 'magic words' or a rote recitation of elements" and that an indictment complies with this subsection if the elements of the offense are " 'clearly inferable' from the allegations in the indictment." *Lancaster*, 385 N.C. at 469 (quoting *In re J.U.*, 384 N.C. at 624). The common law rule's requirement that an indictment allege every element therefore conflicts with both subsection 15A-924(a)(5) and this Court's precedent.

Defendant also relies on subsection 15A-924(a)(6), which provides that a criminal pleading must contain "[f]or each count a citation of any

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12. Our dissenting colleague references due process concerns. However, she fails to cite an example where a due process violation robs a court of jurisdiction. Where there are legitimate due process implications due to deficiencies in indictments, as in other contexts, those issues can and should be addressed in the trial court. The failure to raise such issues, as discussed further herein, goes to the effectiveness of defendant's counsel, not jurisdiction.

13. We are not unaware of our prior case law which applied rigid adherence to the common law rule; in fact we acknowledge inconsistent application. But the precedent relied on by my dissenting colleague has less weight because "it conflicts with a pertinent statutory provision to the contrary," and we may not "by a line of erroneous decisions overrule a statutory enactment." *State v. Mobley*, 240 N.C. 476, 487 (1954). After all, "stare decisis is not an inexorable command." *State v. Hilton*, 378 N.C. 692, 730–31 (Earls, J., dissenting) (cleaned up).

applicable statute, rule, regulation, ordinance, or other provision of law alleged therein to have been violated. Error in the citation or its omission is not ground for dismissal of the charges or reversal of a conviction." N.C.G.S. § 15A-924(a)(6) (2023). We note this statute, like sections 15-153 and 15-155, is fundamentally inconsistent with the common law rule under which any errors in the charging document placed the criminal charge in jeopardy of dismissal. *See* Potter's Revisal of 1819, Laws of 1811, Ch. 809 ("Whereas exceptions, in themselves merely formal, are frequently taken against bills of indictment . . . no bill of indictment or presentment shall be quashed or judgment thereon arrested, for or by reason of any informalities or refinements . . . .").

Defendant further contends that because subsection 15A-924(a)(5) does not contain the second sentence of subsection 15A-924(a)(6), the General Assembly intended noncompliance with subsection 15A-924(a)(5) to result in dismissal of charges or reversal of a conviction. Interestingly, defendant does not assert that noncompliance with subsections 15A-924(a)(1) to (4) and (7), none of which contain the second sentence of subsection 15A-924(a)(6), should result in dismissal of charges or reversal of a conviction. Rather than read a non-existent mandate into subsections 15A-924(a)(1) to (5) and (7), we prefer to follow the words actually contained in the statute.

Specifically, we turn to subsection 15A-924(e). That provision provides:

> Upon motion of a defendant under G.S. 15A-952(b), the court must dismiss the charges contained in a pleading which fails to charge the defendant with a crime in the manner required by subsection (a), unless the failure is with regard to a matter as to which an amendment is allowable.

N.C.G.S. § 15A-924(e) (2023). As this provision applies only to motions made under subsection 15A-952(b), its meaning must be determined by examining subsection 15A-952(b). That subsection provides, in relevant part:

> Except as provided in subsection (d), when the following motions are made in superior court they must be made within the time limitations stated in subsection (c) unless the court permits filing at a later time:
>
> . . . .
>
> (6) Motions addressed to the pleadings, including:

> a. Motions to dismiss for failure to plead under G.S. 15A-924(e).

N.C.G.S. § 15A-952(b) (2023). Subsection 15A-952(e) further provides that "[f]ailure to file the motions in subsection (b)," i.e., motions to dismiss for failure to plead under subsection 15A-924(e), "constitutes a waiver of the motion." N.C.G.S. § 15A-952(e).[14] Taken together, these statutes operate as follows.

First, the State is required to "assert[ ] facts supporting every element of a criminal offense" in the indictment.[15] N.C.G.S. § 15A-924(a)(5). Second, if the defendant believes the indictment "fails to charge . . . a crime in the manner required by subsection (a)," N.C.G.S. 15A-924(e), that is, by failing to assert facts supporting every element of the charge, the defendant may file a motion within a limited timeframe in superior court seeking to dismiss the charge. N.C.G.S. § 15A-952(b)(6)(a). If the defendant fails to timely file such motion, it is waived. N.C.G.S. § 15A-952(e). Finally, if the motion was timely filed, and if the superior court agrees with the defendant, it must dismiss the charge. N.C.G.S. § 15A-924(e). But unlike the common law rule, such a dismissal is on statutory rather than jurisdictional grounds. *See Lancaster*, 385 N.C. at 462 ("Although earlier common law principles certainly conveyed that defective indictments implicated jurisdictional concerns, . . . the Criminal Procedure Act represent[s] a sharp departure from the demands of technical pleading."); *Oldroyd*, 380 N.C. at 619 ("[T]he Criminal Procedure Act of 1975 . . . statutorily modernize[d] the requirements of a valid indictment.").

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14. This statute reinforces our precedent requiring a defendant to move for a bill of particulars prior to trial before requesting arrest of judgment after an unfavorable verdict. *See State v. Brown*, 320 N.C. 179, 192 (1987) ("[I]f, despite the sufficiency of the indictment, defendant was at a loss to determine the specific facts underlying the charges . . . , his proper recourse was to move for a bill of particulars."); *State v. Shade*, 115 N.C. 757, 758–59 (1894) ("[T]he defendant . . . may before trial move the court to order that a bill of particulars be filed, and the court will not arrest the judgment after verdict where he attempts to reserve his fire until he takes first the chance of acquittal. . . . With such safeguards thrown around prosecutions, it must be the fault of the person charged if he goes to trial without being 'informed of the accusation against him.' ").

15. This requirement is obviously relaxed where the State proceeds with a short-form indictment. *See* N.C.G.S. § 15-144.1(a) ("In indictments for rape it is not necessary to allege every matter to be proved at trial"); *see also Lowe*, 295 N.C. at 603–04 (stating short-form statutes "relieve the State of the common law requirement that every element of the offense be alleged" and advising that "a defendant who feels that he may be taken by surprise at trial may ask for a bill of particulars to obtain information in addition to that contained in the indictment which will clarify the charge against him.").

Defendant argues that "[t]here is nothing in these statutes which suggests the General Assembly . . . wants to move away from the practice of treating indictments as jurisdictional requirements." Defendant has not discussed or otherwise argued the legislative history or court commentary set forth above that is fundamentally contrary to his position. Moreover, the requirement that motions to dismiss for failure to plead under subsection 15A-924(e) be made in superior court within a certain time limit, and the directive that failure to timely move waives such motion, differentiate these motions from jurisdictional questions. Because "[t]he question of subject matter jurisdiction may be raised at any time, even in the Supreme Court," *Lemmerman v. A.T. Williams Oil Co.*, 318 N.C. 577, 580 (1986), and because "[j]urisdiction over the subject-matter of an action cannot be waived or conferred by consent," *Dees*, 207 N.C. at 266, subsections 15A-924(e) and 15A-952(b) do not treat pleading errors as jurisdictional issues. Further, the Criminal Procedure Act's elimination of the common law's rote recitation of elements requirement, and the Act's statutory allowance of certain pleading errors, demonstrate the General Assembly's intent to untangle the sufficiency of charging documents from the courts' power to decide a case. *See* N.C.G.S. § 7A-270 ("General jurisdiction for the trial of criminal actions is vested in the superior court and the district court divisions of the General Court of Justice.").

Notably, subsection 15A-952(d) provides that "[m]otions concerning jurisdiction of the court or the failure of the pleading to charge an offense may be made at any time." N.C.G.S. § 15A-952(d) (2023). Subsection 15A-952(d)'s phrase "failure of the pleading to charge an offense" is distinct from the language of subsection 15A-924(e), which concerns a failure "to charge the defendant with a crime in the manner required by subsection [15A-924](a)." *Compare* N.C.G.S. § 15A-952(d), *with* N.C.G.S. § 15A-924(e). This is also consistent with the bifurcation in N.C.G.S. §§ 15-153 and 15-155.

For example, a motion to dismiss an indictment for larceny that "fail[ed] to charge the defendant . . . in the manner required by subsection [15A-924](a)," N.C.G.S. § 15A-924(e), by failing to assert facts supporting each element of larceny, would be properly made in superior court under subsections 15A-924(e) and 15A-952(b)(6)(a) and would be subject to waiver for lack of timeliness. A motion to dismiss an indictment charging the accused with wearing a pink shirt on a Wednesday—conduct that does not constitute a criminal offense—would be properly made at any time under subsection 15A-952(d) and would not be subject to such waiver. *See Moore*, 954 F.3d at 1333 ("The absence of an element

of an offense in an indictment is not tantamount to failing to charge a criminal offense . . . . However, if the charged conduct itself is not criminal, . . . the [trial] court lacks subject matter jurisdiction."). A similar result would be had for charging a defendant with a crime committed in another state.

Nothing in the statutes discussed above indicates that the State's noncompliance with subsection 15A-924(a) could rob the superior court of jurisdiction or that the State's compliance would bestow such jurisdiction. The reason is simple; our Constitution confers jurisdiction, and the General Assembly reaffirms that principle elsewhere in our General Statutes. *See* N.C. Const. art. IV, § 12(3) ("Except as otherwise provided by the General Assembly, the Superior Court shall have original general jurisdiction throughout the State."); N.C. Const. art. IV, § 12(4) ("The General Assembly shall . . . prescribe the jurisdiction and powers of the District Courts and Magistrates."); N.C.G.S. § 7A-270 ("General jurisdiction for the trial of criminal actions is vested in the superior court and the district court divisions of the General Court of Justice."); N.C.G.S. § 7A-271(a) (2023) ("The superior court has exclusive, original jurisdiction over all criminal actions not assigned to the district court division by this Article."); N.C.G.S. § 7A-272(a) (2023) ("Except as provided in this Article, the district court has exclusive, original jurisdiction for the trial of criminal actions, including municipal ordinance violations, below the grade of felony, and the same are hereby declared to be petty misdemeanors.").

Defendant next argues that section 15A-1442 supports his argument that the General Assembly has codified, rather than abrogated, the common law jurisdictional indictment rule. In relevant part, the statute provides:

> The following constitute grounds for correction of errors by the appellate division.
>
> (1) **Lack of Jurisdiction.** —
>
> a. The trial court lacked jurisdiction over the offense.
>
> b. The trial court did not have jurisdiction over the person of the defendant.
>
> (2) **Error in the Criminal Pleading.** — Failure to charge a crime, in that:
>
> a. The criminal pleading charged acts which at the time they were committed did not constitute a violation of criminal law; or

> b. The pleading fails to state essential elements of an alleged violation as required by G.S. 15A-924(a)(5).

N.C.G.S. § 15A-1442 (2023). Again, the General Assembly's differentiation between jurisdictional and non-jurisdictional errors in criminal pleadings cuts against defendant's argument. The General Assembly's separation of these errors indicates abrogation, not codification, of the common law rule which had entangled them. We note that subsections 15A-1442(2)(a) and (b) repeat the delineation between a pleading that fails to charge acts that do not violate criminal law and a pleading that fails to comply with subsection 15A-924(a)(5). *See Moore*, 954 F.3d at 1333 ("The absence of an element of an offense in an indictment is not tantamount to failing to charge a criminal offense . . . . However, if the charged conduct itself is not criminal, . . . the [trial] court lacks subject matter jurisdiction."); *see also* N.C.G.S. § 15-153.

Next, defendant contends that subsection 15A-1446(d)(4) supports his argument because it automatically preserves pleading errors for appellate review. Subsection 15A-1446(d)(4) provides that an alleged error based upon the ground that "[t]he pleading fails to state essential elements of an alleged violation, as required by G.S. 15A-924(a)(5)" is subject to appellate review "even though no objection or motion has been made in the trial division." N.C.G.S. § 15A-1446(d)(4) (2023).

Once again, defendant relies on a statute in which the General Assembly has specifically differentiated between jurisdictional and non-jurisdictional pleading errors. *See* N.C.G.S. § 15A-1446(d)(1) (2023) (providing automatic preservation of alleged errors based upon "[l]ack of jurisdiction of the trial court over the offense of which the defendant was convicted"); N.C.G.S. § 15A-1446(d)(2) (2023) (providing automatic preservation of alleged errors based upon "[l]ack of jurisdiction of the trial court over the person of the defendant"). As with the statutory provisions discussed above, subsection 15A-1446(d)'s distinction between these two species of indictment defects supports the conclusion that the General Assembly has abrogated the common law jurisdictional indictment rule.

Although not strictly necessary to the resolution of this issue, we note that this Court views subsection 15A-1446(d) with skepticism because our Constitution provides that "[t]he Supreme Court shall have exclusive authority to make rules of procedure and practice for the Appellate Division." N.C. Const. art. IV, § 13(2). This Court exercises this constitutional authority by promulgating the Rules of Appellate Procedure and has held that to the extent provisions of subsection 15A-1446(d) conflict

with the Rules of Appellate Procedure, the Rules prevail and "the statute must fail." *State v. Bennett*, 308 N.C. 530, 535 (1983) (holding subsection 15A-1446(d)(13) unconstitutional); *see also State v. Elam*, 302 N.C. 157, 160 (1981) (holding subsection 15A-1446(d)(6) unconstitutional).

Here, there appears to be no conflict between our Rules and subsection 15A-1446(d)(4). Rule 10 of the Rules of Appellate Procedure provides in relevant part that "[a]ny such issue . . . which was deemed preserved . . . including . . . whether the court had jurisdiction over the subject matter, and whether a criminal charge is sufficient in law, may be made the basis of an issue presented on appeal." N.C. R. App. P. 10(a)(1). Thus, on this issue our Rules of Appellate Procedure align with the Criminal Procedure Act by differentiating between jurisdictional and non-jurisdictional pleading issues and by automatically preserving both for appellate review.

We note that while Rule 10 automatically preserves issues of "whether a criminal charge is sufficient in law," it does not follow that all issues related to deficient indictments are jurisdictional merely because subject matter jurisdiction may be raised at any time. If we were to accept this proposition, we would also have to accept that the issue of whether a "judgment is supported by the verdict or by the findings of fact and conclusions of law" is jurisdictional simply because it is automatically preserved by Rule 10. N.C. R. App. P. 10(a)(1). Those familiar with appellate courts will recognize the absurdity of this notion. Ultimately, both subsection 15A-1446(d) and Rule 10 weaken, rather than strengthen, defendant's argument.

Finally, defendant contends that subsection 15A-1447(b) supports his argument because it mandates reversal of the judgment and dismissal of the charge if "the facts charged in a pleading were not at the time charged a crime." N.C.G.S. § 15A-1447(b) (2023). There are two issues with defendant's contention that this subsection indicates codification, rather than abrogation, of the common law jurisdictional indictment rule.

First, it does not follow that because the remedy mandated is reversal of the judgment and dismissal of the charge, the harm compelling that remedy is jurisdictional in nature. Subsection 15A-1447(c) mandates the same remedy of reversal and dismissal if "the evidence with regard to a charge is insufficient as a matter of law," unless there is "evidence to support a lesser included offense," in which case "the court may remand for trial on the lesser offense." N.C.G.S. § 15A-1447(c) (2023). No one would seriously contend that the State's failure to present sufficient

evidence to survive a defendant's motion to dismiss amounts to a failure to cloak the trial court with jurisdiction.

Second, we are not convinced by defendant's expansive reading of subsection 15A-1447(b). Defendant appears to argue that this subsection applies to *any* pleading error, including failure to "assert[ ] facts supporting every element of a criminal offense" under subsection 15A-924(a)(5). *See* N.C.G.S. § 15A-924(a)(5). However, the plain language of subsection 15A-1447(b) contemplates circumstances in which an indictment properly alleges a violation of the laws of this State, but the alleged conduct did not violate criminal law at the time it occurred. Such circumstances would exist if the State charged a person with violating an ex post facto law, e.g., one which retroactively criminalizes conduct. Or, by way of another example, if the State charged a person with exceeding a school zone's posted speed limit despite the conduct occurring outside of the school zone's effective posted hours. In both cases, a defendant's argument would go to the merits of the case rather than jurisdiction.

In sum, a review of the Criminal Procedure Act and the history leading to its adoption does not indicate that our General Assembly has codified the common law jurisdictional indictment rule. Instead, the repeated distinction between jurisdictional and non-jurisdictional pleading errors demonstrates that the Criminal Procedure Act abrogated any remnant of the common law jurisdictional indictment rule.

"When the General Assembly as the policy making agency of our government legislates with respect to the subject matter of any common law rule, the statute supplants the common law and becomes the law of the State." *News & Observer Publ'g Co. v. State ex rel. Starling*, 312 N.C. 276, 281 (1984). Because the Criminal Procedure Act abrogated any remaining portion of the common law jurisdictional indictment rule that may have survived implementation of N.C.G.S. §§ 15-153 and 15-155, that common law rule has been supplanted and is no longer the law in this State.

Our Constitution and General Statutes, not an indictment, confer the general courts of justice with jurisdiction over criminal laws and the defendants accused of violating such laws. We join the Supreme Court of the United States and the majority of our sister states in recognizing that "defects in an indictment do not deprive a court of its power to adjudicate a case." *Cotton*, 535 U.S. at 630; *see also State v. Dunn*, 375 P.3d 332, 355 (Kan. 2016) ("Indeed, the view that a failure to include an essential element in the charging document is a jurisdictional defect ha[s] quickly become the minority view in state and federal jurisdictions.").

3. Challenging and Reviewing an Allegedly Defective Indictment

The abrogation of the common law rule does not relieve the State of its duty to draft indictments in a manner that "satisf[ies] both statutory strictures and . . . constitutional purposes." *Lancaster*, 385 N.C. at 462 (quoting *In re J.U.*, 384 N.C. at 623). Nor does such abrogation prevent defendants from obtaining relief if the State fails to effectively discharge this duty. Our Constitution grants this Court the "exclusive authority to make rules of procedure and practice for the Appellate Division," N.C. Const. art. IV, § 13(2), and our Rules of Appellate Procedure provide that the issue of "whether a criminal charge is sufficient in law" is automatically preserved for appellate review. N.C. R. App. P. 10(a)(1). Thus, issues related to alleged indictment defects, jurisdictional or otherwise, remain automatically preserved despite a defendant's failure to object to the indictment at trial.

But, where non-jurisdictional deficiencies exist in criminal indictments, the better practice is for defendants to raise the issue in the trial courts. *See State v. Brown*, 320 N.C. 179, 192 (1987) ("[I]f, despite the sufficiency of the indictment, defendant was at a loss to determine the specific facts underlying the charges . . . , his proper recourse was to move for a bill of particulars."); *State v. Shade*, 115 N.C. 757, 758–59 (1894) ("[T]he defendant . . . may before trial move the court to order that a bill of particulars be filed, and the court will not arrest the judgment after verdict where he attempts to reserve his fire until he takes first the chance of acquittal. . . . With such safeguards thrown around prosecutions, it must be the fault of the person charged if he goes to trial without being 'informed of the accusation against him.' ").

An indictment might fail to satisfy constitutional purposes by failing to provide "notice sufficient to prepare a defense and to protect against double jeopardy," *Lancaster*, 385 N.C. at 462 (quoting *In re J.U.*, 384 N.C. at 623), or it might fail to satisfy relevant statutory strictures by failing to "assert[ ] facts supporting every element of a criminal offense." N.C.G.S. § 15A-924(a)(5). However, because these deficiencies do not implicate modern jurisdictional concerns, the analytical framework that mandated reflexive vacatur of convictions and dismissal of charges if the indictment contained either a statutory or constitutional defect is inappropriate. As these species of errors in a charging document are not jurisdictional, a defendant seeking relief must demonstrate not only that such an error occurred, but also that such error was prejudicial. *See State v. Alston*, 307 N.C. 321, 339 (1983) ("The defendant is not entitled to a new trial based on trial errors unless such errors were material and prejudicial.").

In determining whether an error was prejudicial, the prejudicial error tests provided in section 15A-1443 are applicable.[16] Subsection 15A-1443(a) is the appropriate test for indictment errors that fail to satisfy statutory strictures, and subsection 15A-1443(b) is the appropriate test for indictment errors that fail to satisfy the constitutional purposes of indictments.[17] *See* N.C.G.S. § 15A-1443 (2023). However, it would appear that the longer a defendant waits to raise issues related to deficient criminal pleadings, the more difficult it would be to establish prejudice.[18]

B. Sufficiency of the Short-Form Indictment

Having determined that an indictment charging a defendant with violating the laws of this State is sufficient to invoke the superior court's jurisdiction without regard to an indictment's statutory or constitutional infirmities, we turn to the State's argument that the Court of Appeals erred in concluding the indictment charging defendant with second-degree rape was defective.

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16. Because a pleading error is not an evidentiary or instructional error, plain error review is not appropriate. In addition, given the availability of discovery and mechanisms such as motions for a bill of particulars, it is difficult to imagine pleading errors could satisfy the prejudice prong.

17. While our precedent on this issue may inform our judgment, we understand that whether subsection 15A-1443(c) may be relevant where, as here, the defendant fails to either object to the allegedly erroneous indictment or file a motion for a bill of particulars, is a question that will need to be addressed in future cases. A defendant who alleges that an indictment failed to provide sufficient notice to prepare a defense may have a more compelling argument that his counsel provided ineffective assistance. *See State v. Reber*, No. 138A23, slip. op. at 20 (N.C. May 23, 2024) ("[W]henever these claims exist on direct appeal, there will be a corresponding claim of ineffective assistance of counsel that can be pursued in a motion for appropriate relief. . . . [A]n ineffective assistance claim brought in a motion for appropriate relief avoids the gamesmanship concern . . .; it provides a forum where a fact-finder can determine whether the failure to object was indeed a reasonable strategic decision, or instead a deficiency on the part of counsel.").

18. Contrary to the hyperbole in the opinion of our dissenting colleague, treating alleged indictment deficiencies in the same manner as other errors does not reveal that this Court has a "thin view of justice" or an "even thinner view of due process." If requiring a defendant to demonstrate prejudice in this context is an attack on due process, why is it permissible when this Court reviews other alleged constitutional violations? Notably, and unlike alleged indictment defects, other alleged constitutional errors require a defendant to properly preserve them for appellate review—yet that concept has never been lambasted for eroding constitutional protections. In noting that a defendant faces an increasingly difficult challenge attempting to demonstrate prejudice the longer he delays raising the issue, we are offering practical guidance, not establishing a bright-line rule.

Recently, this Court unanimously noted that

> the General Assembly's adoption of the Criminal Procedure Act represented a sharp departure from the demands of technical pleading. . . .
>
> Since adoption of the Act, this Court has been consistent in retreating from the highly technical, archaic common law pleading requirements which promoted form over substance. Instead, contemporary criminal pleading requirements have been designed to remove from our law unnecessary technicalities which tend to obstruct justice.

Lancaster, 385 N.C. at 462–63 (cleaned up).

The elements of second-degree rape that the State must prove at trial are that the defendant (1) engaged in vaginal intercourse, (2) with a victim who was mentally incapacitated or physically helpless, and (3) knew or reasonably should have known that the victim was mentally incapacitated or physically helpless. N.C.G.S. § 14-27.22 (2023). Proof necessary for conviction, however, is far different from what is required to indict a defendant, as we have discussed above.

A short-form indictment for second-degree rape of a mentally incapacitated or physically helpless individual satisfies statutory requirements if it

> allege[s] that the defendant unlawfully, willfully, and feloniously did carnally know and abuse a person . . . who was mentally incapacitated or physically helpless, nam[es] the victim, and conclude[es] as required by law.

N.C.G.S. § 15-144.1(c) (2023). Notably absent from this language is any requirement that the indictment assert the accused knew or reasonably should have known that the victim was mentally incapacitated or physically helpless. Here, the indictment charging defendant with second-degree rape alleged that defendant

> unlawfully, willfully, and feloniously did engage in vaginal intercourse with [Jane], who was at the time, physically helpless. This act was done in violation of NCGS § 14-27.22.

Defendant did not object to this indictment before or during his trial. However, he now argues that the indictment is fatally defective because

it used the phrase "did engage in vaginal intercourse with [a person]" rather than "did carnally know and abuse a person," and thereby "failed to allege one of the essential elements; namely, that [defendant] knew or reasonably should have known that Jane was physically helpless when he engaged in sexual intercourse with her." *Singleton*, 285 N.C. App. at 632.

The Court of Appeals agreed with defendant, holding that "[w]hile the phrase used in the indictment is a sufficient substitute for 'carnally know,' it is not a sufficient substitute for the word 'abuse,' " *id.* at 634, and concluding the indictment was fatally defective because "[t]he verb 'abuse' (or some equivalent) is required as a means of describing the essential element . . . that [d]efendant 'knew or reasonably should have known' that Jane was physically helpless." *Id.* This reasoning is contrary to this Court's precedent and the principle that "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. This Court has consistently affirmed the legislature's authority to "relieve the State of the common law requirement that every element of the offense be alleged," *Lowe*, 295 N.C. at 603, which is precisely how the short-form statute at issue here operates.

A plain reading of section 15-144.1(c) demonstrates that the indictment here clearly alleged a crime and was not required to allege actual or constructive knowledge of the victim's physical helplessness. Certainly, such knowledge is an element of the offense and must be proven at trial, but the purpose of short-form indictments is to "relieve the State of the common law requirement that every element of the offense be *alleged*." *Lowe*, 295 N.C. at 603 (emphasis added). In other words, while there is a knowledge element necessary to sustain a conviction at trial, that element is not required to be alleged in the indictment. It cannot reasonably be said that this indictment deprived defendant of notice of the charge such that he could not prepare a defense, or that the court could not enter judgment. The Court of Appeals erred by concluding that the short-form indictment was deficient.

In addition to erroneously searching the indictment language for recitations not required in the short-form statute, the Court of Appeals also appears to have required that the indictment language mirror the short-form statute verbatim. Despite recognizing that this Court "has held that an indictment is not necessarily fatal if its language does not use the precise language of a statute allowing for short form indictment language," the Court of Appeals nevertheless concluded the indictment was defective because the indictment used the phrase "engaged in vaginal intercourse" rather than "carnally kn[e]w and abuse[d]." *Singleton*, 285 N.C. App. at 634.

While this Court has not yet addressed the exact language at issue in this case, our precedent demonstrates that we are loath to invalidate an indictment that communicates the information required by a short-form statute merely because it does so by employing modern language. *See State v. Newborn*, 384 N.C. 656, 661 (2023) ("Applying the principle of substance over form, it is clear that the indictment here gave defendant sufficient notice of the crimes with which he was being charged such that he was able to prepare his defense."); *State v. Tart*, 372 N.C. 73, 79 (2019) (upholding attempted first-degree murder indictment because, despite linguistic difference from relevant short-form statute, indictment nevertheless "serve[d] its functional purposes with regard to both the defendant and the court."); *State v. Wallace*, 351 N.C. 481, 505 (2000) (citing N.C.G.S. § 15-144.1) (holding that indictments "complied with the statutes authorizing short-form indictments for rape and sexual offense" despite their use of the phrases "engage[d] in vaginal intercourse" and "engage[d] in a sexual act" instead of the relevant short-form statute's phrases "ravish and carnally know" and "carnally know and abuse.").[19]

Accordingly, we conclude that the indictment at issue here was not deficient. Because no error occurred, we need not consider the issue of prejudice.

III. Conclusion

For over two hundred years, we have struggled with lingering notions that the common law controls our indictment jurisprudence. Our legislature has consistently and completely taken action to eliminate these "shadowy nothings" that impede justice and erode the public's confidence in our system. Judges and lawyers, however, have been unwilling to give up these technicalities that permit defendants to escape merited punishment.

Since 1811, the plain language and the spirit of the law has been to move away from common law pleading requirements in criminal cases that were overwrought with technicalities. As we recognized in 1898, we reiterate that "[t]he practical sense of the age demands" that technicalities should not carry the day for defendants who argue form over

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19. The few states that have addressed this specific issue have rejected any argument that the phrase "engaged in sexual intercourse" is an insufficient substitute for the phrase "carnally knew and abused." *See State v. Cunday*, 356 P.2d 609, 611 (Wash. 1960) (holding that "carnally know and abuse" should be construed as "the equivalent of 'sexual intercourse' "); *State v. Sebastian*, 69 A. 1054, 1057 (Conn. 1908) ("Unlawful carnal knowledge certainly includes what is meant by carnal abuse, if it be not synonymous with that.").

substance in our indictment jurisprudence, because defendants are seldom prejudiced by mistakes in pleadings. *See Hester*, 122 N.C. at 1050.

Courts lack the ability to act where a criminal indictment suffers from a jurisdictional defect, that is, where it wholly fails to allege a crime against the laws or people of this State. But a mere pleading deficiency in an indictment does not deprive the courts of jurisdiction. The General Assembly abrogated the archaic common law rules concerning criminal pleadings, and the indictment charging defendant with second-degree rape was not deficient.

REVERSED.

Justice EARLS concurring in part and dissenting in part.

I agree with the majority that Mr. Singleton's indictment was not fatally defective. That conclusion should end the case. Both the State and Mr. Singleton concede that reaching the jurisdictional issue is unnecessary if we find no fatal variance in the indictment.[1] We so find, and a court with any respect for judicial restraint would stop there.

The majority, however, goes further. Although every member of this Court agrees that Mr. Singleton's indictment was not defective and thus did not divest the trial court of jurisdiction, the majority opines that virtually no indictment will *ever* meet that threshold. In a sprawling ruling—largely dicta because it is unnecessary to the holding—the majority upends centuries of precedent and announces its view that constitutional and statutory defects in an indictment are non-jurisdictional.

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1. At oral argument, counsel for the State affirmed that this Court need only reach the jurisdictional issue if it concluded that Mr. Singleton's indictment was fatally defective. Oral Argument at 11:58, State v. Singleton (No. 318PA22) (Sept. 19, 2023), https://www.youtube.com/watch?v=zNCACKHqBlg&t=2279s (last visited May 17, 2024). The State framed its position as an "alternative argument," one only relevant to the merits if this Court rejected its first. *Id.* at 12:05. "If this Court were to find that this indictment as written is defective, the State would nonetheless ask that this Court affirm the judgment of the trial court, reverse [the judgment of] the Court of Appeals below, on the basis that the rule that indictments give jurisdiction is an outdated and obsolete rule." *Id.* at 12:11. Defense counsel argued the same. "Mr. Singleton argues today that the State's challenge to the jurisdictional remedy is not within the scope of review. At the Court of Appeals, the State did not raise the issue of a challenge to the jurisdictional remedy, the Court of Appeals opinion was unanimous, and so that puts us—I think—into Rule 16(a) which would require the State to raise the issue in the PDR and in the new briefs. And the State did raise the issue in the new briefs, but not in the PDR. And so I would argue that it's not properly before the Court." *Id.* at 37:24.

This is not originalism, constitutional conservatism, or respect for stare decisis. *Cf. State v. Robinson*, 375 N.C. 173, 193 (2020) (Newby, J., dissenting) ("As a monarch, King Louis XVI once famously said, '*C'est légal, parce que je le veux*' ('It is legal because it is my will.'). Today, four justices of this Court adopt the same approach to the law, violating the norms of appellate review and disregarding or distorting precedent as necessary to reach their desired result. Apparently, in their view, the law is whatever they say it is."). Rather than wait for a case that presents the issue, the majority fashions its own vehicle to rewrite law that has stood for over two centuries. *Cf. id.* at 195 ("Instead of doing the legally correct thing, the majority opinion picks its preferred destination and reshapes the law to get there.").

An indictment "is a written accusation of an offense, preferred and presented upon oath as true by a grand jury at the suit of the government." *State v. Morris*, 104 N.C. 837, 839 (1889). In effect, an indictment is the catalyst of a criminal trial. It marks the start of the State's formal prosecution and alerts the defendant and the presiding court of the accusations. *See McClure v. State*, 267 N.C. 212 (1966).

Before today, this Court held that indictments were jurisdictional. In other words, that "a valid indictment is required for a court to retain jurisdiction." *State v. Rankin*, 371 N.C. 885, 897 (2018). That rule flowed from and recognized the important functions an indictment performs—a "valid indictment, among other things, serves to identify the offense being charged with certainty, to enable the accused to prepare for trial, and to enable the court, upon conviction, to pronounce the sentence." *Id.* at 886 (cleaned up) (quoting *State v. Saults*, 294 N.C. 722, 726 (1978)). We thus examined an indictment to ensure that it alleged the indispensable elements of the charged crime and "fulfill[ed] its constitutional purposes—to identify clearly the crime being charged, thereby putting the accused on reasonable notice to defend against it and prepare for trial, and to protect the accused from being jeopardized by the State more than once for the same crime." *State v. White*, 372 N.C. 248, 250 (2019) (cleaned up).

An indictment was fatally defective if it omitted "some essential and necessary element of the offense" or fell short of constitutionally required notice. *See State v. Ellis*, 368 N.C. 342, 344 (2015) (cleaned up). An indictment so flawed effectively failed to charge a crime, and its allegations were so amorphous that they did not protect against double jeopardy or prepare the defendant for trial. *See Rankin*, 371 N.C. at 895 ("The indictment in this case failed to allege each element of the crime of littering, thereby depriving defendant of sufficient notice."). Because

an indictment initiates a criminal trial, a defective indictment yields defective proceedings. Any resulting conviction or sentence was viewed by this Court as premised on and poisoned by that original sin. *Id.* at 886–87; *see also State v. Campbell*, 368 N.C. 83, 86 (2015).

Faced with a fatally flawed charging instrument, the remedy was to vacate any conviction born of it. *See Campbell*, 368 N.C. at 86 ("A defendant can challenge the facial validity of an indictment at any time, and a conviction based on an invalid indictment must be vacated."). Because the State cannot punish its citizens but through proper legal course, the courts—exercising the State's sovereign judicial authority—cannot try, convict, and sentence a defendant but through lawful process. Thus, when an indictment failed to charge a crime or breached basic tenets of due process, we declined to grant legal force to the fruits of that procedural failure. *See Rankin*, 371 N.C. at 895. In the eyes of the law, the court imposing that judgment lacked the power to do so in contravention of the defendant's rights. *See State v. Whedbee*, 152 N.C. 770, 776 (1910) ("It will not do to say in this land of freedom, where the rights of every citizen are carefully guarded and preserved, that a man should be convicted. He must be convicted, if at all, according to the law, and in that way only.").

That rule—drawn from the common law—declared indictments "jurisdictional." *See, e.g.*, *State v. Simpson*, 302 N.C. 613, 616 (1981) ("[A] valid bill of indictment is essential to the jurisdiction of the court to try defendant for a felony."); *State v. Mostafavi*, 370 N.C. 681, 684 (2018) (observing that "a valid bill of indictment is essential to the jurisdiction of the trial court to try an accused for a felony" (quoting *State v. Sturdivant*, 304 N.C. 293, 308 (1981))). We did not vacate convictions for minor technical hitches, as the majority frames it. Instead, we reserved that relief for indictments with fatal constitutional or statutory flaws, documents missing "indispensable allegation[s] of the charge" or failing of their constitutional purposes. *See Rankin*, 317 N.C. at 887 (quoting *State v. Russell*, 282 N.C. 240, 245 (1972)). In those cases—rare indeed—we declined to honor the legal force of the conviction because it was premised on fatally defective process.

Under today's ruling, however, a constitutionally or statutorily defective indictment is not enough to merit relief. A defendant must also show prejudice—that is, harm *on top of* the State's procedural violation. Or to be exact, a defendant can allege prejudice; as the majority makes clear, that hurdle promises to be all-but-insurmountable.

I think that decision is profoundly misguided. On the law, the majority is wrong—time and again, this Court has rooted the remedy for a

defective indictment in fundamental constitutional protections and the statutory provisions realizing them. On logic, there is little—the majority reaches its result by blurring lines and cutting corners. Most regrettably, today's decision rests on a thin view of justice and an even thinner view of due process. Flawed indictments, the majority insists, are mere technicalities used by guilty defendants to escape merited punishment.

I take a different view. Requiring the State to properly charge a citizen with a crime before marshalling its immense power against them is "properly characterized as [a] constitutional procedural due process protection[ ]." *See In re J.U.*, 384 N.C. 618, 630 (2023) (Earls, J., dissenting). When the State fails to indict a defendant in line with constitutional and statutory guardrails, vacating that conviction is the only remedy that vindicates those legal safeguards and the precious values they protect. Because the majority removes those principled due process restraints on State power, I dissent.

I. The Nexus Between Indictments and Jurisdiction

At its most basic, "jurisdiction" refers to the "legal power and authority of a court to make a decision that binds the parties to any matter properly brought before it." *See In re T.R.P.*, 360 N.C. 588, 590 (2006) (quoting *Judicial Jurisdiction*, *Black's Law Dictionary* (7th ed. 1999)). To act, a court must have jurisdiction over the parties before it and the subject matter involved. *See id.* As we have explained, jurisdiction is the "indispensable foundation upon which valid judicial decisions rest." *Id.* Without it, a court "has no power to act." *Id.* And when a court proceeds without jurisdiction—when it lacks the power to decide the case before it—any decision it renders is, in the eyes of the law, a nullity. *See id.*; *see also Burgess v. Gibbs*, 262 N.C. 462, 465 (1964) ("A universal principle as old as the law is that the proceedings of a court without jurisdiction of the subject matter are a nullity."). It has no binding effect or legal force. *See In re T.R.P.*, 360 N.C. at 590. No legal "rights are acquired or divested by it." *Hart v. Thomasville Motors, Inc.*, 244 N.C. 84, 90 (1956) (quoting *Stafford v. Gallops*, 123 N.C. 19, 21 (1898)). And all "proceedings founded upon it are worthless." *Id.* (quoting *Stafford*, 123 N.C. at 22).

Jurisdiction is not just an abstract concept—it is integral to procedural due process. *See State v. Smith*, 265 N.C. 173, 180 (1965). Procedural due process is, in essence, a "guarantee of fair procedure." *Zinermon v. Burch*, 494 U.S. 113, 125 (1990). It means "notice and an opportunity to be heard and to defend in an orderly proceeding adapted to the nature of the case before a competent and impartial tribunal *having jurisdiction of the cause*." *Simeon v. Hardin*, 339 N.C. 358, 377 (1994) (cleaned up) (emphasis added). In other words, due process

restricts the State from depriving a person of life, liberty, and property except through duly authorized judicial proceedings by a court with the authority to act.

In criminal cases, this Court has long linked indictments to jurisdiction. *See State v. Whedbee*, 152 N.C. 770 (1910); *State v. Snipes*, 185 N.C. 743 (1923); *State v. Nugent*, 243 N.C. 100 (1955). That nexus, we have explained, flows from North Carolina's Constitution itself. *See, e.g.*, *State v. Snyder*, 343 N.C. 61, 65 (1996) ("Jurisdiction to try an accused for a felony depends upon a valid bill of indictment guaranteed by Article I, Section 22 of the North Carolina Constitution."). Before the State may deploy its immense power to strip a person of their freedom, it must, at a minimum, properly charge and notify him of his alleged crimes. To do so, the "public prosecuting attorney" must draw up "a written accusation of a crime"—the indictment. *State v. Thomas*, 236 N.C. 454, 457–58 (1952). That document must allege "lucidly and accurately all the essential elements of the offense endeavored to be charged." *State v. Greer*, 238 N.C. 325, 327 (1953). Once the indictment is "submitted to the grand jury, and by them found and presented on oath or affirmation as a true bill," the State may bring the case before a criminal court. *Thomas*, 236 N.C. at 457.

Our precedent has labelled a valid indictment an "essential of jurisdiction." *See State v. McBane*, 276 N.C. 60, 65 (1969). As the majority notes, the word "jurisdiction" has sparked some confusion, as the common law terminology is not coincident with modern notions of that term. "Jurisdictional remedy" supplies a better descriptor of the common law rule. *See Rankin*, 371 N.C. at 895 (discussing the "common law rule that a defective indictment deprives a criminal court of jurisdiction" interchangeably with the "common law remedy for invalid indictments"). It captures the idea that a conviction secured at the expense of procedural protections should, on review, be divested of legal force. Our precedent has indeed embraced that principle, casting the jurisdictional remedy as a recognition that tainted criminal judgments must yield to the safeguards afforded to the accused. *See, e.g.*, *McClure v. State*, 267 N.C. 212, 215 (1966) ("There can be no trial, conviction, or punishment for a crime without a formal and sufficient accusation. In the absence of an accusation the court acquires no jurisdiction whatever, and if it assumes jurisdiction a trial and conviction are a nullity." (cleaned up)).

A. Proper Exercise of Judicial Power

On one level, the jurisdictional remedy reflects bedrock ideas of the proper role and function of courts. A criminal court—just like any other

court—cannot act without a proper invocation of its rightful authority. *See In re T.R.P.*, 360 N.C. at 590. The indictment serves that function in criminal cases, much like service of process in civil suits. When the State indicts a defendant for a crime, it equips the court to adjudicate specific allegations of criminal conduct within the contours of the adversarial system. *See State v. Albarty*, 238 N.C. 130, 131 (1953) ("The first rule of good pleading in criminal cases is that the indictment or other accusation must inform the court and the accused with certainty as to the exact crime the accused is alleged to have committed.").

It is thus vital that the State charge a defendant with the essential elements of a crime—or at the very least, "provide[ ] such certainty in the statement of the accusation as would identify the offense with which defendant was charged" and "enable[ ] defendant to prepare for trial." *State v. Tart*, 372 N.C. 73, 79 (2019) (citing *Greer*, 238 N.C. at 327). If an indictment falls short of statutory or constitutional benchmarks, the presiding court lacks jurisdiction over the defendant's case. The State's failure to properly notify the defendant of the accusations means that the court cannot, in compliance with due process, "bring [him] into its adjudicative process." *See In re T.R.P.*, 360 N.C. at 590 (cleaned up); *see State v. Phelps*, 65 N.C. 450, 451–52 (1871) ("The indictment must show on its face that it has been found by competent authority, in accordance with the requirements of law and that a particular person mentioned therein[ ] has done within the jurisdiction of the indictors such and such specific acts, at a specific time, which acts, so done, constitute what the Court can see, as a question of law, to be a crime." (cleaned up)). And an indictment that omits essential elements of an offense or is too vague to "apprise the defendant with reasonable certainty" of the accusation does not, in effect, charge a crime. *See White*, 372 N.C. at 251 (cleaned up). That shortcoming goes to subject-matter jurisdiction, as a court presented with such a threadbare charging instrument has no criminal conduct that it may properly adjudicate. *See State v. Ballangee*, 191 N.C. 700, 702 (1926) (explaining that a court "cannot properly give judgment unless it appears in the record that an offense is sufficiently charged" (quoting *State v. Watkins*, 101 N.C. 702, 703 (1888))); *State v. Hathcock*, 29 N.C. (7 Ired.) 52, 54 (1846) ("[I]n order to bring a trespass within the criminal jurisdiction of the court it must appear on the face of the indictment to amount to a violation of the criminal law.").

For that reason, a defective indictment divests a criminal court of the power to act—it jeopardizes the court's legal authority to bind the parties to its judgment and resolve the case before it. *See Albarty*, 283 N.C. at 133. And so if that court tries, convicts, and sentences a defendant,

its actions are void because they stray outside the court's lawful power. *See State v. Yoes*, 271 N.C. 616, 630 (1969) ("It is axiomatic that a trial of an accused person in a court which has no jurisdiction of the matter cannot result in a valid determination of his guilt or innocence of the offense with which he is charged. Consequently, a judgment rendered by such court is void and, upon appeal, must be vacated irrespective of the sufficiency of the evidence presented in the trial court to establish the guilt of the accused.").

B. Constitutional Guarantee and Bulwark of Due Process

But valid indictments are jurisdictional for still more fundamental reasons. For one, they are inscribed in our Constitution—proceedings built on invalid indictments are thus built on a deprivation of constitutional rights. From the first, our Constitution has guaranteed that "no person shall be put to answer any criminal charge but by indictment." N.C. Const. art. I, § 22. So, too, does it afford "every person charged with crime" the right "to be informed of the accusation" against him. N.C. Const. art. I, § 23. That "constitutional guarantee is a substantial redeclaration of the common law rule" requiring the State to include in an indictment the key elements of the alleged offense. *Nugent*, 243 N.C. at 101. Though simple in language, those constitutional protections are profound in meaning. They reflect the framers' distrust of untrammeled State power and their intentional construction of procedural guardrails. *Thomas*, 236 N.C. at 457. When they met "at Halifax in 1776 to frame a [C]onstitution for the newly born state" of North Carolina, the framers "knew how grossly the English Crown had abused its legal power to prosecute its subjects upon informations preferred by its prosecuting attorneys without the intervention of a grand jury." *Id.* The constitutional right to an indictment sprang from the framers' desire to "forestall like abuses of criminal accusations in the infant commonwealth." *Id.*

That safeguard, alongside the guarantee of notice, is "one of the chief glories of the administration of the criminal law in our courts." *State v. Barnes*, 253 N.C. 711, 714 (1961). As we have explained, those protections "are in strict accord with our inherited and traditional notions of fair play and substantial justice." *Id.* (cleaned up). They are "dear to every free man," we have continued—they serve as "his shield and buckler against wrong and oppression." *Snipes*, 185 N.C. at 748 (quoting *State v. Moss*, 47 N.C. (2 Jones) 66, 68 (1854)). And again, those protections are "fundamental," and they "lie at the foundation of civil liberty." *Moss*, 47 N.C. (2 Jones) at 68. To vigorously protect them is "nothing but right and just." *Whedbee*, 152 N.C. at 774. A rule straying from them "would be clearly oppressive, if not cruel, in its operation." *Id.* For that

reason, we have labelled that safeguard as "a substantial right that may not be ignored, and not a mere technical or formal right." *Nugent*, 243 N.C. at 101. Since defendants have a constitutionally enshrined right to a valid indictment, the absence of that safeguard disempowers the presiding court, as proceedings and judgments rendered in contravention of that right must yield to constitutional guarantees.

Not only is the right to an indictment a freestanding constitutional protection, but it is also integral to due process. As this Court has explained, a valid indictment breathes life into the other protections afforded to the accused and is vital to fair and accurate proceedings. The indictment is the mechanism through which a defendant is "informed of the accusation" against him. *See Sturdivant*, 304 N.C. at 309 (explaining that "notice of the nature of a criminal accusation is a necessary corollary to the jurisdictional requirement of an indictment in capital cases" and explaining that "[t]his constitutional mandate" grants "a defendant the right to be charged by a lucid prosecutive statement which factually particularizes the essential elements of the specified offense"). Only by learning of the charges brought by the State can a defendant and his counsel meaningfully respond. *See Rankin*, 371 N.C. at 886. Lucid allegations in an indictment are thus "required to enable the defendant to meet the charge and prepare for his defense." *State v. Gallimore*, 272 N.C. 528, 533 (1968) (quoting *State v. Van Pelt*, 136 N.C. 633, 639 (1904)). On a strategic level, too, they equip a defendant to identify and challenge legal flaws in the State's case. *See State v. Tisdale*, 145 N.C. 422 (1907). A valid indictment is also vital to a defendant's decision about *how* to proceed—whether he elects to plead or take the case to trial. *See Van Pelt*, 136 N.C. at 640 ("The accused has therefore the right to have a specification of the charge against him in this respect, in order that he may decide whether he should present his defense by motion to quash, demurrer or plea; and the Court, that it may determine whether the facts will sustain the indictment." (cleaned up)); *accord State v. Faucett*, 20 N.C. (4 Dev. & Bat.) 239 (1838).

In the same vein, an indictment allows the presiding court to examine and ensure that the State has charged the defendant for an actual crime. *See Whedbee*, 152 N.C. at 774 ("The indictment must be so drawn and the facts so stated therein that this Court can see upon its face that an offense has been committed, if the evidence corresponds with and supports the allegations of the bill."). And though indictments are returned before trial, they bear on the trial itself. Requiring an indictment to contain "reasonably definite and certain" charges furnishes a "necessary safeguard to the accused against surprise, misconception and error in conducting his defense." *Van Pelt*, 136 N.C. at 640 (cleaned

up); *accord Faucett*, 20 N.C. (4 Dev. & Bat.) at 239. It also provides a guardrail on the scope of potential criminal liability, as "a defendant must be convicted, if convicted at all, of the particular offense charged in the bill of indictment." *State v. Jackson*, 218 N.C. 373, 376 (1940).

If a defendant is adjudged guilty, the indictment also shapes his punishment. It "enable[s] the court, on conviction or plea of *nolo contendere* or guilty to pronounce sentence according to the rights of the case." *Greer*, 238 N.C. at 327; *see also State v. Jesse*, 19 N.C. (2 Dev. & Bat.) 297, 300 (1937) (explaining that the indictment needed to properly charge a felony, as that necessary language "determines the privileges of the accused on his trial, and the degree and consequences of the punishment"); *see also State v. Battle*, 130 N.C. 655 (1902); *Nugent*, 243 N.C. at 101 ("[R]equiring the charge against the defendant to be set out in the warrant or indictment with such exactness . . . can enable the court, on conviction, to pronounce sentence according to law."); *Apprendi v. New Jersey*, 530 U.S. 466, 478–80 (2000) (explaining historical linkage between indictments and criminal punishment and stating that "after verdict, and barring a defect in the indictment, pardon, or benefit of clergy, 'the court must pronounce that judgment, which the law hath annexed to the crime' " (quoting 4 Blackstone 369–70)).

An indictment even retains legal import after proceedings end. In "case of an acquittal or conviction," the indictment allows a defendant "to show by the record the identity of the charge, so that he may not be indicted a second time for the same offense." *Gallimore*, 272 N.C. at 533 (quoting *Van Pelt*, 136 N.C. at 639). An indictment thus goes hand in hand with another constitutional guarantee: that "no person may be twice put in jeopardy of life or limb for the same offense." *State v. Rambert*, 341 N.C. 173, 175 (1995). That "fundamental feature of our legal system"—commonly known as double jeopardy—protects defendants by "providing repose," "eliminating unwarranted embarrassment, expense, and anxiety," and "limiting the potential for government harassment." *State v. Brunson*, 327 N.C. 244, 249 (1990).

And so when an indictment is fatally defective—when it fails of its essential and constitutionally prescribed purposes—that defect defangs the legal weight of any criminal judgment imposed by the court. *See Nugent*, 243 N.C. at 101. Whatever semantic murkiness over the term "jurisdiction," the guiding intuition of the common law remedy was clear: When the State ignores constitutional protections and sidesteps due process, any resultant conviction flows from a breach of the defendant's constitutional rights. *See Rankin*, 371 N.C. at 895. That judgment should not be given legal force.

II. Flaws in the Majority's Reasoning

Until today, that was where our law stood. But the majority now reverses course. It announces that when the State fails to properly indict a defendant for a crime, that error does not affect a court's power to try, convict, and sentence that defendant. Statutory and constitutional errors in the foundational charging instrument are, according to the majority, mere superficial problems with little practical impact. That holding defies core principles of due process and centuries of precedent. It is also analytically and legally flawed.

A. Merging Separate Elements of the Common Law

To reach its result, the majority starts by collapsing discrete facets of the common law into a monolithic boogeyman. To be exact, the majority conflates the common law's exacting requirements for a valid indictment with the remedy for a defective indictment. Those are distinct issues. Just as diagnosing a disease is different than treating it, defining a defective indictment is different than remedying a concededly faulty one.

This Court has taken separate paths on those discrete spheres of the common law. On the substantive requirements of a valid indictment, we have retreated from the stringent common law standard. *See, e.g.*, *Campbell*, 368 N.C. at 86; *accord State v. Wallace*, 351 N.C. 481, 507 (2000). We have thus allowed the General Assembly to enact short form indictments by statute. *State v. Randolph*, 312 N.C. 198, 210 (1984); *State v. Lowe*, 295 N.C. 596, 604 (1978). And we have disclaimed the need for an indictment to contain "magic words," focusing instead on whether the substance of the document tracks the essential elements of the charged offense. *See, e.g.*, *State v. Hunter*, 299 N.C. 29, 41 (1980) ("[T]here is no requirement that an indictment must follow the precise language of the statute provided that the pleading charges facts which are sufficient to enable the indictment to fulfill its essential purposes.") So in recent years—unlike at common law—an indictment need not be flawless to pass muster. *See Rankin*, 371 N.C. at 887 ("The law disfavors application of rigid and technical rules to indictments; so long as an indictment adequately expresses the charge against the defendant, it will not be quashed."). Instead, a defective charging instrument imperils a court's jurisdiction only if it is "fatally defective"—that is, if it omits an "essential element" or "indispensable allegation" of the charged offense. *See id.* at 886–87.

But the remedy for an indictment adjudged invalid is a different issue. Though we have adjusted our rubric for identifying when an

indictment is defective, we have retained the remedy when an indictment satisfies that test. *See id.* Put another way, though we have altered how we diagnose a disease, once identified, the cure for that ailment has stayed the same. Even under the more lax modern approach, we recognized that a "fatally defective" indictment effectively failed to charge a crime and fell short of its constitutional aims. *See, e.g.*, *State v. Wagner*, 356 N.C. 599, 601 (2002) (per curiam). The remedy prescribed by the common law—and until today employed by this Court—was to vacate the conviction and treat it as beyond the court's lawful authority. *See State v. Vestal*, 281 N.C. 517, 520 (1972). Put simply, we declined to grant legal force to a conviction built on such a faulty foundation. *See McClure*, 267 N.C. at 215–16.

The majority, however, swaps analytical precision for a soaring condemnation of the "common law" as a whole. It collapses the common law's substantive requirements with the remedy employed for defective indictments, functionally treating the common law as a singular mass without disaggregating its discrete doctrinal parts.

B. Misguided Forray Through History

Building on that analytical error, the majority retrofits history and precedent to align with its preferred result. It seems to argue that the legislature abolished the common law remedy—probably in 1811, almost assuredly by 1853, and without question by 1975. That would come as a surprise to the scores of cases and dozens of jurists who have interpreted the same statutes as the majority but reached the opposite result. For we now learn that the majority's position has actually been the law for over 200 years! This Court's decisions have apparently been wrong—for two centuries, no less. The majority's analysis, however, does not justify its sweeping denunciation of its predecessors.

Take for instance, the majority's invocation of N.C.G.S. § 15-153. That provision—first enacted in 1811 and still in effect, though with minor tweaks—disclaims courts from setting aside a conviction based on "informalities or refinements" in an indictment, so long as its substantive allegations are enough to "induce [the court] to proceed to judgment." *See* Potter's Revisal of 1819, Laws of 1811, Ch. 809. According to the majority, section 15-153—"[w]hen read alone or in *pari materia* with N.C.G.S. 15-155"—ended the "formalistic practice of the common law," "except where no crime at all was charged." In one sense, the majority is right. Section 15-153, as this Court has explained, "abolished the requirement that the detailed particulars of a crime must be stated in the meticulous manner prescribed by the common law." *Nugent*, 243

N.C. at 101. Even so, "the requirement remains that in every prosecution by warrant or indictment the defendant shall be informed of the accusation against him, and this accusation must be set forth with sufficient certainty for the purposes" embedded in the Constitution. *Id.*

In other words, though the statute loosened the common law requirements for what a valid indictment must allege, it still retained a substantive baseline. *See State v. Tarlton*, 208 N.C. 734, 736–37 (1935); *State v. Gibbs*, 234 N.C. 259, 261 (1951) ("We have not overlooked G.S. 15-153, which provides that an indictment shall not be quashed by reason of a mere 'informality or refinement.' This statute, however, does not dispense with the requirement that the essential elements of an offense must be charged, and many decisions of this Court have so held."). Most importantly, the statute did not jettison the remedy for an indictment that fell below its already-relaxed standard. After section 15-153's enactment—as before—this Court vacated a conviction based on an indictment that lacked a "distinct averment of any fact or circumstance which is an essential constituent of the offense charged." *State v. Cole*, 202 N.C. 592, 598 (1932); *see also McBane*, 276 N.C. at 65 (vacating conviction because indictment was defective and explaining that "[n]othing in G.S. 15-153 or in G.S. 15-155 dispenses with the requirement that the essential elements of the offense must be charged").

The majority's analysis of other statutes is equally unconvincing. It next cites N.C.G.S. § 15-155, another provision that patched technical defects in an indictment. By its text, however, that statute cuts against the majority's conclusion—it disclaims quashing of indictments if "the court shall appear by the indictment to have had *jurisdiction of the offense*." N.C.G.S. § 15-155 (2023). If the legislature intended to uproot all traces of the common law jurisdictional rule, as the majority holds, it is odd indeed to enact a statute reifying the link between indictments and jurisdiction. Unsurprisingly then, this Court has previously read the provision differently than does the majority, "confin[ing]" section 15-155 "to formal objections." *State v. Wise*, 66 N.C. 120, 124 (1872). The statute, we have explained, was "intended only to cure formal defects, after conviction, so that the guilty should not go 'unwhipt of justice,' and evade punishment on technical objections." *Id.* It did not, however, excuse indictments with "a vital defect" which "could not be cured, unless the Court is to give judgment in the dark." *Id.* So yet again, the majority wrings from a statute a far different—and far broader—rule than our precedent prescribes.

Lastly, the majority clings to the Criminal Procedure Act of 1975 (CPA)—a broad-based statutory reform that retooled many facets of

criminal procedure in our state. If there is "any doubt regarding the continued application of the common law's technical requirements," the majority insists, then the CPA dispelled them. Through that statute, the majority continues, the legislature "removed any vestiges of the archaic, hyper-technical common law requirement that a valid indictment contain a rote recitation of elements." Again, that claim is partially right—this Court has read that statute to further relax the stringent common law standards for a valid indictment. *See State v. Palmer*, 293 N.C. 633, 638 (1977). But again, the majority stretches the CPA past its breaking point, reading it to displace not just the common law pleading requirements for an indictment, but also the common law remedy for an invalid indictment.

We rejected that very result in *Rankin*, discerning "no unsettled question of whether the common law remedy for invalid indictments was abrogated by the [CPA]." *Rankin*, 371 N.C. at 898. In that case, we canvassed the history, context, and purpose of the statute. *Id.* at 896–98. And we concluded that when it adopted the statutory reforms, the General Assembly neither intended nor acted to supplant the "common law remedy." *Id.* Just the opposite. The legislature "acknowledged and approved" of the common law rule. *Id.* at 897. Its "comprehensive reform" and "detailed commentary included with the codified statutes" showed its careful examination of current criminal procedures. *Id.* The official commentary cited our decisions vacating convictions based on defective indictments and "explicitly endorsed" the "common law remedy for invalid indictments." *Id.* at 898. By its text, too, the CPA barred a court from continuing "criminal prosecution if the indictment fails to charge the defendant with a crime." *Id.* at 897. And "in the decades since the enactment of the [CPA], the common law remedy for invalid indictments has been applied time and again by the appellate courts," with no further intervention by the legislature. *Id.* at 898. We thus held that the "General Assembly, no doubt aware of this practice, has never acted to abrogate this common law rule." *Id.*

The majority tacitly overrules *Rankin*, though its reasoning is murky. It begins by applauding the correctness of its conclusions reached mere paragraphs before. Because *Rankin* took a different view, the majority deduces, it must necessarily be wrong. That argument only holds if, in fact, the majority's readings of history and precedent are correct. They are not. And repeating those flawed statements does not make them true, any more than insisting that the sky is red makes it anything but blue. We are next told that the dissent in *Rankin* was so "well-reasoned and vigorous" that it displaced the decision of the Court.

But in a curious twist, that same dissent disclaimed the historical and legal postulates excavated by the majority today. *See id.* at 909 (Martin, C.J., dissenting) ("Despite its comprehensive nature, though, the [CPA] did not directly address whether indictments that do not meet the Act's statutory standards fail to confer jurisdiction on the court; there is no single provision that explicitly adopts or rejects the common law jurisdictional rule. Compounding this omission is a dearth of cases analyzing whether the [CPA] carried forward or abrogated the common law jurisdictional rule.").

Any confusion is soon resolved, though, as the majority lays bare its real disagreement with *Rankin*. The CPA was geared towards eliminating practices that "frustrate the effective and efficient administration of justice," a goal that—in the majority's view—is "directly contrary" to the common law remedy. Missing, of course, is the legislative evidence that the General Assembly considered and kept that very remedy. *See Rankin*, 371 N.C. at 896–98. But even if the majority is right and the CPA elevates efficiency above all else, a statute cannot buy expedience at the price of constitutional rights. *See Lowe*, 295 N.C. at 603 (affirming the legislature's "prerogative" to enact statutory short-form indictments "so long as the newly prescribed indictment still complies with the constitutional requirement that the defendant be informed of the accusation against him"). So the General Assembly's efforts to modernize criminal pleadings did not—and cannot—dispense with constitutional guarantees. *State v. Harris*, 145 N.C. 456, 457–58 (1907); *see also State v. Moore*, 104 N.C. 743, 750–51 (1890).

In short, the majority's historical analysis is a masterclass in shadowboxing. It attacks one aspect of the common law rule—its rigid pleading requirements—as grounds to invalidate a different facet of the common law—the proper remedy when a court finds an indictment invalid. It contends that its rule has always been the right one, as proven by this Court's "inconsistent" application of statutory law. But what the majority paints as "vacillations" and "inconsistencies" were, in truth, this Court's efforts to interpret the law with nuance and care. In some cases, we found the indictment sufficient in substance to sustain the conviction. *See*, *e.g.*, *State v. Murrell*, 370 N.C. 187, 196 (2017); *see also State v. Sossamon*, 259 N.C. 374 (1963). In others, we reached the opposite conclusion. *See*, *e.g.*, *Palmer*, 293 N.C. 633. But in each case, this Court tread gingerly, respecting the precious rights hanging in the balance and the accreted wisdom of precedent. That caution and restraint find no home in today's decision.

C. Unworkable and Ill-Founded Distinctions

In its next analytical twist, the majority splits defective indictments into two camps. An indictment implicates jurisdiction only if it "wholly fails to allege a crime against the laws or people of this State." By contrast, an indictment raises no jurisdictional concerns if it fails "to allege with sufficient precision facts and elements of a crime thereby permitting the defendant to prepare a defense and the court to render judgment." The majority classifies the latter category as "superficial errors" and "mere pleading deficiencies." Those technical hiccups, the majority concludes, have no bearing on a court's power to try, convict, and sentence a defendant.

That artificial bifurcation is riddled with problems. Consider what the Court labels a mere pleading deficiency: the State's failure to charge an essential element of the crime or to provide constitutionally required notice of its accusations against a defendant. In my view, those flaws are far from "superficial"—they are the very reasons why the framers included a constitutional guarantee of indictments. *See State v. Ray*, 92 N.C. 810 (1885) ("The very purpose of the indictment is to inform the accused with certainty and in an intelligent manner, of the offense charged against him. The justice of the law not only requires that he shall be thus informed, but it requires as well, that he shall have reasonable opportunity to prepare to defend himself against the charge."). Forcing the State to apprise citizens of their alleged crimes before arraying its vast power against them is a basic tenet of due process. *See Cole v. Arkansas*, 333 U.S. 196, 201 (1948) ("No principle of procedural due process is more clearly established than that notice of the specific charge . . . ."); *see also Jackson v. Virginia*, 443 U.S. 307, 314 (1979) ("[A] conviction upon a charge not made . . . constitutes a denial of due process."). If the State does not properly charge a defendant with a crime—strafing its indictment with piecemeal or amorphous allegations—that deficiency taints the rest of the proceedings, imperiling not just the reliability of the result, but the integrity of the process underlying it. *See State v. Banks*, 263 N.C. 784 (1965); *see also State v. Morgan*, 226 N.C. 414, 415 (1946).

Logically, too, the majority's two-tier regime of jurisdictional defects is difficult to understand. Especially because the majority cites cases recognizing that "where an indictment fails to charge a crime falling within the scope of the court's jurisdiction, the matter is a nullity." In *Rawls*, for instance, we invoked the constitutional guarantee of an indictment in holding that a county court with original jurisdiction over "petty misdemeanors" lacked authority to try the defendant for other

types of offenses. *See State v. Rawls*, 203 N.C. 436, 438 (1932). We reached similar decisions in other cases, too. *See*, *e.g.*, *State v. Wilkes*, 233 N.C. 645, 646–47 (1951) (affirming the quashing of an indictment because the court lacked jurisdiction to try the charged crime); *State v. Harrison*, 126 N.C. 1049, 1049–50 (1900) (same). In each of those cases, the State indicted the defendant for a criminal offense. Under the majority's newly fashioned rule, then, the indictments could not have raised jurisdictional concerns because they did not "wholly fail[ ] to allege a crime against the laws or people of this State." But in each of those cases, as the majority acknowledges, we held that the presiding court lacked the power to try the defendant and bind him to its judgment. *See Rawls*, 203 N.C. at 438; *Wilkes*, 233 N.C. at 646–47; *Harrison*, 126 N.C. at 1050. That was because the indictments clashed with external legal restraints on the court's power to adjudicate and enforce criminal law. *See Rawls*, 203 N.C. at 438; *Wilkes*, 233 N.C. at 647; *Harrison*, 126 N.C. at 1050. If a court lacks jurisdiction when an indictment charges a crime outside of its sphere of authority, why should a different rule apply when an indictment omits the core elements of a criminal offense or fails to provide constitutionally required notice? In the latter case—just like the former—defects in the charging instrument place the proceedings, from the start, in conflict with legal guardrails and beyond the court's duly vested power. The majority's purported distinction between jurisdictional and non-jurisdictional flaws makes no effort to square its rule with the very precedent it cites.

Finally, the majority's ritual incantation of federal precedent is misplaced. Federal doctrine, unlike state law, is suffused with and guided by federalism concerns and the distribution of authority between the national and state governments. *See United States v. Cotton*, 535 U.S. 625, 629-30 (2002) (tying federal doctrine on indictments to the Supreme Court's evolving federal statutory authority to review criminal convictions and the gradual incorporation of federal constitutional rights). More basically, in North Carolina, the right to an indictment springs from our State Constitution, *see Snyder* 343 N.C. at 65—whatever the federal courts have to say on the topic flows from different analytical and doctrinal roots.

D. Dislodging Indictments from their Constitutional Footing

With its two-track conception of indictments in place, the majority decouples indictments from their constitutional mooring. It says that our Constitution offers no support for the "common law rule that

indictments are jurisdictional and must allege each element of an offense with precision."[2] The majority makes three arguments on that score.

First, if the jurisdictional remedy flows from defendants' constitutional right to an indictment and notice, *See* N.C. Const. art. I, §§ 22-23, the majority reasons, then short-form indictments must fail. That result, the majority continues, is belied by the legislature's longstanding provision of short-form indictments for select felonies. *See State v. Hunt*, 357 N.C. 257, 267–69 (2003); N.C.G.S. § 15-144 (2023) (homicide); N.C.G.S. § 15-144.1 (2023) (rape); N.C.G.S. § 15-144.2 (2023) (statutory sex offenses). This Court has approved those abbreviated indictments, even though they "relieve the State of the common law requirement" that it detail each element of the specified offense. *See State v. Avery*, 315 N.C. 1, 13–14 (1985) (upholding legality of short-form indictment for homicide); *Lowe*, 295 N.C. at 603 (same for rape); *State v. Edwards*, 305 N.C. 378, 380 (1982) (same for sex offenses). According to the majority, those decisions could not exist if the jurisdictional rule is of constitutional berth.

Omitted from that flat syllogism is *why* our cases have sustained short-form indictments. It is true, as the majority notes, that short-form indictments are a qualified exception to the rule that an indictment must include a "plain and concise factual statement asserting facts supporting every element of a criminal offense and the defendant's commission thereof." *Rankin*, 371 N.C. at 886 (cleaned up); *Hunt*, 357 N.C. at 273. But that is because the substantive allegations that the State must include in short-form indictments brings those charging instruments "within constitutionally mandated parameters." *See Lowe*, 295 N.C. at 603. The State must name "[w]ith certainty both the defendant and victim" and allege the offense in "words having precise legal import." *Id.* at 604; *see also*

2. Note again the majority's commingling of discrete facets of the common law. As explained above, the common law is not a monolith—relevant to this case, its approach to indictments has two moving parts. On one hand is the question of content. That is, the substantive allegations required for a valid indictment. On the other hand is the issue of remedy—the proper relief when a court determines that an indictment falls below substantive baselines. Again, those are separate concepts with different track records. Though the law has *retreated* from the exacting common law requirements for the content alleged in indictments, it has *retained* the common law remedy for concededly defective indictments. *See, e.g.*, *Rankin*, 371 N.C. at 896-98; *Nugent*, 243 N.C. at 101; *Greer*, 238 N.C. at 326-27; *Cole*, 202 N.C. at 596. The jurisdictional remedy—long employed by this Court—has firm constitutional roots. *See, e.g.*, *Harris*, 145 N.C. at 458; *State v. Bissette*, 250 N.C. 514, 517-18 (1959); *McClure*, 267 N.C. at 215; *Simpson*, 302 N.C. at 616. But in its constitutional discussion, the majority continues its grave analytical error of treating the common law as a singular mass without constituent parts. At the threshold, that methodological flaw undermines the soundness of the majority's conclusion.

White, 372 N.C. at 249 (holding that short-form indictment for child sex offense "was facially defective, and thus failed to establish jurisdiction in the trial court, because it identified the alleged victim only as 'Victim #1' " in violation of section 15-144.2's "statutory requirement that the indictment name the victim"). The indictments thus "charge[ ] the substance of the crime and put[ ] the defendant on notice that he will be called upon to defend against proof of the manner and means by which the crime was perpetrated." *Lowe*, 295 N.C. at 604; *see also State v. Tart*, 372 N.C. 73, 76–78 (2019) (analyzing substantive requirements for short-form homicide indictment).[3] For that reason, short-form indictments that include the statutorily required allegations "show on their face facts that give the court jurisdiction." *Lowe*, 295 N.C. at 604. This Court has thus approved that species of indictments only because—and only so long as—they "complie[d] with the constitutional requirement that the defendant be informed of the accusation against him." *Id.* Thus, under our precedent—and contrary to the majority's stilted reading—short-form indictments are tethered to and measured against their constitutional purpose. *See id.*; *see also White*, 372 N.C. at 251.[4]

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3. *Tart* offered specific guidance on the content required for a short-form homicide indictment to charge murder versus manslaughter. *See* 372 N.C. at 76–77, 79 ("[T]here are two express differences in the terminology utilized by the General Assembly to establish short-form indictments for the offenses of murder and manslaughter that are critical to the case at bar: (1) the reference in manslaughter offenses that the named defendant did slay an individual, compared with the reference in murder offenses that the defendant did 'murder' an individual; and (2) the mandated inclusion in an indictment for a murder offense of the essential element of 'malice aforethought,' while the allegation of 'malice aforethought' is not required to charge manslaughter. The critical and dispositive difference between short-form indictments for murder offenses and manslaughter offenses is the substantive allegation of the element of 'malice aforethought' in murder offense short-form indictments . . . . The prosecution's proper and necessary inclusion of the legal element 'malice aforethought' in the present indictment's charge of attempted first-degree murder substantively and constitutionally distinguishes this charge from an alleged manslaughter offense[.]" (cleaned up)).

4. In criticizing this argument, the majority poses a simplistic question: why should we evaluate short-form indictments "against their ability to provide notice, but not engage in such an analysis of an allegedly defective indictment just because it is not a short-form indictment?" A singular standard for all indictments overlooks the differences between short-form and regular indictments. As this Court has made clear, short-form indictments are "special instrument[s], statutorily distinguished from other indictments." *See Hunt*, 357 N.C. at 270. Refined over the long arc of their use, they are the product of a lengthy dialogue between courts and the legislature. *See, e.g.*, *Avery*, 315 N.C at 13–14 (cataloguing cases dealing with the substance of short-form homicide indictments). Short-form indictments serve to streamline and standardize charges for a narrow compass of offenses, while adhering to the constitutional requirement that the State "apprise the defendant of the charge against him with enough certainty to enable him to prepare his defense and

The majority's next argument is no stronger. Constitutionally defective indictments cannot be jurisdictional, it deduces, because violations of other constitutional rights are not jurisdictional. But the rights the majority cites—like the right to remain silent, to counsel, to a speedy trial, and to confront witnesses—are different in kind and function than the right to a valid indictment. That is because an indictment is the touchstone of a criminal trial—it forces the State to specify, and a grand jury to approve, specific criminal charges against a specific criminal defendant. *See White*, 372 N.C. at 251. Each of the rights cited by the majority, however, spring into legal force during the criminal proceedings. *See, e.g.*, *Carpenter v. United States*, 585 U.S. 296, 317 (2018) (right to be free from unreasonable searches and seizures); *Miranda v. Arizona*, 384 U. S. 436, 474 (1966) (right to remain silent); *State v. Tucker*, 331 N.C. 12, 33 (1992) (right to counsel); *Crawford v. Washington*, 541 U.S. 36, 68 (2004) (right to confront witnesses); *State v. McCoy*, 303 N.C. 1, 7 (1981) (right to speedy trial). They are thus downstream of and dependent on the validity of the indictment itself.

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to protect him from subsequent prosecution for the same offense." *See Lowe*, 295 N.C. at 603 (cleaned up). Put differently, short-form indictments were legislatively created and have been judicially upheld *because* they meet "the relevant constitutional and statutory requirements for valid [ ] offense indictments and serve[ ] [their] functional purposes with regard to both the defendant and the court." *See Tart*, 372 N.C. at 79; *see also State v. Holden*, 321 N.C. 125, 154 (1987) ("The notice provided by [N.C.G.S. § 15-144] is sufficient to satisfy the constitutional requirements of due process."); *State v. Young*, 312 N.C. 669, 675 (1985) (holding that the statutory notice provided by section 15A-2000(e) is sufficient to satisfy constitutional requirements of due process).

Given their careful calibration, the substance of the offense is "encompassed within the [statutorily prescribed] language of the short-form indictment," thus notifying the defendant of the State's accusations and equipping him to mount a meaningful defense at trial. *See State v. Braxton*, 352 N.C. 158, 175 (2000). The same cannot be said of offenses not chargeable by short-form indictment. So when the State indicts a defendant for one such offense, but omits an essential element, that defect is of unique legal and practical magnitude. For that very reason, this Court has scrutinized short-form indictments differently than other types of indictments. *See Hunt*, 357 N.C. at 273 ("The legislature has [ ] made it clear that murder and other crimes for which it has authorized the use of short-form indictments are to be treated differently in the application of N.C.G.S. § 15A-924."); *see also id.* at 276; *State v. Jerrett*, 309 N.C. 239, 259 (1983). Applying the same analysis to short-form and regular indictments, as the majority seems to suggest, would ignore the former's intentional formulation as a device that meets constitutional standards and satisfies the dictates of due process.

In all events, the majority's argument might have more force but for its ultimate holding in this case. Under today's decision, both statutory *and* constitutional defects stand on the same non-jurisdictional footing. The State's failure to indict a defendant in line with already-relaxed standards is further insulated behind the majority's newly minted prejudice hurdle—regardless of whether the error is of statutory or constitutional stature. For all the argument about what standard to apply to what type of defect, the practical effect of the majority's decision is to make all species of defects harder to remedy.

Significant, too, the efficacy of those rights is anchored to the sufficiency of the indictment. The representation afforded by counsel, challenges to seized evidence or self-incriminating statements, the length of trial delays, and the questions posed to witnesses depend on the charges brought by the State and laid out in the indictment. *See Gallimore*, 272 N.C. at 533; *see also White*, 372 N.C. at 250–51; *Greer*, 238 N.C. at 327. A violation of those rights differs from a defective indictment in the same way that a flat tire halfway through a road trip differs from setting off with the wrong map. In both examples, one error happens once the proceedings are in motion; the other skews the journey from the start. In distinguishing indictments from other constitutional rights, then, the majority simply underscores their unique status and centrality to other procedural protections.

Finally, the majority notes that the right to an indictment is waivable in noncapital cases. If a valid indictment is essential for jurisdiction, it continues, then a defendant could not waive that requirement and, in effect, consent to jurisdiction. That analysis deploys the same rigidity for which the majority faults the common law. As explained above, the common law's conception of "jurisdiction" is not a carbon copy of modern doctrine. But the central intuition of the common law remedy was that a conviction premised on a defective indictment should not enjoy legal force because it was purchased at the price of due process. *See Whedbee*, 152 N.C at 776. When a noncapital defendant represented by counsel knowingly and voluntarily waives their right to an indictment, the due process guarantees protected by the procedural requirement are satisfied. *See Thomas*, 236 N.C. at 460–61 (examining the protections afforded to an accused who waives the right to an indictment). So a defendant waiving an indictment does not "consent" to jurisdiction, as the majority puts it, but verifies the accomplishment of the goals secured by that constitutional safeguard.

At bottom, the majority strips the jurisdictional remedy of constitutional stature because, in its view, "a court's jurisdiction to decide criminal cases flows directly from the people speaking through their constitution and statutes and cannot be destroyed by other means." That sentiment is difficult to square with the majority's bottom line. Professed adherence to constitutional directives rings hollow from a decision that cheapens the Constitution's guarantees of an indictment and adequate notice by burying those rights behind a functionally impenetrable prejudice standard. The majority also ignores case after case in which this Court has rooted the jurisdictional remedy for defective indictments in the Constitution itself. *See*, *e.g.*, *State v. Stevens*, 264 N.C. 364, 365

(1965); *State v. Jenkins*, 238 N.C. 396, 397–98 (1953); *Nugent*, 243 N.C. at 101; *Harris*, 145 N.C. at 458; *Greer*, 238 N.C. at 326–27; *Cole*, 202 N.C. at 596; *Hunter*, 299 N.C. at 41; *McClure*, 267 N.C. at 215; *Simpson*, 302 N.C. at 616. I would hold—as this Court had long affirmed—that vacating a conviction based on a fatally defective indictment honors the people's choices on how to allocate power and curb its abuse.

E. Examination of Current Statutes

Pivoting from history to modern statutes, the majority holds that the General Assembly did not codify the jurisdictional remedy into statutory law. Its analysis, however, is a result in search of a rationale. Though this Court has read the same statutory provisions to track the common law remedy, the majority, unsurprisingly discards that precedent, importing its new jurisdictional/non-jurisdictional dichotomy into the legislature's language. *See*, *e.g.*, *State v. Oldroyd*, 380 N.C. 613, 617 (2022) ("Subsection 15A-924(a)(5) is a codification of the common law rule that an indictment must allege all of the essential elements of the offense charged." (cleaned up)); *State v. Freeman*, 314 N.C. 432, 435 (1985) (holding that section 15A-924(a)(5) "incorporates the view expressed in prior holdings of this Court that an indictment must allege all of the essential elements of the offense charged" and "also incorporates our long held view that the purposes of an indictment include giving a defendant notice of the charge against him so that he may prepare his defense and be in a position to plead prior jeopardy if he is again brought to trial for the same offense"); *Mostafavi*, 370 N.C. at 685–86 (explaining that the CPA "sought to eliminate the technical pleading requirements previously recognized for criminal pleadings" but referencing that statute in tandem with rule that indictment "must allege all the essential elements of the offense endeavored to be charged" (cleaned up)); *Rambert*, 341 N.C. at 176.

But even conceding the force of the majority's statutory interpretation, the legislature cannot dictate standards below the constitutional baseline. *See State v. Brice*, 370 N.C. 244, 249 (2017) (citing the CPA before noting that "[t]o be sufficient under our Constitution, an indictment 'must allege lucidly and accurately all the essential elements of the offense endeavored to be charged.' " (quoting *Hunt*, 357 N.C. at 267)). The majority only stitches together its statutory reading by first severing indictments from their constitutional anchorage—a result I believe is misaligned with precedent and principles.

III. Conclusion

Ultimately, the majority's ruling flows from a hollow notion of justice. Justice is achieved, the majority intimates, when the State secures a "guilty" verdict—a defendant's challenges to the criminal proceedings are simply attempts to escape his just desserts. After all, the majority insinuates, a defendant would not be punished if he did not deserve punishment. That intuition is misguided. It ignores how procedural protections like indictments boost reliability "by enhancing the possibility that truth will emerge from the confrontation of opposing versions of events and conflicting data." *In re J.U.*, 384 N.C. at 631 (Earls, J., dissenting) (cleaned up) (quoting *In re Gault*, 387 U.S. 1, 21 (1967)); *see also Cole*, 202 N.C. at 599 ("[W]ant of the requisite precision and certainty which may at one time postpone or ward off punishment of the guilty may, at another, present itself as the last hope and only asylum of persecuted innocence." (cleaned up)).

More important, the majority lets slip its cramped vision of rights. Due process, by its nature, "serves to define the rights of the individual while also delimiting the powers which the state may exercise." *In re J.U.*, 384 N.C. at 630 (Earls, J., dissenting) (cleaned up). It has etched into our "basic law the requirement" that "the forfeiture of the lives, liberties or property of people accused of crime can only follow if procedural safeguards of due process have been obeyed." *Chambers v. Florida*, 309 U.S. 227, 237 (1940). That constitutional promise reaches the guilty and innocent alike. *See id.* at 241 ("[A]ll people must stand on an equality before the bar of justice in every American court."). And when the dictates of due process are most fervently tested—when the allure of expedience is at its strongest—the courts must redouble their commitment to protecting the Constitution's guarantees. *See id.*

There are higher values than stoking the churn of criminal prosecutions. Due process is one of them. For two centuries, this Court elevated procedural integrity over bare expedience. But the majority today upsets that balance. Because the Court erodes yet another constitutional safeguard, I dissent.

Justice RIGGS joins in this concurring and dissenting opinion.

STATE OF NORTH CAROLINA
v.
ERIC PIERRE STEWART

No. 23PA22

Filed 23 May 2024

Indictment and Information—sexual battery—essential elements—force implied by lack of consent—sufficiency of notice to defendant

The indictment charging defendant with sexual battery was facially valid where it contained sufficient facts to support each essential element of the charged offense, including force, since the allegation that defendant engaged in sexual conduct with the victim without her consent was sufficient to imply that the contact was committed by force, however slight, and was therefore adequate to put defendant on notice of the charge.

Justice EARLS concurring in the result.

Justice RIGGS joins in this concurring in result opinion.

On discretionary review pursuant to N.C.G.S. § 7A-31 from the unpublished decision of a unanimous panel of the Court of Appeals, No. COA21-101, (N.C. Ct. App. Jan. 4, 2022), vacating a judgment entered on 16 May 2019 by Judge George Cooper Bell in Superior Court, Mecklenburg County. Heard in the Supreme Court on 8 November 2023.

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

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

NEWBY, Chief Justice.

In this case we decide whether an indictment charging defendant with sexual battery is fatally flawed because it failed to expressly allege that defendant engaged in sexual contact with another person "by force." An indictment is valid if it alleges facts to support the essential elements of the crime with which a defendant is charged, such that the defendant

has sufficient notice to prepare his defense. The indictment here asserts that defendant unlawfully and willfully engaged in sexual contact with the victim "without her consent" but does not include the words "by force." Because this language implies the use of force and gives defendant adequate notice of the charge against him, the indictment is facially valid. Therefore, we reverse the decision of the Court of Appeals.

The evidence at trial tended to show the following. On 17 January 2016, the victim celebrated her birthday with two friends in Charlotte. The trio went to brunch before driving together to Zen Massage, where the victim was scheduled for a deep-tissue massage. Upon arrival, defendant, a massage therapist employed by Zen Massage, met the victim in the lobby and led her to a massage room located in a separate building. After a brief conversation with defendant, the victim undressed to her underwear and laid face-down on the massage table, covering herself with a sheet. Defendant subsequently began massaging the victim's back and shoulders.

After massaging the victim's back, defendant asked the victim to turn over so that he could massage the tops of her legs. The victim remained covered by the top sheet after turning over. As defendant massaged the victim's legs, she warned defendant that she had several cysts located on the inside of her right thigh. Defendant offered to massage the area near the cysts, to which the victim agreed.

As defendant massaged the inside of her thigh, the victim felt his pinky finger "kind of graze the fabric of [her] panties." The victim said nothing, believing it was an accident. Moments later, however, defendant digitally penetrated the victim's vagina three times. The victim did not consent to the penetrations, nor did defendant say anything. The victim testified that she was shocked by the incident and described herself as "frozen" in the moments after the incident occurred. Defendant acted as though nothing happened and began massaging the victim's arms, telling her, "I wouldn't want to do anything that would make you uncomfortable."

Defendant completed the victim's massage and instructed her to get dressed prior to leaving the room. Before the victim could finish dressing, defendant stuck his head back into the room without knocking and asked if the victim was "good in [t]here." The victim testified that she found this behavior strange and that it added to her discomfort. The victim finished dressing and left Zen Massage with her friends without reporting the incident to the staff because she "really just wanted to get out of there."

After getting into the car with her friends, the victim told them about the incident during her massage. The trio then went to the home of one of the friends, where they searched for and found defendant's Facebook profile. The victim called the police and reported the incident the following day, 18 January 2016. Later that day, the victim went to the police station and made an official statement where she recounted the incident in writing. Police conducted a recorded follow-up interview with the victim about the incident on 26 January 2016.

On 27 January 2016, police contacted Zen Massage seeking defendant's contact information. Police informed the staff at Zen Massage that they planned to obtain a warrant for defendant's arrest in connection with a criminal assault. Police obtained a warrant for defendant's arrest on 28 January 2016. Defendant contacted the police officers investigating his case and met with them for an interview on 2 February 2016. Prior to the interview, defendant looked himself up on the Mecklenburg County Sheriff's Department online warrant repository and confirmed that an arrest warrant had been sworn out against him for felonious sexual assault.

On 2 February 2016, following his interview with police, defendant was arrested in connection with the incident. On 11 April 2016, defendant was indicted on one count of second-degree forcible sexual offense under N.C.G.S. § 14-27.27 and one count of sexual battery under N.C.G.S. § 14-27.5A.[1] Regarding the sexual battery offense, the indictment expressly cited the pertinent statute and read as follows:

> [O]n or about the 17th day of January, 2016, in Mecklenburg County, [defendant], did unlawfully and willfully for the purpose of sexual arousal, engage in sexual contact with another person, [the victim], without her consent.

Defendant pled not guilty. Defendant did not request a bill of particulars, nor did he object to the language of the indictment at trial. At no time did defendant challenge the trial court's jurisdiction or argue that the indictment failed to put him on notice of the charged offense or protect him from double jeopardy.

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1. The General Assembly recodified the crime of sexual battery as N.C.G.S. § 14-27.33 effective 1 December 2015, and applicable to offenses committed on or after that date. Act of Aug. 5, 2015. S.L. 2015-181, § 15, 2015 N.C. Sess. Laws 460, 464. No argument was raised that the citation to section 14-27.5A failed to put defendant on adequate notice.

On 16 May 2019, a jury found defendant guilty of sexual battery and not guilty of second-degree forcible sexual offense. The trial court entered judgment accordingly and sentenced defendant to sixty days in the custody of the Mecklenburg County Sheriff. The trial court suspended the sentence and placed defendant on twenty-four months of supervised probation. The trial court also ordered defendant to surrender his massage therapist license and register as a sex offender. Defendant appealed.

On appeal, defendant argued that the trial court lacked subject matter jurisdiction over the sexual battery charge because the indictment omitted an essential element of the offense. *State v. Stewart*, No. COA21-101, slip op. at 2 (N.C. Ct. App. Jan. 4, 2022) (unpublished). Specifically, defendant argued that the indictment omitted that the act was committed "by force." *Id.* The Court of Appeals concluded that the plain language of N.C.G.S. § 14-27.33 requires that an indictment for sexual battery "allege *both* that the act was committed by force *and* against the will of the other person," and that the indictment in this case failed to do so. *Id.* at 4. Because the indictment only expressly mentioned one of these essential elements, the Court of Appeals concluded that it was invalid. *Id.*; *see State v. Snyder*, 343 N.C. 61, 65, 468 S.E.2d 221, 224 (1996) (holding that a valid indictment must contain the "essential elements of the offense" to confer subject matter jurisdiction); *In re J.U.*, No. COA20-812, slip op. at 6 (N.C. Ct. App. Jul. 6, 2021) (unpublished) (holding that "force" is an essential element of sexual battery), *rev'd on other grounds*, 384 N.C. 618, 887 S.E.2d 859 (2023).

On 7 February 2022, the State filed a petition for discretionary review asking this Court to review the decision of the Court of Appeals. The State argued that the sexual battery indictment was sufficient. This Court allowed the State's petition on 4 May 2022.

In another opinion filed today by this Court, we hold that so long as a crime against the laws and people of this State has been alleged, defects in indictments do not deprive the trial court of jurisdiction. *See State v. Singleton*, No. 318PA22, slip op. at 40 (N.C. May 23, 2024). A defendant challenging an indictment as defective must show that the indictment contained a statutory or constitutional defect and that such error was prejudicial. *See id.* at 42. Therefore, we consider whether the indictment here, which failed to allege the act was committed "by force," is flawed so as to constitute error. This Court reviews the sufficiency of an indictment de novo. *State v. White*, 372 N.C. 248, 250, 827 S.E.2d 80, 82 (2019).

"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.' " *State v. Lancaster*, 385 N.C. 459, 462, 895 S.E.2d 337, 340 (2023) (quoting N.C.G.S. § 15A-641(a) (2021)). Generally, the purposes of an indictment "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." *State v. Sturdivant*, 304 N.C. 293, 311, 283 S.E.2d 719, 731 (1981). An indictment is valid and

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

N.C.G.S. § 15-153 (2023).

Furthermore, "[i]t is generally held that the language in a statutorily prescribed form of criminal pleading is sufficient if the act or omission is clearly set forth so that a person of common understanding may know what is intended." *State v. Coker*, 312 N.C. 432, 435, 323 S.E.2d 343, 346 (1984). Indictments, therefore, do not "bind the hands of the State with technical rules of pleading" as "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, 283 S.E.2d at 731. Rather, "contemporary criminal pleading requirements have been designed to remove from our law unnecessary technicalities which tend to obstruct justice." *Lancaster*, 385 N.C. at 462–63, 895 S.E.2d at 340 (quoting *In re J.U.*, 384 N.C. 618, 623, 887 S.E.2d 859, 863 (2023)). Taken together with the purpose of an indictment "to put the defendant on notice of the crime being charged and to protect the defendant from double jeopardy," a test for indictment validity becomes "whether the indictment alleges facts supporting the essential elements of the offense to be charged." *State v. Newborn*, 384 N.C. 656, 659, 887 S.E.2d 868, 871 (2023); *see also* N.C.G.S. § 15A-924(a)(5) (2023).

Section 14-27.33 states that "[a] person is guilty of sexual battery if the person, for the purpose of sexual arousal, sexual gratification, or sexual abuse, engages in sexual contact with another person . . . [b]y force and against the will of the other person." N.C.G.S. § 14-27.33(a) (2023). Recently, this Court considered a similar issue in *In re J.U.*: whether force, as required in a sexual battery under N.C.G.S. § 14-27.33, could be implied from language that the act was nonconsensual. *In re J.U.*, 384 N.C. at 625, 887 S.E.2d at 864. In *In re J.U.*, a juvenile petition

"alleg[ed] that [the juvenile] touched [the victim's] vaginal area without her consent." *Id.* at 625–26, 887 S.E.2d at 864–65. This Court held that although the petition did not allege that the act was committed by force, because the petition alleged that the act was committed without the victim's consent, "the petition asserted a fact from which the element of force was, at the very least, 'clearly inferable' such that 'a person of common understanding may know what [wa]s intended.' " *Id.* (quoting *Coker*, 312 N.C. at 435, 323 S.E.2d at 346). This Court explained that "one cannot engage in nonconsensual sexual contact with another person without the application of some 'force,' however slight." *Id.* at 625, 887 S.E.2d at 864.

Here the indictment charged that defendant "did unlawfully and willfully for the purpose of sexual arousal, engage in sexual contact with another person, [the victim], without her consent." Implicit in this language is the fact that defendant committed sexual acts upon the victim by force, however slight. Nonconsensual sexual contact necessarily implies that the contact was committed by the use of some degree of force and against the will of the victim. The element of force is inferable from the language of the indictment such that a person of common understanding might know what was intended. Additionally, the indictment states the charge against defendant in a plain, intelligible, and explicit manner, citing the statute under which defendant was charged. Defendant was placed on notice of the charge levied against him, allowing him to prepare for trial and protecting him from double jeopardy. Moreover, defendant never objected to the language of the indictment or alleged that it failed to put him on notice of the charged offense.

Defendant's argument here represents a regression to the era of technical pleading rules from which this State's jurisprudence has long since departed. As this Court has written time and again, such rules tend to emphasize form over substance, undermining justice. We hold that the indictment here is facially valid, having sufficiently alleged facts to place defendant on notice of the charge against him. Accordingly, the decision of the Court of Appeals is reversed.

REVERSED.

Justice EARLS concurring in the result.

If this Court were addressing as a matter of first impression whether an allegation of force is a necessary element of sexual battery under N.C.G.S. § 14-27.33, I would dissent from the Court's decision and

recommend affirming the Court of Appeals for the reasons given in my dissenting opinion in *In re J.U.*, 384 N.C. 618, 626–31 (2023) (Earls, J., dissenting). As I explained in that dissent, "our legislature has determined that force is required to commit sexual battery." *Id.* at 626. Applying that analysis here, Mr. Stewart's indictment for sexual battery needed to specifically assert that he engaged in sexual contact with another person "by force." *See id.* at 626–30. In *In re J.U.*, however, a majority of this Court held that the State need not expressly allege force so long as the "element of force [is] clearly inferable from the facts alleged in the" charging document. *Id.* at 626 (majority opinion). Because Mr. Stewart's indictment meets the standard articulated in *In re J.U.*, and because that decision is the binding law of this State until overruled, I concur in the Court's decision on whether the indictment needed to explicitly allege the use of force.

On the question of whether Mr. Stewart's indictment was fatally defective so as to deprive the trial court of jurisdiction, I would dissent if this Court were addressing the issue in the first instance. As explained in my dissent in *State v. Singleton*, No. 318PA22 (N.C. May 23, 2024) (Earls, J., dissenting), I would hold that defective indictments are jurisdictional and require vacatur of a conviction premised on a fatally flawed charging instrument. As with *In re J.U.*, however, a majority of the Court has taken a different view and holds today that constitutional and statutory defects in an indictment are non-jurisdictional. *See State v. Singleton*, No. 318PA22 (N.C. May 23, 2024) (majority opinion). Until that decision is reversed, it remains the law to which I am bound. For that reason, I concur in the result reached by the Court.

Justice RIGGS joins in this concurring opinion.

STATE v. VANN

[386 N.C. 244 (2024)]

STATE OF NORTH CAROLINA
v.
TEVIN DEMETRIUS VANN

No. 157PA22

Filed 23 May 2024

1. Appeal and Error—preservation of issues—criminal trial—judge's failure to follow statutory mandate—no preliminary prejudice analysis required

The Court of Appeals properly reviewed defendant's appeal from his convictions for first-degree murder, murder of an unborn child, and robbery with a dangerous weapon after concluding that his main argument—that the trial court failed to exercise its discretion under N.C.G.S. § 15A-1233 when it denied the jury's request to review partial transcripts of witness testimony—was preserved for appellate review despite defendant's failure to raise the issue at trial. The statutory mandate placed upon the trial court in section 15A-1233 automatically preserved defendant's argument, and the Court of Appeals was not required to condition appellate review on a showing that the trial court's alleged error was prejudicial—a step that would require reviewing the issue on the merits before determining whether it was even preserved.

2. Jury—request for transcript of witness testimony—trial court's discretion—ambiguous language by court—evidence in record

At a trial for first-degree murder, murder of an unborn child, and robbery with a dangerous weapon, the trial court did not abuse its discretion by denying the jury's request for partial transcripts of testimony—from defendant, the lead investigator in the case, and the medical examiner—after stating that "[w]e're not—we can't provide a transcript as to that." Defendant had the burden on appeal to show that the court misunderstood and failed to exercise its discretion under N.C.G.S. § 15A-1233(a) to grant the jury's request, since the court's language of "we're not" juxtaposed with "we can't" was ambiguous and therefore insufficient to overcome the "presumption of regularity" afforded to trial courts on appellate review. Defendant failed to meet this burden where the record showed that the court: granted the jury's other requests to review evidence, even partially granting the request at issue by allowing the jury to see the medical examiner's report; provided other evidence that the jury did not

request but that the court believed would be helpful; and, when denying the request for the transcripts, stated that it was the jury's duty to recall the testimony.

Justice RIGGS concurring in result only.

Justice EARLS dissenting.

On discretionary review pursuant to N.C.G.S. § 7A-31 from an unpublished decision of the Court of Appeals, No. COA20-907 (N.C. Ct. App. May 3, 2022) (unpublished), finding error and granting defendant a new trial after appeal from a judgment finding defendant guilty of first-degree murder, felony murder of an unborn child, and robbery with a dangerous weapon entered on 16 December 2019 by Judge Henry Stevens in Superior Court, New Hanover County. Heard in the Supreme Court on 1 November 2023.

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

James R. Glover, for defendant.[1]

BERGER, Justice.

Prior to finding defendant guilty of first-degree murder, murder of an unborn child, and robbery with a dangerous weapon, a New Hanover County jury made multiple requests to review evidence admitted during defendant's trial. The trial court allowed the jury to review some of the requested exhibits but denied the jury's attempts to obtain partial transcripts of testimony from the lead detective, the medical examiner, and defendant. The Court of Appeals granted a new trial after it concluded that the trial court failed to exercise its discretion pursuant to N.C.G.S. § 15A-1233 when it denied the jury's request to review the partial transcripts. We reverse.

I. Factual and Procedural Background

On 12 August 2016, officers with the Wilmington Police Department responded to a call regarding an unconscious female at a local hotel.

1. Mr. Glover withdrew as counsel for defendant following the filing of the brief.

Upon arrival, the officers found Ashley Ann McLean cold to the touch and lying beside a blood-soaked pillow. The officers observed extensive swelling and bruising on the victim's face and puncture wounds on her chin and cheeks.

Dr. John Almeida Jr. performed the autopsy on Ms. McLean, and he concluded that McLean died from blunt force trauma which caused rupturing of her liver and intraperitoneal hemorrhaging. Dr. Almeida confirmed at trial that McLean's ruptured liver was "consistent with being stomped or kicked," and testified that the severity of the injuries the victim suffered were more akin to what is typically observed "in motorcycle or aircraft accidents." The autopsy showed that the victim also had bruising and swelling on the right side of her face, an abrasion on the face consistent with being stomped, three superficial incised wounds to the right side of the face, linear abrasions of the neck, bruising of the left upper shoulder, a subarachnoid hemorrhage in the brain, and a fractured rib. McLean was eight weeks pregnant at the time of her death.

In the hotel room where McLean's body was found, officers discovered items that led them to believe that the hotel room was used to facilitate prostitution. Officers also noticed a purse lying on the floor, with its contents dumped out and strewn across the room. One officer observed that there was a phone charger and an empty phone case lying close to McLean, which suggested that her phone was missing. With the assistance of the cell service provider and the victim's boyfriend, officers located McLean's phone in a nearby ditch.

The officers accessed McLean's phone and discovered missed calls and text messages between her and a number that was later determined to belong to defendant. At 5:21 a.m. on 12 August 2016, defendant began texting McLean, and she responded with fees and the hotel address. At 9:13 a.m., defendant texted the victim, stating that he was attempting to locate her at the hotel. McLean responded that he was at the correct location and that she would let him in the hotel. An extraction report of the victim's phone generated by the Wilmington Police Department showed that at 9:30 a.m. that morning, the victim ceased all outgoing communications on her phone despite numerous incoming messages and calls.

Officers confirmed defendant's presence at the location with hotel surveillance footage showing defendant arriving at the hotel on a bicycle around 9:29 a.m. He parked his bicycle and walked towards the back entrance of the hotel. At 9:49 a.m., defendant was shown exiting the hotel, pulling a hood over his head, and leaving on his bicycle.

On 16 August 2016, defendant was arrested at his place of work pursuant to an outstanding warrant on an unrelated matter. Once at the police station, detectives Lee Odham and David Short informed defendant of his *Miranda* rights and then interviewed defendant regarding his association with the victim around the time of her death. Defendant initially denied being at the hotel but later admitted to the officers that he was the individual in the hotel surveillance footage. Defendant told the officers that he went to the hotel "[f]or a back massage and stuff," but he left because the woman never came down to meet him.

However, as the interview continued, defendant admitted to entering McLean's room for sexual services. In addition, defendant confessed to assaulting McLean, telling detectives that he hit her multiple times in the face and ribs. Defendant explained that he hit McLean after she demanded additional money, threatened to accuse him of sexually assaulting her, and then threatened him with a knife. Defendant repeatedly denied killing McLean stating, "all I did was knock her out." According to defendant, McLean was snoring on the bed when he left the room.

Defendant also admitted to taking the victim's phone, the money he paid her, and the knife he claimed the victim used. In addition, defendant told the officers that he burned the shirt and shoes he was wearing when he was with McLean and stated that he threw the knife down a drain near the hotel.

Defendant was subsequently indicted for first-degree murder, murder of an unborn child, and robbery with a dangerous weapon. At trial, defendant testified that he visited McLean at the hotel for sexual services and that she was alive when he left the hotel. However, defendant denied taking the victim's phone, the money he had given her, or anything else from out of the room, and he denied burning his shirt and shoes. Defendant testified that he did not hit McLean and that he only told the police he had hit the victim because he "didn't want to be charged with murder." Defendant asserted that part of the story he initially told officers was not true because "[t]hey wouldn't listen to the answers" he was giving.

During deliberations, the jury made multiple requests to review evidence. The jury first asked the court to provide a transcript of the interview of defendant by detectives Odham and Short and the phone extraction report for McLean's cell phone. The trial court discussed this request with the State and defendant, summoned the jury into the courtroom, and provided the interview transcript and extraction report to the

jury. In addition, the trial court chose to provide additional reports to the jury at this time, including the victim's phone records from 10 August 2016 to 12 August 2016.

The jury subsequently asked the court for "Defendant's Exhibit No. 3," which was a map of the route defendant took entering and leaving the hotel. The trial court granted this request after consulting with the State and defendant.

The jury later sent a note to the court requesting the testimony of detective Odham, defendant, the medical examiner, and the medical examiner's report. The trial court discussed this request with the State and defendant:

> THE COURT: Do we – do we know what exhibit the medical[ ] examiner's report is?
>
> [THE STATE]: Judge, I pulled out the three exhibits, State's Exhibit 121, 122, and 123. It includes Dr. Almeida's report; the – Dr. Nicks, the medical – the local coroner; and the toxicology report.
>
> THE COURT: Okay. And I think that's what they're asking.
>
> Ms. Harjo, do you want to check it?
>
> [DEFENSE]: May I see? May I approach?
>
> THE COURT: Yes.
>
> THE COURT: Are you okay with that?
>
> [DEFENSE]: Yes, sir.
>
> . . . .
>
> [THE STATE]: And – are you going to bring them in and tell them that, regarding their other requests, that it's their duty to recall testimony?
>
> THE COURT: Yes.
>
> [THE STATE]: Okay. Thank you.

After this discussion, the trial court summoned the jury back to the courtroom and addressed the request, stating:

> I have received a request from the jury that we have entered into evidence as Court's Exhibit No. 7 in

> which the jury is requesting Detective Odham's testimony when he was on the stand specific to Reed and Hamby; second, Vann's testimony when he was on the stand; third, the medical examiner – examiner's testimony and his report.
>
> The testimony of the detective, Mr. Vann, and the medical – medical examiner from the stand, it's your duty to recall their testimony. So you will have to remember that. We're not – we can't provide a transcript as to that.
>
> With regards to the medical examiner's report, we are going to provide what was admitted into evidence as State's Exhibit 121, 122, and 123, which are the reports from the medical examiner.

Defendant did not object to the trial court's denial of the jury's request for the transcripts.

That afternoon, the jury returned a unanimous verdict finding defendant guilty of first-degree murder, murder of an unborn child, and robbery with a dangerous weapon. Defendant was sentenced to life imprisonment without parole and timely appealed.

At the Court of Appeals, defendant argued that the trial court failed to exercise discretion pursuant to N.C.G.S. § 15A-1233(a) when it did not allow the jury to review the requested transcripts. According to defendant, the trial court's language that "[w]e're not – we can't provide a transcript as to that" indicated a failure to exercise discretion. Defendant asserted that because there was a "reasonable possibility that, had the error not been committed, a different result would have been reached," he was entitled to a new trial.

In an unpublished opinion, the Court of Appeals determined that the trial court's language "we can't provide a transcript" demanded "a finding . . . that the trial court did not exercise the required discretion." *State v. Vann*, No. COA20-907, 2022 WL 1313956, *3 (N.C. Ct. App. May 3, 2023) (unpublished). The Court of Appeals opined that this purported error was prejudicial because "whether the jury believed defendant's recant of his confession [was] determinative to the jury's verdict," and defendant's recantation naturally involved "an issue of some confusion or contradiction such that a jury would want to review the evidence to fully understand it." *Id.* (cleaned up).

The State's petition for discretionary review was allowed by this Court on 3 March 2023. The State argues that the Court of Appeals erred: (1) by determining this issue was preserved for appeal prior to determining whether defendant was prejudiced; (2) by determining that the trial court failed to exercise its discretion without considering the entirety of the record; and (3) by ordering defendant a new trial without first requiring him to make a showing of prejudicial error under N.C.G.S. § 15A-1443(a).

II. Analysis

Subsection 15A-1233(a) of the North Carolina General Statutes provides that

> [i]f the jury after retiring for deliberation requests a review of certain testimony or other evidence, the jurors must be conducted to the courtroom. The judge in his discretion, after notice to the prosecutor and defendant, may direct that requested parts of the testimony be read to the jury and may permit the jury to reexamine in open court the requested materials admitted into evidence. In his discretion the judge may also have the jury review other evidence relating to the same factual issue so as not to give undue prominence to the evidence requested.

N.C.G.S. § 15A-1233(a) (2023).

"A trial court's ruling in response to a request by the jury to review testimony or other evidence is a discretionary decision, ordinarily reviewable only for an abuse thereof." *State v. Perez*, 135 N.C. App. 543, 554 (1999) (citing *State v. Hough*, 299 N.C. 245 (1980)). However, a trial court errs when it fails "to exercise its discretion in the erroneous belief that it has no discretion as to the question presented." *State v. Starr*, 365 N.C. 314, 317 (2011) (quoting *State v. Barrow*, 350 N.C. 640, 646 (1999)). A defendant is entitled to relief only when such an error is prejudicial. *See State v. Johnson*, 346 N.C. 119, 126 (1997).

Whether a trial court failed to exercise discretion, and in turn, whether this error was prejudicial to a defendant, are questions of law reviewed de novo. *See State v. Lang*, 301 N.C. 508 (1980).

A. Preservation

[1] It is undisputed that defendant failed to contemporaneously object to the trial court's denial of the jury's request for the trial transcripts.

Ordinarily, such a failure waives the right to appellate review. *See State v. Nobles*, 350 N.C. 483, 498 (1999) ("[T]he rule is that when [a] defendant fails to object during trial, he has waived his right to complain further on appeal."). However, "[a] statute will automatically preserve an issue for appellate review if the statute either: (1) requires a specific act by a trial judge; or (2) leaves no doubt that the legislature intended to place the responsibility on the judge presiding at the trial." *State v. Austin*, 378 N.C. 272, 276 (2021) (cleaned up). We have stated that N.C.G.S. § 15A-1233(a) contains a statutory mandate for which preservation is automatic. *See State v. Ashe*, 314 N.C. 28, 39 (1985); *State v. Lang*, 301 N.C. 508, 510 (1980).

But the State argues that in addition to the traditional statutory mandate analysis, *Ashe* conditioned appellate review on a showing of prejudice as well. *See Ashe*, 314 N.C. at 39 ("[W]hen a trial court acts contrary to a statutory mandate and a defendant is *prejudiced thereby*, the right to appeal the court's action is preserved . . . .") (emphasis added). Essentially, the State asserts that an appellate court must engage in a prejudice analysis before determining whether the issue is preserved.

However, in subsequent cases, this Court has not imposed an *ex ante* prejudice analysis. Addressing the same issue in *State v. Lawrence*, this Court held that "[w]hen a trial court acts contrary to a statutory mandate, the defendant's right to appeal is preserved despite the defendant's failure to object during trial." 352 N.C. 1, 13 (2000). More recently in *State v. Starr*, this Court explicitly held that,

> [w]hen a trial court violates this statutory mandate by denying the jury's request to review the transcript upon the ground that the trial court has no power to grant the motion in its discretion, the ruling is reviewable, and the alleged error is preserved by law even when the defendant fails to object.

Starr, 365 N.C. at 317 (cleaned up). Both *Lawrence* and *Starr* concerned preservation in the absence of an objection in relation to N.C.G.S. § 15A-1233(a).

While the State is correct that a fair reading of *Ashe* would require such a showing of prejudice, it would be illogical to require an appellate court to engage in a full analysis on the merits prior to determining whether the issue is actually preserved for appeal. Therefore, despite defendant's failure to object to this issue at trial, the alleged error under N.C.G.S. § 15A-1233(a) is preserved on appeal.

B. Exercising Discretion Under N.C.G.S. § 15A-1233(a)

[2] Subsection 15A-1233(a) set out above "imposes two duties upon the trial court when it receives a request from the jury to review evidence." *Ashe*, 314 N.C. at 34. First, the statute requires that the court bring all jurors into the courtroom. Second, and at issue here, "the trial court must exercise its discretion in determining whether to permit requested evidence to be read or examined by the jury." *Id.* at 34. "There is error when the trial court refuses to exercise its discretion in the erroneous belief that is has no discretion as to the question presented." *Starr*, 365 N.C. at 317 (cleaned up). Ultimately, it is the defendant's burden to show "that the trial court abused its discretion under N.C.G.S. § 15A-1233(a)." *State v. Guevara*, 349 N.C. 243, 252 (1998).

"This Court has held that a trial court does not commit reversible error by denying a jury request to review testimony . . . when it is clear from the record that the trial court was aware of its authority to exercise its discretion." *Id.* at 252. Thus, even where a trial court gives specific reasons for its determination under N.C.G.S. § 15A-1233(a), an appellate court must review this reasoning in context with the entire record. *See State v. Buckner*, 342 N.C. 198, 232 (1995) ("Nothing in the record indicates the trial judge was acting under the misapprehension of the limits of his discretion when he made his decision."); *State v. Lee*, 335 N.C. 244, 290 (1994) ("It is clear from this record that the trial court was aware of its authority to exercise its discretion."). Review of the entire record is vital, as it would be difficult for an appellate court to properly determine whether discretion was used on the basis of one word or sentence in a transcript.[2]

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2. We recognize that in some cases, the jury request raised on appeal may be the only request within the record which pertains to the discretionary power afforded under N.C.G.S. § 15A-1233(a). Thus, in those circumstances, review of the single instance would constitute review of the entire record. Here, however, the record contains multiple jury requests which the trial court dealt with pursuant to N.C.G.S. § 15A-1233(a), and as such we must review these for context.

Our dissenting colleague, however, would have us review this case through the lens of four prior cases, each of which only dealt with a single, isolated request in the record. *See State v. Ford*, 297 N.C. 28, 30 (1979); *Starr*, 365 N.C. at 317; *Barrow*, 350 N.C. at 646–47; *State v. Hatfield*, 225 N.C. App. 765, 767 (2013). While helpful, these cases are different from the case *sub judice* in that they did not contain a record replete with other jury requests that could be used to give context to the request at issue. Further, it must also be pointed out that our dissenting colleague only found these cases to mirror the case at hand after entirely rewriting the words used by the trial court. Such an approach demonstrates the speculative leaps that must be taken to find that the case at hand "fit[s] comfortably" with our case law, as it does not.

When reviewing the record, our case law highlights certain circumstances which may indicate a failure on the part of a trial court to exercise discretion. For example, a statement made by a trial court that it "doesn't have the ability," *State v. Barrow*, 350 N.C. 640, 647 (1999), or "that it is unable to provide the transcript to the jury" may indicate the failure to use discretion. *Starr*, 356 N.C. at 318. (emphasis omitted). Similarly, unambiguous language such as "we will not be able to," *Johnson*, 346 N.C. at 124, "the transcript is not available to the jury," *Lang*, 301 N.C. at 510–11, or "there is no transcript available at this time," *State v. Hudson*, 331 N.C. 122, 144 (1992), has likewise been interpreted as a failure to exercise discretion when read in context with the entirety of the record.

On the other hand, a "trial court's instruction that the jurors rely upon their individual and collective memory of the testimony is indicative of further exercise of its discretion." *State v. Harden*, 344 N.C. 542, 563 (1996). Moreover, a trial court that receives multiple requests from the jury demonstrates that it has used discretion when it "allow[s] one and denie[s] the other." *State v. Lewis*, 321 N.C. 42, 51 (1987).[3]

All of this considered, it is presumed that a trial court acted correctly until "statements of the trial court show that the trial court did not exercise discretion." *Starr*, 365 N.C. at 318 (quoting *Johnson*, 346 N.C. at 126); *see also State v. Thomas*, 344 N.C. 639, 646 (1996); *State v. Sanders*, 280 N.C. 67, 72 (1971). Further, when there are "ambiguous statement[s] capable of multiple interpretations, the 'presumption of regularity' is not overcome." *State v. Pickens*, 385 N.C. 351, 364 (2023).

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3. The dissent cites *Johnson* for the proposition that "[i]f the trial court contrasts 'what it cannot do' against 'what it can do,' that juxtaposition of determinations suggests that it did not believe it had discretion to grant the request." 346 N.C. 119. However, the language used by the trial court in *Johnson* is starkly different than the language used by the trial court in the case at hand. In *Johnson*, the trial court said, "we will not be able to replay or review the testimony for you [but] I *can* review further instructions . . . ." *Id.* at 123 (emphasis added). The use of the words "I can" in this sentence connotes that the trial court weighed what it believed it *could* and could *not* do. Whereas here, the trial court stated "[w]e're not – we can't," followed by "we are going to provide . . . State's Exhibits 121, 122, 123." Because the trial court's decision to provide the State's Exhibits was not based on what it believed it was permitted to do, we see no such "juxtaposition" as our dissenting colleague believes there is. Instead, the language used by the trial court demonstrated a decision being made, not a distinction between what was and was not permitted. Therefore, given these key differences, we believe *Lewis* to be the more appropriate comparative case law. 321 N.C. at 51 ("[The trial court] told the jurors that they could examine the photographs or other exhibits [and] then gave a negative answer to review of the transcript. . . . It thus appears that the trial judge did exercise discretion. He considered both requests and . . . allowed one and denied the other.").

This presumption "dictates that appellate courts should presume that the trial judge did not commit error absent affirmative evidence to the contrary." *LePage v. People*, 320 P.3d 348, 354 (Colo. 2014); *see also State v. Neely*, 26 N.C. App. 707, 709 (1975) ("Absent some specific, affirmative showing by the defendant that error was committed, we will uphold the conviction because of the presumption of regularity in a trial."); *State v. Rasmussen*, 404 P.3d 719, 722 (Mont. 2017) ("The defendant has the burden to overcome the presumption of regularity by producing affirmative evidence . . . ." (cleaned up)); *State v. Pappas*, 337 N.W.2d 490, 494 (Iowa 1983) ("[D]ecisions of the trial court are cloaked with a strong presumption in their favor and . . . to overcome this presumption of regularity requires an affirmative showing of abuse . . . ."(cleaned up)).

Here, the court's language of "[w]e're not – we can't provide a transcript" is, at best, ambiguous. While the word "can't," if read alone, could be indicative of a lack of discretion, the phrase "we're not" indicates the exercise of discretion. This inconsistent language creates ambiguity. Because "ambiguous statement[s] capable of multiple interpretations" do not overcome the presumption of regularity, *Pickens*, 385 N.C. at 364, defendant still bears the burden of providing affirmative evidence that the trial court misunderstood its discretion under N.C.G.S. § 15A-1233(a).

Both defendant and the Court of Appeals ignored the "[w]e're not" portion of the transcript, focusing solely on the "we can't" language. This is not enough to overcome the presumption. While the Court of Appeals acknowledged that "[o]n several occasions during deliberations the jury asked to review evidence from the trial," the Court of Appeals failed to properly consider these other requests. *Vann*, 2022 WL 1313956, at *1.

A thorough inspection of the record demonstrates that the trial court was fully aware of and appropriately exercised its discretion. The jury request at issue was not the first jury request of the trial. Rather, the jury had previously submitted two requests to the court. Defendant does not argue that the trial court abused or was otherwise unaware of its discretion in these prior requests, but review of the trial court's responses to these requests is necessary to determine whether the trial court was aware of its discretion for the denial at issue. *See Lee*, 335 N.C. at 290.

First, the jury requested the transcript of defendant's interview with detectives Odham and Short, as well as the full phone extraction report. The court summoned the jury and informed them that they would be provided with both the transcript and the full extraction report, as well as other reports which the jury did not specifically request, but that the court believed would be helpful. The trial court's action here highlights

the degree to which it understood and exercised its discretion. *See* N.C.G.S. § 15A-1233(a) ("In his discretion the judge may also have the jury review other evidence relating to the same factual issue so as not to give undue prominence to the evidence requested.").

Second, the jury requested Defendant's Exhibit No. 3, which the trial court discussed with the State and defendant, noting that it was defendant's exhibit with "handwritten notes on it." The court received consent from both parties, and ultimately provided the exhibit to the jury. Once again, the record shows that the trial court understood and exercised its discretion to allow the jury to examine this evidence. *See* N.C.G.S. § 15A-1233(a) ("The judge in his discretion . . . may permit the jury to reexamine . . . the requested materials admitted into evidence.").

Finally, and at issue before us, the jury requested transcripts of the trial testimony given by detective Odham, defendant, and the medical examiner. Upon receiving the request, the trial court conferred with the State and defendant, answering affirmatively when the State asked, "are you going to bring them in and tell them that, regarding their other requests, that it's their duty to recall the testimony?" The trial court then informed the jury that it was their "duty to recall the[ ] testimony," which is indicative of the use of discretion. *See Harden*, 344 N.C. at 563. Further, while denying the jury's request for the transcripts of trial testimony, the trial court still granted the request in part by permitting the jury to review the medical examiner's report, which is likewise indicative of an exercise of discretion. *See Lewis*, 321 N.C. at 51. Finally, when viewed in context with the prior requests in the record, the fact the trial court followed a similar pattern when considering all the jury requests is likewise indicative of discretion.

Thus, based upon a review of the entire record, "the trial court was aware of its authority to exercise its discretion," *Lee*, 335 N.C. at 290, and defendant has failed to provide affirmative evidence to the contrary.[4] Because the record indicates that the trial court understood and properly exercised its discretion under N.C.G.S. § 15A-1233(a), there

4. The dissent cites to *Hudson*, 331 N.C. at 144, to support its assertion that a court's grant of "the jury's request for some evidence does not cure the erroneous denial of the other." However, in *Hudson*, the trial court unambiguously stated, "the transcript is not available to the jury," while proceeding to grant other requests which it believed it was permitted to do. *Id.* It makes sense then in that situation that the trial court's grant of some evidence did not cure its error in denying other evidence. Here, however, the trial court's statement (unless completely rewritten in the way the dissent believes it should be) is ambiguous. Thus, review of the entire record is necessary and provides clarity for determining whether the trial court understood its discretion under N.C.G.S. § 15A-1233(a).

can be no finding of prejudicial error.[5] *See Johnson*, 346 N.C. at 126. Accordingly, the Court of Appeals' decision is reversed.

REVERSED.

Justice RIGGS concurring in result only.

I agree with the majority that the Court of Appeals erred in granting Mr. Vann a new trial, but I differ on the rationale. Consistent with my dissenting colleague's well-reasoned analysis, I would hold that the trial court erred in its resolution of the jury's request to review testimony transcripts. Even so, because I believe that error was not prejudicial, I concur in the majority's decision to reverse the Court of Appeals.

To receive a new trial, Mr. Vann "bears the burden of showing that he has been prejudiced by the trial court's error in not exercising discretion in accordance with N.C.G.S. § 15A-1233(a)." *State v. Starr*, 365 N.C. 314, 319 (2011). The error is sufficiently prejudicial to require a new trial where there is "a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises." *Id.* (quoting N.C.G.S. § 15A-1443(a)). While the materiality of the testimony and any contradictions arising therefrom are part of this holistic determination, so too is the presence of other evidence corroborating the defendant's guilt. *Id.* at 320.

I believe the other evidence presented to the jury in this case is sufficient to preclude a showing of prejudice in the trial court's error. That evidence includes:

- Mr. Vann admitted in his interrogation and on the stand that he was with the victim before her death.
- Her cellphone logs and the motel surveillance video placed his arrival and departure at 9:30 a.m. and 9:49 a.m. that morning, respectively.
- Her body—cold to the touch—was found by housekeeping at 12:30 p.m., indicating a significant passage of time between her death and the discovery of her body.

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5. It appears the Court of Appeals failed to analyze prejudice in accordance with the standard set forth in N.C.G.S. § 15A-1443(a) (2023), which requires the defendant to demonstrate that "there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial." However, since we find no error, we do not reach the issue of prejudice.

- Her cellphone logs further indicate that she made no further contact with anyone else after Mr. Vann left her motel room, which was inconsistent with her general practice.
- In his testimony, Mr. Vann admitted to carrying a knife everywhere, though he maintained that he had lied during his interrogation about struggling over a knife with the victim because "[t]hey said something about she was stabbed. So now I'm trying to make the situation look like, as far as the stabbings, being accidental." But a review of his interrogation transcript shows that Mr. Vann described the presence of a knife well *before* investigators mentioned any stab wounds.
- And Mr. Vann acknowledged on both occasions that he and the victim could not agree on the price for her services. In sum, there was sufficient corroborating evidence of his guilt to conclude, looking holistically and focused on the facts of this case solely, that had the jury been provided the requested transcript, there was not a reasonable probability that the jury would have reached a different conclusion.

Turning to Mr. Vann's testimony itself, the thrust of his denials on the witness stand appears to have been to suggest that the victim's admitted slaying was caused by a third person in the room; although that person's presence was entirely absent from his recounting of events on direct examination, he alternatingly testified on cross examination that he "was the only one involved" in what transpired in the victim's motel room, and that "I wasn't the only person . . . in that room. . . . Y'all didn't fully investigate." In fact, the bulk of his representations to that effect appeared in his interrogation transcript—a copy of which the jury *did* receive and review during deliberations. In short, Mr. Vann's testimony did not contradict the circumstantial evidence recounted above showing his guilt, particularly when his testimony did not present an alibi defense, plausibly demonstrate that someone else perpetrated the murder, and the jury was freely able to assess his credibility when it heard his testimony live. Under these circumstances, I do not believe there is a reasonable possibility that the jury would have reached a different result had it received a transcript of his testimony.

Justice EARLS dissenting.

In my view, the trial court failed to exercise its discretion on the jury's request for testimony transcripts. Because the court violated

N.C.G.S. § 15A-1233(a) (2023), and that error prejudiced Mr. Vann, I would affirm the Court of Appeals and award a new trial.

I. Exercise of Discretion Under Section 15A-1233(a)

Section 15A-1233(a) allows a jury to request review of testimony or other evidence after retiring for deliberation. As this Court has explained, the statute levies a duty: when the jury asks to review evidence, the trial court *must* exercise its discretion to resolve that request. *State v. Lang*, 301 N.C. 508, 510 (1980); *see also State v. Ashe*, 314 N.C. 28, 34 (1985).

Under section 15A-1233(a), a court does not err in denying a jury request if "it is clear from the record that the court was aware of its authority to exercise its discretion and allow the jury to review" the sought evidence. *State v. Guevara*, 349 N.C. 243, 252 (1998) (cleaned up). On the other hand, a trial court errs if it "misunderstood its authority to allow review of a witness'[s] testimony," *id.*, or if it "erroneously informed the jury that there was no procedure which permitted them to review testimony," *State v. Weddington*, 329 N.C. 202, 208 (1991). Put simply, a trial court violates section 15A-1233(a) if it refuses to exercise its discretion in the mistaken belief that it has none to exercise. *State v. Starr*, 365 N.C. 314, 318 (2011). This Court has thus consistently found a statutory breach when a court believed that it could not grant the jury's request. *See, e.g.*, *id.*; *see also State v. Barrow*, 350 N.C. 640 (1999). Our cases have thus distilled a general rule: a trial court's "response indicating the inability to provide a transcript constitutes erroneous failure to exercise discretion." *Starr*, 365 N.C. at 318.

In gauging whether a trial court "misunderstood its authority," this Court examines the "precise words chosen by the trial court." *State v. Johnson*, 346 N.C. 119, 124 (1997). When the court disclaims its ability, "power, skill, resources, or qualifications" to grant a jury's request, it violates section 15A-1233(a). *See id.* at 125. This Court also considers context. If the trial court contrasts "what it cannot do" against "what it can do," that "juxtaposition of determinations" suggests that "it did not believe it had discretion to grant the request." *Id.*

This Court explored that "juxtaposition" in *Johnson*. In that case, like this one, jurors asked to revisit a witness's testimony. *Id.* The trial court first told jurors that it "*will not be able* to replay or review the testimony." *Id.* at 124. But right after disavowing its capacity to provide testimony, the court told the jury that it "*can* review further instructions." *Id.* at 125. Based on those contrasting comments, this Court concluded that the trial court knew that its authority had limits—it simply misunderstood where to draw the line. *Id.* And coupled "with the

subsequent admonishment that it is the jurors' duty to consider the evidence as they recall it," we explained, the trial court apparently believed "that it was not empowered to let the jurors review the testimony at issue." *Id.* (cleaned up).

The trial court made a similar error here. On the first day of deliberations—a Friday—the jury asked to see a transcript of Mr. Vann's police interrogation and Ms. McLean's phone records. The trial court assented and furnished each juror with a personal copy of those documents. The jury did not reach a verdict, so the trial court recessed for the weekend.

When jurors resumed deliberations the next Monday, they asked for transcripts of the testimony of Mr. Vann, Detective Odham, and the medical examiner. The jury also asked for Ms. McLean's autopsy report. The trial court provided the report but withheld the transcripts, explaining:

> The testimony of the detective, Mr. Vann, and the medical—medical examiner from the stand, it's your duty to recall their testimony. So you will have to remember that. *We're not—we can't provide a transcript as to that.*

(Emphasis added.)

Left with Mr. Vann's interrogation transcript, Ms. McLean's phone records, and the autopsy report, the jury continued deliberating. It soon convicted Mr. Vann on each charge against him.

The "precise words chosen by the court" betray its misunderstanding of—and failure to exercise—its discretion on the jury's request. *Johnson*, 346 N.C. at 124. The trial court first said, "we're not," before pausing and clarifying, "we *can't* provide a transcript as to that." (Emphasis added.) Among other things, "can't" or "cannot" means "to be unable to do otherwise than." *Can't/Cannot*, *Merriam-Webster's Collegiate Dictionary* (11th ed. 2007). Rephrased in those terms, the court effectively told jurors, "We're not—we are unable to do otherwise than withhold a transcript as to that." *Cf. Starr*, 365 N.C. at 318 ("A trial court's statement that it is *unable* to provide the transcript to the jury demonstrates the court's apparent belief that it lacks the discretion to comply with the request." (citing *Barrow*, 350 N.C. at 646)).

Those remarks thus fit comfortably with our well-settled rule: A "court does not exercise its discretion when, as evidenced by its response, it believes it cannot" comply with the jury's request. *Starr*, 365 N.C. at 318. Unsurprisingly, then, the trial court's comments mirrors others found violative of section 15A-1233:

- "[W]e're not allowed to go back in . . . we really *can't* help you with that particular matter," *State v. Ford*, 297 N.C. 28, 30 (1979) (emphasis added);
- "We don't have that . . . [*w*]*e don't have the capability* of real-time transcripts so we *cannot* provide you with that," *Starr*, 365 N.C. at 317 (emphasis altered);
- "The Court *doesn't have the ability* to now present to you the transcription of what was said during the course of the trial," *Barrow*, 350 N.C. at 647 (emphasis altered);
- "[W]e *can't* do that," *State v. Hatfield*, 225 N.C. App. 765, 767 (2013) (emphasis added).

The Court of Appeals drew those parallels. In granting Mr. Vann a new trial, the court canvassed our caselaw. *See State v. Vann*, No. COA20-907, slip op. at 4–6 (N.C. Ct. App. 2022) (unpublished). From that precedent, it gathered that "[l]anguage from the trial court that a transcript can't be provided, is not available, or is not allowed to be reviewed" shows that the court "did not exercise the required discretion in considering whether to grant the jury's request." *Id.* at 6. It then applied that rule to the trial court's words, concluding that the court misapprehended its authority to furnish jurors with the testimony transcripts. *Id.*

The majority here, however, conjures up ambiguity in the trial court's statements. It concedes that "the word 'can't,' if read alone, could be indicative of a lack of discretion." But that reading somehow evaporates because the "phrase 'we're not' indicates the exercise of discretion." I think that argument reshuffles the trial court's remarks. True, the court first told jurors "we're not" providing the transcripts. But even if that phrase connotes discretion—a strained interpretation in its own right—the trial court did not stop there—it paused and corrected course, telling jurors that "we can't" furnish the transcripts. In my view, that remark is ambiguous in the same way that water is dry. And any murkiness in the phrase "we're not" was readily displaced by the categorical "we can't." Because the "precise words chosen by the court" disclaimed its ability to grant the jury's request, we could end our section 15A-1233(a) analysis with the court's plain language. *Johnson*, 346 N.C. at 124.

The majority offers two reasons why the trial court exercised its discretion. First, the majority maintains, the court understood and wielded its authority because it reminded jurors of their "duty to recall

the[ ] testimony." Second, since the trial court exercised its discretion on other jury requests, the majority contends that it did the same for the testimony transcripts.

I find neither argument persuasive. For one, this Court has already rejected the idea that a trial court cures its failure to exercise discretion by simply telling jurors to recall the testimony. In *Starr*, for instance, we expressly held that if "the trial court's statement indicates its belief that it does not have discretion" to consider the jury's request, then "the court's additional instruction that the jurors rely on their memory will not render the response discretionary." *Starr*, 365 N.C. at 318–19. We have also applied that rule in practice. Take our decision in *Ford*. There, as here, the trial court reminded the jury "[i]t is your duty . . . to recall all of the evidence." *Ford*, 297 N.C. at 30. Yet this Court still held that the trial court failed to exercise its discretion when, in response to a request for evidence, it told jurors, "we really can't help you with that," a remark strikingly similar to this case. *Id.*; *see also State v. Hudson*, 331 N.C. 122, 144 (1992) (holding that trial court failed to exercise discretion even though it instructed jury to recall testimony). In fact, when a court disclaims its ability to grant the jury's request and then "admonish[es] that it is the jurors' duty to consider the evidence as they recall it," that "juxtaposition of determinations" suggests a failure to exercise discretion. *Johnson*, 346 N.C. at 125 (cleaned up). Here, then, the trial court's reminder that jurors recall the testimony does not remedy its statutory breach. Quite the opposite. Under our precedent, that instruction merely underscored the court's misapprehension of its authority. *See id.*

Next, the majority points out that the trial court allowed the jury's requests for other pieces of evidence, including Mr. Vann's interrogation transcript, Ms. McLean's phone records, and the medical examiner's report. Because the court knew of and exercised its discretion for other jury requests, the majority reasons, it did the same for the testimony transcripts.

That syllogism, however, requires an unjustified logical leap. A court may understand its discretion over some types of evidence but misapprehend its authority over others, just as a driver who knows how to make a three-point turn may not understand how to parallel park. Recall that the trial court provided jurors with non-testimonial written evidence while categorically withholding transcripts of witness testimony. That conspicuously divergent treatment suggests that the trial court meant what it said—that it "couldn't" furnish jurors with the requested testimony transcripts.

This Court confronted a similar situation in *Hudson*, 331 N.C. 122. There, we held that a trial court failed to exercise its discretion when it granted part of the jury's request but erroneously refused to allow jurors to review a category of evidence that it thought it could not provide. *See id.* at 143–44. In that case, the jury asked to revisit the "written reports of expert witnesses who testified to defendant's mental capacity." *Id.* at 143. One expert witness—Dr. Rollins—"had not prepared a written report, so no such report was introduced into evidence or available to the jury." *Id.* As an alternative, the jury requested a transcript of Dr. Rollins' testimony. *Id.* There—as here—the trial court granted a portion of the jury's request; it allowed jurors "to review the available written reports" of the expert witnesses. *Id.* But there—as here—the court "refused to permit the jury to examine a transcript of the Rollins testimony." *Id.* In response to the jury, the court stated:

> Now, with respect to any request for a transcript of any portions of the testimony, I would say to you *that there is no transcript available at this time* of any of the testimony. I would further say to you, as I did during my earlier instructions to you, that you are to rely on your recollection of the evidence as it was presented during the course of the trial during your deliberations.

Id. at 144.

According to this Court, the trial judge erroneously denied the request for Dr. Rollin's testimony on the grounds that "the transcript was 'not available.' " *Id.* By labelling that evidence off limits—without exercising its judgment on the merits of the request—the trial court violated section 15A-1233. *See id.* That was so even though the court furnished some of the evidence sought by jurors.

The same reasoning applies to Mr. Vann's case. Here—as in *Hudson*—the trial court granted the jury's request for prepared written documents while denying the bid for witness transcripts. That was because here—as in *Hudson*—the trial court believed that it lacked the power to grant the jury's request for a particular species of evidence. And so here—as in *Hudson*—allowing the jury's request for some evidence does not cure the erroneous denial of other evidence.

Because the trial court believed that it could not provide the jury with transcripts of Mr. Vann's testimony, it failed to exercise its discretion. It thus violated section 15A-1233.

II. Prejudice

I would also hold that the trial court's error prejudiced Mr. Vann—but for the court's mistake, there is a "reasonable possibility" of a different result. *Starr*, 365 N.C. at 319 (quoting N.C.G.S. § 15A-1443(a)). In section 15A-1233 cases, this Court has found prejudice when the jury's full understanding of the requested testimony was "material to the determination of defendant's guilt or innocence." *Id.* (cleaned up); *see also Ashe*, 314 N.C. at 38; *Lang*, 301 N.C. at 511. The more "central" the testimony to the case, the more likely the trial court's error was prejudicial.[1] *See Johnson*, 346 N.C. at 126; *see also Ashe*, 314 N.C. at 37 ("The heart of this case . . . is the testimony concerning defendant's alibi, both that offered by defendant tending to support it and that offered by the state tending to rebut it."). In that vein, we have deemed an error prejudicial when the evidence withheld was the "only evidence directly linking defendant to the alleged crimes." *Johnson*, 346 N.C. at 126.

Mr. Vann has shown prejudice warranting a new trial. Because his testimony was the "heart of the case," *Ashe*, 314 N.C. at 37, erroneously withholding that evidence could have made all the difference. For one, Mr. Vann's account was "central" to the jury's verdict. *Johnson*, 346 N.C. at 126; *see also Ashe*, 314 N.C. at 37. Put simply, the State *needed* Mr. Vann's confession to convict him—as the Court of Appeals recognized, no other evidence "directly link[ed] him to the killing." *Vann*, slip op. at 7 (quoting *Johnson*, 346 N.C. at 126). True, other evidence "placed [Mr. Vann] in the victim's hotel room." *Id.* But it did not tie him to the felony robbery (the predicate for his felony murder charges), Ms. McLean's fatal injuries, or the death of her unborn child.

In other words, Mr. Vann's confession was the sole evidence for at least one essential element of each charge against him. Begin with the felony robbery. Because the State charged Mr. Vann with *felony* murder, it first had to prove that he committed a predicate felony—here, robbery with a dangerous weapon. Among other key elements, the State needed to show that Mr. Vann: (1) unlawfully took "personal property from [Ms. McLean] or in the presence of another" (2) by "use or threatened use" of a dangerous weapon. *State v. McLymore*, 380 N.C. 185, 199 n.3 (2022) (cleaned up).

Mr. Vann's confession was the only evidence on both scores. Only Mr. Vann linked himself to a "dangerous weapon"—i.e., Ms. McLean's

1. It is assumed for the prejudice analysis that, if the trial court properly exercised its discretion, it would have provided jurors with the requested evidence. There is no reason here to assume otherwise.

knife. And only Mr. Vann implicated himself in the theft of Ms. McLean's phone, money, and knife. Though police later found the phone and lifted prints from it, none matched Mr. Vann. And the State never found the money or knife. In fact, there might have never been a knife at all—later in Mr. Vann's interrogation, he backtracked on his original account and stated that Ms. McLean did not have a knife, but another object that he was not able to identify.

The jury *had* to rely on Mr. Vann's confession to convict him of felony robbery—no other evidence showed that he used a dangerous weapon or took Ms. McLean's belongings. And since that robbery was the predicate for the felony murder of Ms. McLean and her unborn child, Mr. Vann's statements were foundational to those charges, too.

Likewise, Mr. Vann's confession was the only evidence tying him to the killing of Ms. McLean and her unborn child. During his interrogation, Mr. Vann admitted to officers that he repeatedly struck Ms. McLean, landing at least one punch to her "ribs." That was the fatal blow; according to Ms. McLean's autopsy, it ruptured her liver and caused internal bleeding. And when Ms. McLean died, her unborn child did, too. But nothing besides Mr. Vann's own words "link[ed] him to the actual killing." *Vann*, slip op. at 7. Though police discovered unidentified male DNA on Ms. McLean's underwear and her body, they did not find Mr. Vann's DNA anywhere in the motel room, on her clothes, or on her person. Likewise, there were no eyewitnesses to the alleged crimes. No forensic or circumstantial evidence proved that "his actions cause[d] or directly contribute[d] to the death of the victim[s]." *See State v. Collins*, 334 N.C. 54, 60–61 (1993). Mr. Vann's confession was thus the only evidence that he proximately caused the fatal injuries—an essential element for his murder convictions. *See id.* at 60 (citing *State v. Brock*, 305 N.C. 532 (1982)).

Without Mr. Vann's statements to officers, the charges against him fall apart. For similar reasons, Mr. Vann's trial testimony was the "heart of the case." *Ashe*, 314 N.C. at 37. When he took the stand, he recanted his confession and retracted the statements implicating him in the robbery and killings. He told jurors that he never argued with or assaulted Ms. McLean. He stated that when he left the motel, Ms. McLean was unharmed and alive. And he averred that he did not take any of her property, much less use a dangerous weapon to do so.

Mr. Vann's admissions to officers were the building blocks of the predicate felony and murder charges, and so his testimony gave jurors a stark choice: credit his interrogation statements or believe his

recantation at trial. Only if jurors trusted his confession and discounted his testimony could they properly convict him of the robbery and murders. Because the content and credibility of Mr. Vann's trial testimony was "crucial"—indeed "central"—to the case against him, *Johnson*, 346 N.C. at 126, it was material to the "determination of [his] guilt or innocence," *Starr*, 365 N.C. at 319. Since his testimony recanted his earlier confession, jurors needed to review and examine that testimony when deciding his guilt. Had the trial court not erred and duly exercised its discretion to allow Mr. Vann's pivotal testimony, there is a "reasonable possibility" that the jury would have "reached a different result." *Id.* (quoting N.C.G.S. § 15A-1443(a)). Because I would find that the trial court failed to exercise its discretion and prejudiced Mr. Vann, I respectfully dissent.

STATE OF NORTH CAROLINA
v.
MACK WASHINGTON

No. 34PA22

Filed 23 May 2024

Evidence—Rule 412—definition of "sexual behavior"—criminal prosecution—sexual offenses against child—evidence of prior sexual abuse by different perpetrator

In a prosecution for sexual offense with a child by an adult and indecent liberties with a child, the trial court properly excluded evidence of previous sexual abuse of the victim by an abuser other than defendant, where Evidence Rule 412 bars evidence of a victim's "sexual behavior," which is defined as "sexual activity other than the sexual act which is at issue in the indictment on trial." Although Rule 412 does not define "sexual activity," the Rule's plain language indicates that all evidence of a victim's sexual activity other than the sexual act at issue is inadmissible regardless of whether that activity was consensual or nonconsensual. Thus, defendant's argument that the victim's prior sexual abuse did not fall under Rule 412's definition of "sexual behavior" lacked merit.

On discretionary review pursuant to N.C.G.S. § 7A-31 from the unpublished decision of a unanimous panel of the Court of Appeals, No. COA20-448 (N.C. Ct. App. Dec. 21, 2021), affirming a judgment entered

on 11 October 2019 by Judge Andrew T. Heath in Superior Court, Wake County. Heard in the Supreme Court on 16 April 2024.

Joshua H. Stein, Attorney General, by Kristin J. Uicker, Special Deputy Attorney General, for the State-appellee.

Glenn Gerding, Appellate Defender, by Daniel K. Shatz, Assistant Appellate Defender, for defendant-appellant.

NEWBY, Chief Justice.

In this case we determine whether evidence of previous instances of sexual abuse, or nonconsensual sex, constitutes "sexual behavior" under Rule 412 of the North Carolina Rules of Evidence and should therefore be excluded. Under the rule, the term "sexual behavior" is defined as "sexual activity of the complainant other than the sexual act which is at issue in the indictment on trial." N.C.G.S. § 8C-1, Rule 412(a) (2023). While sexual activity is not defined in Rule 412 and has not previously been defined by this Court, the language of Rule 412 is clear and unambiguous and necessarily includes evidence of actions of the complainant having to do with or involving sex other than the sexual act at issue in the indictment on trial. The rule does not distinguish between consensual and nonconsensual sexual activity. Because the evidence here falls squarely within this definition of sexual activity, we give effect to Rule 412's plain language excluding the evidence of prior sexual abuse and affirm the decision of the Court of Appeals.

On 22 October 2018, N.M., who was twelve years old at the time, told her mother that defendant, her stepfather, sexually abused her on several occasions while her mother worked in the evenings. N.M. detailed a variety of sex acts defendant performed with her against her will in their home. N.M. corroborated her claims by identifying defendant's distinct skin disease located on his genitalia. Her mother then took N.M. to the police station. Over the course of the next several weeks, N.M. discussed defendant's acts of sexual abuse with several individuals, including medical professionals, law enforcement, and a SAFEChild social worker, Tiffany Hampton.

During a recorded conversation between N.M. and Hampton, Hampton asked N.M. whether "anyone other than [defendant] ever did something like this to [her] before." N.M. responded affirmatively, describing the additional abuser as a fifteen-year-old teenager. N.M.

largely refused to answer questions about the additional abuser, fearful that this person "might do something crazy" and that others might believe she welcomed this behavior. Hampton asked several additional questions about the fifteen-year-old to no avail.

On 10 December 2018, defendant was indicted on two counts of sexual offense with a child by an adult and six counts of indecent liberties with a child. Defendant pled not guilty. Although Rule 412 generally bars evidence of prior "sexual behavior," defendant moved in limine to admit the portion of N.M.'s SAFEChild interview in which she discussed the additional abuser. *See* N.C.G.S. § 8C-1, Rule 412(a), (b) (2023) (excluding evidence of the sexual behavior of a complainant "other than the sexual act which is at issue" in a sex offense case as generally irrelevant and therefore inadmissible). Specifically, defendant argued, *inter alia*, that the interview did not fall under Rule 412's definition of "sexual behavior" because it did not discuss "any specific sex acts."[1] The trial court denied the motion and excluded the evidence under Rules 401, 402, and 412 of the North Carolina Rules of Evidence.

Prior to closing arguments, the trial court granted defendant's motion to dismiss one of the two counts of sexual offense with a child by an adult. Defendant was found guilty of all remaining charges and sentenced to 332 to 478 months imprisonment. Defendant appealed.

On appeal, defendant argued, in relevant part, that the trial court prejudicially erred in excluding the SAFEChild interview "because sexual abuse does not fall within the definition of 'sexual behavior' " under Rule 412. *State v. Washington*, No. COA20-448, slip op. at 9 (N.C. Ct. App. Dec. 21, 2021) (unpublished). Specifically, defendant argued that Rule 412 only bars evidence of consensual sexual activity but allows admission of prior nonconsensual sexual activity. *Id.* The Court of Appeals disagreed and held that "[t]he plain language of Rule 412 . . . does not speak to a consensual requirement." *Id.* at 11. Thus, it held that the trial court did not err in excluding the interview because evidence

1. Defendant raised several additional arguments at the trial court regarding the admissibility of the interview. He contended that the interview fell within an exception to Rule 412, and he also sought to admit the interview as evidence of an explanation for N.M.'s psychological trauma and self-harm. The trial court, however, denied defendant's requests to admit the interview on these grounds, and defendant does not raise those arguments on appeal to this Court.

of sexual abuse by an abuser other than defendant is exactly the sort of evidence Rule 412 was designed to exclude.[2] *Id.*

On 25 January 2022, defendant filed a petition for discretionary review with this Court seeking review of the Court of Appeals' decision. This Court allowed defendant's petition on 4 November 2022.

Here we consider whether the trial court erred in excluding the SAFEChild interview pursuant to Rule 412. As he did at the Court of Appeals, defendant argues that Rule 412 does not exclude the evidence of N.M.'s prior sexual abuse because the language of the rule only bars evidence of prior consensual sex but allows admission of prior nonconsensual sex. Accordingly, we must determine whether evidence of nonconsensual sex acts constitutes sexual behavior under Rule 412. Conclusions of law, such as issues of statutory interpretation, are reviewed de novo by this Court. *State v. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011).

"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." *In re R.L.C.*, 361 N.C. 287, 292, 643 S.E.2d 920, 923 (2007) (quoting *Diaz v. Div. of Soc. Servs.*, 360 N.C. 384, 387, 628 S.E.2d 1, 3 (2006)).

Relevant evidence is defined as "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 (2023). All relevant evidence is admissible unless "otherwise provided by the Constitution of the United States, by the Constitution of North Carolina, by Act of Congress, by Act of the General Assembly, or by [the Rules of Evidence]." N.C.G.S. § 8C-1, Rule 402 (2023). Irrelevant evidence is inadmissible. *Id.* Rule 412 of the North Carolina Rules of Evidence, commonly known as the rape shield statute, states that "[n]otwithstanding any other provision of law, the sexual behavior of the complainant is irrelevant to any issue in the prosecution" and is therefore inadmissible unless the behavior falls within one of the statutorily provided exceptions. N.C.G.S. § 8C-1, Rule 412(b). Rule 412 defines "sexual behavior" as "sexual activity of

2. The Court of Appeals further held that the evidence did not fall into the alternate suspect exception under Rule 412(b)(2). *Id.* at 13. *See generally* N.C.G.S. § 8C-1, Rule 412(b)(2) (2023). Defendant did not raise this issue in his petition to this Court; therefore, we do not consider that issue here. The only issue before this Court is the scope of "sexual activity" in Rule 412.

the complainant other than the sexual act which is at issue in the indictment on trial." N.C.G.S. § 8C-1, Rule 412(a). Sexual activity, however, is not defined in Rule 412 or elsewhere in the North Carolina Rules of Evidence. *See id.* Thus, we now look to whether the plain meaning of sexual activity is clear and unambiguous.

"Activity" is defined by Webster's Dictionary as "the quality or state of being active; action." *Activity*, *Webster's New World College Dictionary* (5th ed. 2014). The same defines "sexual" as "of, characteristic of, or involving sex." *Sexual*, *Webster's New World College Dictionary* (5th ed. 2014). Taken together, sexual activity refers to actions characteristic of or involving sex and does not distinguish between consensual and nonconsensual sex.

Similarly, looking to the full definition of "sexual behavior" in Rule 412(b), it is plain that, contrary to what defendant argues, the definition does not differentiate between consensual and nonconsensual sex acts, nor does it tend to exclude nonconsensual sex. Rather, the language of Rule 412(a) distinguishes between the sexual act at issue and *all* other sexual activity: "the term 'sexual behavior' means sexual activity of the complainant *other than the sexual act which is at issue in the indictment on trial.*" N.C.G.S. § 8C-1, Rule 412(a) (emphasis added). Thus, the plain language of Rule 412 is clear and unambiguous.[3]

Given this plain meaning, the trial court did not err in excluding N.M.'s SAFEchild interview. The interview consisted of N.M.'s statement that someone other than defendant committed similar sexual abuse against her in the past. These statements are not related to the acts complained of in the present case and thus, fall squarely within the type of evidence that Rule 412 is specifically designed to exclude. *See State v. Fortney*, 301 N.C. 31, 44–45, 269 S.E.2d 110, 117 (1980) (holding that evidence of sexual behavior that is not probative of the victim's consent to the acts complained of "is precisely the kind of evidence the [rape shield] statute was designed to keep out because it is irrelevant and tends to prejudice the jury"). Accordingly, N.M.'s statements about the

3. In *State v. Bass*, the Court of Appeals considered a nearly identical issue: whether evidence of a minor victim's previous sexual abuse by someone other than the defendant was properly excluded under Rule 412. 121 N.C. App. 306, 309, 465 S.E.2d 334, 336 (1996). In a single sentence, the Court of Appeals held that such prior abuse fell within the definition of sexual behavior under Rule 412 and was properly excluded. *Id.* at 309–10, 465 S.E.2d at 336. The efficiency with which the Court of Appeals decided the question in that case speaks to the clarity of the language at issue here.

additional abuser in the SAFEChild interview were properly excluded as evidence of sexual behavior.

In sum, the language of Rule 412 is clear that, generally, *all* evidence of a complainant's sexual behavior, other than the sexual act at issue, is irrelevant regardless of whether that sexual behavior was consensual or nonconsensual. N.M.'s statements about the additional abuser in her SAFEChild interview constitute evidence of sexual behavior "other than the sexual act" committed by defendant in this case. N.C.G.S. § 8C-1, Rule 412(a). Therefore, that evidence is irrelevant, and the trial court properly excluded it. Accordingly, the decision of the Court of Appeals is affirmed.

AFFIRMED.

HAPPEL v. GUILFORD CNTY. BD. OF EDUC.

[386 N.C. 271 (2024)]

EMILY HAPPEL; INDIVIDUALLY, TANNER SMITH, A MINOR AND EMILY HAPPEL ON BEHALF OF TANNER SMITH AS HIS MOTHER

v.

GUILFORD COUNTY BOARD OF EDUCATION AND OLD NORTH STATE MEDICAL SOCIETY, INC.

From N.C. Court of Appeals
23-487

From Guilford
22CVS7024

No. 86P24

ORDER

The petition for discretionary review as to additional issues filed by plaintiffs on 5 April 2024 is allowed as to the first issue only.

By order of the Court in Conference, this the 21st day of May 2024.

/s/ Riggs, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 23rd day of May 2024.

s/Grant E. Buckner

Grant E. Buckner
Clerk of the Supreme Court

STATE v. ROGERS

[386 N.C. 272 (2024)]

STATE OF NORTH CAROLINA	From N.C. Court of Appeals 21-707
v.	
MARTY DOUGLAS ROGERS	From New Hanover 19CRS56950 19CRS56952

No. 377P22

ORDER

This matter is before this Court on the State's petition for discretionary review of a decision of the Court of Appeals holding that no probable cause existed to support the collection of defendant's historical cell-site data and ordering a new trial. This petition is (1) allowed to review whether the good-faith exception under N.C.G.S. § 15A-974 applies; and (2) denied as to all remaining issues.

By order of the Court in Conference, this the 21st day of May 2024.

/s/ Riggs, J.
For the Court

Dietz, J., recused.

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 23rd day of May 2024.

s/Grant E. Buckner

Grant E. Buckner
Clerk of the Supreme Court

UNIVERSAL LIFE INS. CO. v. LINDBERG

[386 N.C. 273 (2024)]

UNIVERSAL LIFE INSURANCE COMPANY	From N.C. Court of Appeals 23-274
v.	From Durham 22CVS2507
GREG E. LINDBERG	

No. 344P23

ORDER

This matter is before this Court on plaintiff's petition for discretionary review of a decision of the Court of Appeals vacating an injunction and reversing in part a charging order entered by the trial court against defendant. This petition is allowed to determine (1) whether Article 31 proceedings require the return of an unexecuted writ before a trial court has the jurisdiction to act and to address the conflicting line of cases at the Court of Appeals, and (2) whether the Court of Appeals erred by reviewing this interlocutory order as an appeal of right under N.C.G.S. § 7A-27(b)(3)(b). The petition is denied as to all remaining arguments.

By order of the Court in Conference, this the 21st day of May 2024.

/s/ Riggs, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 23rd day of May 2024.

s/Grant E. Buckner

Grant E. Buckner
Clerk of the Supreme Court

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

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3P23-6	State of North Carolina v. Joseph Edwards Teague, III	Def's Pro Se Motion for PCR Post Conviction Relief and Vacate the Conviction, Dismiss All Charges, and Find Def Legally and Factually Innocent (COA21-10)	Dismissed
8P24	Apryl N. Davis v. Future Realty LLC (Bridge SFR IV Acquisitions LLC), Bank of America N.A./ BAC, Brock & Scott PLLC, Trustee Services of Carolina LLC, United States Inc, United States	1. Plt's Pro Se Motion for Petition 2. Plt's Pro Se Motion for Appeal 3. Plt's Pro Se Motion for Complaint 4. Plt's Pro Se Motion for Injunction 5. Plt's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Mecklenburg County 6. Plt's Pro Se Motion to Seal Documents 7. Plt's Pro Se Motion for Summary Judgment	1. Dismissed 2. Dismissed 3. Dismissed 4. Dismissed 5. Dismissed 6. Dismissed 7. Dismissed
18P24	State v. Charles A. Hodge	1. Def's Pro Se Petition for Writ of Mandamus 2. Def's Pro Se Motion to Proceed *In Forma Pauperis*	1. Dismissed 2. Allowed
24P23-3	SCGVIII-Lakepointe, LLC v. Vibha Men's Clothing, LLC; Kalishwar Das	1. Def's Pro Se Motion to Set Aside Recent Dismissal Amid Pending Forensic Verification of the Transcript (COA21-690 21-740) 2. Def's Pro Se Motion for Petition to Acquaint and for a Guideline and Thorough Review of this Case Amid Crucially Changed Circumstances	1. Dismissed 2. Dismissed **Dietz, J., recused**
25P23-3	Kalishwar Das v. SCGVIII-Lakepointe, LLC in c/o Mr. John F. Morgan, Jr.	Plt's Pro Se Motion for Detailed Order Copy Dated March 20th, 2024 and Leave to Refile Petition for Writ of Certiorari with Appellate Court (COA21-806)	Dismissed **Dietz, J., recused**
32PA24	James H.Q. Davis Trust and William R.Q. Davis Trust v. JHD Properties, LLC, Berry Hill Properties, LLC, and Charles B.Q. Davis Trust	1. Def's (Charles B.Q. Davis Trust) Petition for Writ of Certiorari from Business Court 2. Def's (Charles B.Q. Davis Trust) Petition in the Alternative for Discretionary Review Under N.C.G.S. § 7A-31 3. Def's (Charles B.Q. Davis Trust) Motion for Temporary Stay 4. Def's (Charles B.Q. Davis Trust) Petition for Writ of Supersedeas	1. Allowed **04/12/2024** 2. Dismissed as moot **04/12/2024** 3. Dismissed as moot **04/12/2024** 4. Allowed **04/12/2024**

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43P24	State v. Horace Hamid Kersey	Def's Pro Se Petition for Writ of Certiorari to Review Order of the COA (COAP17-546)	Dismissed
47P24	In the Matter of M.M., E.M., J.M., S.M., C.M.	1. Respondent-Father's Pro Se Motion for Extension of Time to File PDR (COA23-114) 2. Respondent-Father's Pro Se PDR Under N.C.G.S. § 7A-31 3. Respondent-Father's Pro Se Motion to Vacate Orders	1. Dismissed 2. Denied 3. Dismissed
48P24	State v. Barry Devontae Richardson	Def's Pro Se Motion for Relief (COA18-696 22-342)	Dismissed
50P00-4	State v. Albert Lee Stevenson, Jr.	1. Def's Pro Se Supplemental Petition for Writ of Certiorari to Review Order of the COA (COAP23-353) 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
50P24	Capital One, N.A. v. Charles L. Roberson	1. Def's Pro Se Petition for Writ of Certiorari to Review Decision of District Court, Stokes County 2. Def's Pro Se Motion for Notice of Appeal 3. Def's Pro Se Petition for Writ of Certiorari to Review Decision of District Court, Stokes County 4. Def's Pro Se Motion to Remedy Docket Sheet 5. Def's Pro Se Motion for Court Wager 6. Def's Pro Se Motion for Clarification on Surety of Debts 7. Def's Motion for Notice of Right to Appeal and Motion for Function 8. Def's Pro Se Motion to Expedite 9. Def's Pro Se Motion to Seal 10. Def's Pro Se Motion to Include Exhibits 11. Def's Pro Se Corrected Motion to Include Exhibits	1. Denied 2. Dismissed *ex mero motu* 3. Denied 4. Dismissed 5. Dismissed 6. Dismissed 7. Dismissed 8. Dismissed 9. Allowed 10. Dismissed as moot 11. Dismissed as moot
51P24	State v. Michael Hamilton Threadgill	Def's Pro Se Petition for Writ of Mandamus	Dismissed

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55P24	State v. Nicholas Ryan Buchanan	Def's PDR Under N.C.G.S. § 7A-31 (COA23-517)	Denied
58P24	State v. Willie Kenneth McKinnon	1. Def's Pro Se Notice of Appeal Based Upon a Constitutional Question (COA22-813) 2. Def's Pro Se PDR Under N.C.G.S. § 7A-31 3. Def's Pro Se Motion to Proceed *In Forma Pauperis*	1. Dismissed *ex mero motu* 2. Denied 3. Allowed
59P24	State v. Andreas Peter Bastas	1. Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Wake County (COAP23-738) 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
66P24	State v. Vincent Leonard Roebuck	Def's PDR Under N.C.G.S. § 7A-31 (COA23-335)	Denied
71P24	Doris Griffin Land and Elliott Land v. Kori B. Whitley, M.D., Physicians East, P.A. d/b/a Greenville OB/GYN, Pitt County Memorial Hospital, Inc. d/b/a Vidant Medical Center, and Pitt County Memorial Hospital, Inc. d/b/a Vidant SurgiCenter	Defs' PDR Under N.C.G.S. § 7A-31 (COA23-250)	Allowed
72P24	State v. Michael Contrez Jones	1. Def's Pro Se Motion for Notice of Appeal (COAP23-284) 2. Def's Pro Se Motion for PDR	1. Dismissed 2. Dismissed **Riggs, J., recused**
73P24	Gerald Edward Benson v. Roy Cooper	Plt's Pro Se Motion for Notice of Liability and Claim for Damages Original Action	Dismissed
77P24	State v. Chad Norman Collins	Def's Pro Se Motion for PDR (COAP23-786)	Dismissed
80P24	State v. Anthony Jerome Walker	Def's Pro Se PDR Under N.C.G.S. § 7A-31 (COA23-585)	Denied

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84P24	State v. Henry Walker	Def's Pro Se PDR Under N.C.G.S. § 7A-31 (COA23-681)	Denied
85P24	Paul Yongo Odindo v. Mary Terry Kanyi	1. Plt's Pro Se Petition for Writ of Certiorari to Review Decision of the COA (COA23-437) 2. Plt's Pro Se PDR Under N.C.G.S. § 7A-31 3. Plt's Pro Se Motion to File Supplement Documents 4. Def's Motion for Sanctions 5. Plt's Pro Se Motion to Strike	1. Denied 2. Denied 3. Allowed 4. Denied 5. Dismissed as moot
86A02-2	State v. Bryan Christopher Bell	Def's Motion to Continue	Denied **04/01/2024**
86P24	Emily Happel, individually, Tanner Smith, a Minor and Emily Happel on behalf of Tanner Smith as his mother v. Guilford County Board of Education and Old North State Medical Society, Inc.	1. Plts' Notice of Appeal Based Upon a Constitutional Question (COA23-487) 2. Plts' PDR Under N.C.G.S. § 7A-31 3. Def's (Guilford County Board of Education) Motion to Dismiss Appeal	1. --- 2. Special Order 3. Allowed
88P24	Amy Delene Kean v. Warren Paul Kean	1. Def's Motion for Temporary Stay (COA23-46) 2. Def's Petition for Writ of Supersedeas 3. Def's PDR Under N.C.G.S. § 7A-31 4. Plt's Conditional PDR Under N.C.G.S. § 7A-31	1. Allowed **04/09/2024** 2. 3. 4.
89P24	State v. Dwight Douglas Smith	1. Def's Pro Se Motion for Temporary Stay (COA23-645) 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	1. Denied **04/10/2024** 2. Dismissed as moot **04/10/2024** 3. Denied **04/10/2024**
91P14-10	State v. Salim Abdu Gould	Def's Pro Se Petition for Writ of Mandamus (COA18-425)	Denied **Dietz, J., recused** **Riggs, J., recused**

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92P23-2	State v. Deon Patrick Bobbitt	1. Def's Pro Se Motion for Notice of Appeal (COA22-510) 2. Def's Pro Se Motion for PDR 3. Def's Pro Se Motion for Voluntary Dismissal Without Prejudice	1. --- 2. --- 3. Allowed
96P24	State v. Jaron Monte Cornwell	1. State's Motion for Temporary Stay (COA23-36) 2. State's Petition for Writ of Supersedeas 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **04/22/2024** 2. 3.
97P24	State v. Anthony Lavon Hancock	Def's Pro Se PDR Under N.C.G.S. § 7A-31 (COA23-758)	Denied
102P13-8	State v. Charles Anthony Ball	Def's Pro Se Motion for Permission to Apply to Trial Court for Writ of Error *Coram Nobis* (COA12-610)	Denied
102P19-7	State v. Christopher Lee Neal	Def's Pro Se Petition for Writ of Habeas Corpus (COAP17-537)	Denied **04/11/2024**
102P19-8	State v. Christopher Lee Neal	Def's Pro Se Petition for Writ of Habeas Corpus (COAP17-537)	Denied **04/22/2024**
102P19-9	State v. Christopher Lee Neal	Def's Pro Se Petition for Writ of Habeas Corpus (COAP17-537)	Denied **04/24/2024**
102P19-10	State v. Christopher Lee Neal	1. Def's Pro Se Petition for Writ of Habeas Corpus (COAP17-537) 2. Def's Pro Se Motion for Appropriate Relief	1. Denied **05/02/2024** 2. Dismissed **05/02/2024**
102P19-11	State v. Christopher Lee Neal	Def's Pro Se Petition for Writ of Habeas Corpus (COAP17-537)	Denied **05/16/2024**
104P24	State v. Ali Tariq Khabir Wiggins	Def's Pro Se Petition for Writ of Habeas Corpus	Denied **05/07/2024**
108P24	In the Matter of L.C.	1. Petitioner and Guardian ad Litem's Motion for Temporary Stay (COA23-759) 2. Petitioner and Guardian ad Litem's Petition for Writ of Supersedeas 3. Petitioner's and Guardian ad Litem's PDR Under N.C.G.S. § 7A-31	1. Allowed **05/07/2024** 2. 3.

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114P24	In re Rutz	1. Petitioner's Pro Se Motion for Urgent and Emergency Notice, Criminal and Civil Claims, and Writ for Remedy and Reparations 2. Petitioner's Pro Se Motion for Emergency Injunction and Writ Commanding Arrest, Indictment, and Disbarment	1. Dismissed **05/08/2024** 2. Dismissed **05/08/2024**
119P24	State v. Ronald Wayne Vaughn, Jr.	1. State's Motion for Temporary Stay (COA23-337) 2. State's Petition for Writ of Supersedeas	1. Allowed **05/16/2024** 2.
131P16-31	State v. Somchai Noonsab	1. Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Wake County 2. Def's Pro Se Petition for Writ of Mandamus	1. Dismissed 2. Dismissed
135P16-2	State v. Robert Antwain Stanback	Def's Pro Se Motion for an Order Authorizing Evidentiary Hearing (COA02-114)	Dismissed
151PA18-3	Ramar Dion Benjamin Crump v. Shanticia Hawkins	Petitioner's Pro Se Petition for Writ of Habeas Corpus (COA17-488)	Denied **05/02/2024**
158P23	Maurice Devalle v. North Carolina Sheriffs' Education and Training Standards Commission	Respondent's PDR Under N.C.G.S. § 7A-31 (COA22-256)	Allowed
165P16-5	State v. Simaron Demetrius Hill	Def's Pro Se Motion Seeking $2,500 from Trey Allen for Refusal to Grant Writ (COAP22-408)	Denied
167PA22	John Doe 1K v. Roman Catholic Diocese of Charlotte a/k/a Roman Catholic Diocese of Charlotte, NC	1. Plt's Petition For Discretionary Review Under N.C.G.S. § 7A-31 (COA21-254) 2. Def's Conditional PDR Under N.C.G.S. § 7A-31 3. Def's Motion to Consolidate with Doe v. Roman Catholic Diocese of Charlotte, NC, No. 168PA22 4. Def's Motion to Hold Oral Argument Contemporaneously with McKinney v. Gaston County Board of Education, No. 109PA22-2	1. Allowed **03/21/2024** 2. Allowed **03/21/2024** 3. Allowed **04/12/2024** 4.

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168PA22	John Doe v. Roman Catholic Diocese of Charlotte a/k/a Roman Catholic Diocese of Charlotte, NC	1. Plt's Petition For Discretionary Review Under N.C.G.S. § 7A-31 (COA21-255) 2. Def's Conditional PDR Under N.C.G.S. § 7A-31 3. Def's Motion to Consolidate with Doe 1K v. Roman Catholic Diocese of Charlotte, NC, No. 167PA22 4. Def's Motion to Hold Oral Argument Contemporaneously with McKinney v. Gaston County Board of Education, No. 109PA22-2	1. Allowed **03/21/2024** 2. Allowed **03/21/2024** 3. Allowed **04/12/2024** 4.
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 4. Def's Motion to Expedite Consideration of the State's PDR	1. Allowed **08/07/2023** Dissolved 2. Denied 3. Denied 4. Dismissed as moot **Riggs, J., recused**
202PA22	State v. Kenneth Louis Walker	Def's Motion to Take Judicial Notice (COA21-535)	Allowed **03/22/2024**
205P23-3	Travis Wayne Baxter v. North Carolina State Highway Patrol Troop F District V, et al.	1. Plt's Pro Se Notice of Appeal Based Upon a Constitutional Question (COA23-605) 2. Plt's Pro Se Motion for Extension of Time to File Brief	1. Dismissed *ex mero motu* 2. Dismissed as moot
232P23	Abbott, et al. v. Abernathy, et al.	1. Defs' (Rodney and Lynne Worthington) Motion for Temporary Stay (COA22-901) 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 **09/15/2023** Dissolved 2. Denied 3. Denied
237P23	State v. John Louis Spera	Def's PDR Under N.C.G.S. § 7A-31 (COA22-814)	Denied **Riggs, J., recused**
250P23	John Scott McMurray v. Deborah Joann McMurray	Plt's PDR Under N.C.G.S. § 7A-31 (COA22-904)	Denied

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258P23	State v. Eric Wayne Wright	1. State's Motion for Temporary Stay (COA22-996) 2. State's Petition for Writ of Supersedeas 3. State's PDR Under N.C.G.S. § 7A-31 4. Def's Conditional PDR Under N.C.G.S. § 7A-31	1. Allowed **10/04/2023** 2. Allowed 3. Allowed 4. Denied **Riggs, J., recused**
263P22-5	David Anthony Harris v. Todd E. Ishee	Petitioner's Pro Se Petition for Writ of Habeas Corpus (COAP21-541)	Denied **05/01/2024** **Riggs, J., recused**
269P23	Gary Gantt d/b/a Gantt Construction Co. v. City of Hickory	Plt's PDR Under N.C.G.S. § 7A-31 (COA21-767-2)	Denied
280P23-3	Brandon Williams v. State of North Carolina, County of Cabarrus, et al.	1. Plt's Pro Se Motion for Notice of Appeal (COAP24-59) 2. Plt's Pro Se Petition for Writ of Certiorari to Review Order of the COA 3. Plt's Pro Se Motion for Leave to Proceed *In Forma Pauperis*	1. Dismissed *ex mero motu* 2. Denied 3. Allowed
281P06-17	Joseph E. Teague, Jr., P.E., C.M. v. NC Department of Transportation, J.E. Boyette, Secretary	Plt's Pro Se Motion for Review (COA05-522)	Dismissed
281A22	North Carolina Farm Bureau Mutual Insurance Company, Inc. v. Matthew Bryan Hebert	Def's Petition for Rehearing (COA22-82)	Denied **05/21/2024** **Dietz, J., recused**

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285A23	Pinnacle Health Services of North Carolina LLC d/b/a Cardinal Points Imaging of the Carolinas Wake Forest and Outpatient Imaging Affiliates LLC, Petitioner v. NC Department of Health and Human Services, Division of Health Service Regulation, Health Care Planning & Certificate of Need Section, Respondent and Duke University Health System Inc., Respondent-Intervenor	1. Respondent-Intervenor's Notice of Appeal Based Upon a Dissent (COA22-1042) 2. Respondent's Notice of Appeal Based Upon a Dissent 3. Petitioner's Petition to Brief Additional Issues that Provide Alternative Bases for Affirming the Court of Appeals' Decision	1. --- 2. --- 3. Allowed **05/21/2024**
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** Dissolved 2. Denied 3. Denied
297P23-2	Shannon Steger/T. Steger v. NCDHHS/ State Robeson County DSS/County of Robeson	1. Petitioner's Pro Se Motion to Reconsider/Vacate Dismissal of Appellant's Notice of Appeal (COAP23-662) 2. Petitioner's Pro Se Motion to Proceed as Indigent 3. Petitioner's Pro Se Motion to Seal 4. Petitioner's Pro Se Motion for Judicial Notice 5. Petitioner's Pro Se Motion to Participate in Appellate Pro Bono Program 6. Petitioner's Pro Se Motion for a Jury Trial 7. Petitioner's Pro Se Motion to Reconsider and/or Vacate Order 8. Petitioner's Pro Se Motion for Declaratory Judgment 9. Petitioner's Pro Se Motion to Clarify	1. Dismissed **03/20/2024** 2. Allowed **03/20/2024** 3. Dismissed 4. Dismissed 5. Denied 6. Dismissed 7. Dismissed 8. Dismissed 9. Dismissed

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		10. Petitioner's Pro Se Motion for Discovery and/or Production of Documents 11. Petitioner's Pro Se Motion to Consolidate Actions 12. Petitioner's Pro Se Motion for Joinder 13. Petitioner's Pro Se Motion for Judgment as a Matter of Law 14. Petitioner's Pro Se Motion for Extension of Time 15. Petitioner's Pro Se Motion for Waiver of Rules 16. Petitioner's Pro Se Petition for Writ of Certiorari	10. Dismissed 11. Dismissed as moot 12. Dismissed as moot 13. Dismissed 14. Dismissed as moot 15. Dismissed as moot 16. Denied
299P22-3	Shaunesi DeBerry v. Tinita DeBerry, Reginald DeBerry, Larry DeBerry Jr. as Administrator of the Estate of Larry DeBerry Sr.	Petitioner's Pro Se Motion for Appeal (COA22-872 22-969 22-974 22-998)	Dismissed **Riggs, J., recused**
309A23	JDG Environmental, LLC d/b/a Advantaclean of OKC v. BJ & Associates, Inc. d/b/a G.A. Jones Construction and the Coves at Newport II, Association, Inc.	1. Plt's Motion to Dismiss Appeal (COA21-692) 2. Parties' Joint Motion for Withdrawal of Appeal	1. Denied **03/21/2024** 2. Allowed **04/15/2024**
319P23	State v. Wayne Hansen Hsiung	Def's Pro Se PDR Under N.C.G.S. § 7A-31 (COA22-801)	Dismissed
327P22-2	Stephen Lawing and Donna Lawing v. Chadwick P. Miller, C.P. Miller, Inc., Danny Edward Eaton, II, and Danny Eaton Plumbing, LLC	1. Plts' Pro Se Motion to Stay All Other Proceedings in this Action (COA22-99) 2. Plts' Pro Se PDR Under N.C.G.S. § 7A-31	1. Denied **05/01/2024** 2.
339P23	Hunter Lee Smith, (now Known as Hunter Smith Willette) v. Reid Alan Dressler	Plt's PDR Under N.C.G.S. § 7A-31 (COA22-909)	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. Allowed 3. Special Order
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** Dissolved 2. Denied 3. Denied 4. Allowed
349P20-3	State v. Clorey Eugene France	Def's Pro Se Motion for Notice of Appeal (COA12-50)	Dismissed
353P23	Cato Corporation, a Delaware Corporation, et al. v. Zurich American Insurance Company, a New York Corporation	Plts' PDR Under N.C.G.S. § 7A-31 (COA23-305)	Allowed
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. Denied 3. Denied 4. Dismissed as moot
377P22	State v. Marty Douglas Rogers	1. State's Motion for Temporary Stay (COA21-707) 2. State's Petition for Writ of Supersedeas 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **12/22/2022** 2. Allowed 3. Special Order **Dietz, J., recused**

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381P22-5	Matthew Safrit v. Todd Ishee	1. Petitioner's Pro Se Motion for PDR (COAP22-495 P23-314 P23-545) 2. Petitioner's Pro Se Motion for Indigency Status	1. Dismissed 2. Allowed **Dietz, J., recused** **Riggs, J., recused**
425P15-3	State v. Dawayne David Knolton	Def's Pro Se Motion for Discretionary Review (COA16-671)	Dismissed
433PA21	State v. Daniel Raymond Jonas	Def's Motion to Strike (COA20-712)	Dismissed as moot
475P20-2	State v. Solomon Nimrod Butler	Def's Pro Se Petition for Writ of Mandamus (COAP18-746)	Dismissed
536P00-13	Terrance L. James v. N.C. Department of Public Safety, et al.	Petitioner's Pro Se Motion for Petition for Writ of Right (COAP09-835 P11-273 P13-598 P15-995 P24-88)	Dismissed
592P97-3	Denver W. Blevins v. Timothy Maynor, April Parker, and State of North Carolina	1. Petitioner's Pro Se Petition for Writ of Mandamus (COAP20-420 P23-746 P94-398) 2. Petitioner's Pro Se Motion to Proceed *In Forma Pauperis*	1. Dismissed **05/15/2024** 2. Allowed **05/15/2024**

JOSEPH ASKEW, CHARLIE GORDON WADE III, AND CURTIS WASHINGTON
v.
CITY OF KINSTON, A MUNICIPAL CORPORATION

No. 55A23

Filed 28 June 2024

Constitutional Law—North Carolina—direct constitutional claims—condemnation of plaintiffs' properties—adequate state law remedy

In an action raising direct claims under the state constitution ("*Corum* claims"), in which plaintiffs alleged that defendant city violated their rights to equal protection and substantive due process by condemning plaintiffs' properties and marking them for demolition, the trial court had subject matter jurisdiction to hear the claims even though plaintiffs had not exhausted their administrative remedies first. Exhaustion of administrative remedies does not dictate a court's jurisdiction over direct constitutional claims, but instead speaks to an element of this type of claim: whether an adequate state law remedy exists for the constitutional harm alleged. Further, in determining the availability of an adequate state law remedy, plaintiffs' equal protection and due process claims could not be lumped together, since each claim involved different constitutional rights, raised different injuries, and envisioned different modes of relief.

On appeal of right of a substantial constitutional question pursuant to N.C.G.S. § 7A-30(1) of a unanimous decision of the Court of Appeals, 287 N.C. App. 222 (2022), vacating an order of summary judgment entered on 29 September 2021 by Judge Joshua Willey in Superior Court, Lenoir County, and remanding the case. Heard in the Supreme Court on 9 April 2024.

Ralph T. Bryant, Jr., for plaintiffs-appellants.

Hartzog Law Group LLP, by Dan M. Hartzog Jr. and Katherine Barber-Jones, for defendant-appellee.

EARLS, Justice.

In *Corum v. Univ. of N.C.*, 330 N.C. 761, 783 (1992), this Court "recognized a direct action under the State Constitution against state officials for violation of rights guaranteed by the Declaration of Rights."

The question in this case is whether plaintiffs bringing *Corum* claims must exhaust administrative remedies before entering the courthouse doors. The Court of Appeals said yes. Linking administrative exhaustion to subject-matter jurisdiction, it held that a court cannot hear a *Corum* suit unless the plaintiff first depleted all agency relief. *Askew v. City of Kinston*, 287 N.C. App. 222, 230 (2022).

We reject that approach. Exhaustion of administrative remedies does not dictate jurisdiction over *Corum* claims. That authority flows from the Constitution itself. *See Corum*, 330 N.C. at 784. To ensure that North Carolinians "may seek to redress all constitutional violations," *Corum* creates a unique path into court when existing channels fail to offer an adequate remedy. *Craig v. New Hanover Cnty. Bd. of Educ.*, 363 N.C. 334, 342 (2009).

The prospect of agency relief goes to an element of a *Corum* cause of action: that the plaintiff lacks meaningful redress through "established claims and remedies." *Corum*, 330 N.C. at 784; *see also Washington v. Cline*, 898 S.E.2d 667, 671 (N.C. 2024). That issue is substantive rather than jurisdictional—it focuses on whether *Corum* is the right vehicle for a claim, not a court's power to act on it. In *Corum* cases like this one, the question is whether the review and relief afforded by the administrative process is an effective stand-in for a direct constitutional suit. *See id.* Because the Court of Appeals substituted that case-by-case inquiry with a blanket jurisdictional mandate, we vacate and remand.

I. Background

A. Kinston Crafts a Large-Scale Condemnation Plan

Plaintiffs Joseph Askew and Curtis Washington[1] live and own property in the City of Kinston (Kinston). Plaintiffs are African American, and they allege that their lots are in predominately African American neighborhoods. In 2017, Kinston condemned two of Mr. Askew's properties and one of Mr. Washington's. Soon after, it slated those properties for demolition.

Those condemnations were not isolated decisions—they were part of Kinston's renewed efforts to remove blighted buildings. In the early 2010s, Kinston began razing "condemned, unsafe properties." For several years, those properties were "identified one-by-one" and "[d]emolitions proceeded when necessary." Starting in 2017, however, Kinston

1. At the start of this litigation, a third plaintiff—Gordon Wade III—joined Mr. Askew and Mr. Washington in filing the complaint. Mr. Wade, however, voluntarily dismissed his claims without prejudice before the trial court granted summary judgment for Kinston.

adopted "a more targeted approach to improve the appearance of neighborhoods." It ramped up its efforts to "condemn[ ] and demolish[ ] dilapidated, blighted houses and commercial buildings." And that same year, it upped demolition funding by 150%.

To make wise use of those new funds, Kinston's planning department chose 150 properties "that met the criteria for condemnation" under "applicable statutes and building code provisions." The City narrowed that list to a "Top 50" to prioritize for condemnation. According to Kinston, it chose those "Top 50" properties based on factors like dilapidation and closeness to "a heavily travelled road." The City also used a technique called clustering—sites in "proximity to other qualifying" buildings were grouped together as "part of a 'cluster' of dilapidated properties." Identifying and focusing on "clusters" ensured that "buildings close together were condemned" and made "eligible for demolition around the same time." As an added measure, Kinston asked its police department to "identify[ ] buildings [that] were especially problematic."

Later that year, the Kinston City Council met to review the "Top 50" list and the criteria used to create it. During the meeting, council members "confirmed that houses would be clustered to cut down on cost where possible." Adam Short, Kinston's planning director, pointed the council to clusters in specific areas that were candidates for large-scale condemnations. For instance, he flagged a grouping of lots on Tower Hill Road as a "great starting point for clustering." That area, Mr. Short conceded in deposition, "is predominantly African American." The council, with minor revisions, approved the selection criteria and finalized the "Top 50" list. With that blessing, Kinston moved forward with condemning and demolishing the "Top 50" properties.

B. Plaintiffs Assert Racial Discrimination in Kinston's Condemnation Selections

Plaintiffs offer a different perspective on Kinston's condemnation scheme. In their view, the City engaged in the "systematic destruction of African American buildings" by using "the process for demolishing dilapidated properties in a racial[ly] discriminatory manner." They allege that Kinston singled out "buildings that are owned by African Americans or buildings that exist in the African American neighborhoods." At the same time, they continue, Kinston ignored "buildings that are in similar or worse state[s] of disrepair[ ] that have Caucasian property owners" and are located "in the neighborhoods with predominately Caucasian residents." Plaintiffs assert, for instance, that the City "has targeted the east side of Kinston where African Americans primarily live." But

in "primarily Caucasian" areas—such as "Mitchell Town, a historic district . . . on the west side of Kinston"—"very few or any buildings are being demolished." Though the City has funds to repair and preserve historic properties, plaintiffs contend that it "distribute[s] those funds in a racially disproportionate manner." In their view, Kinston reserves those funds for "historic buildings" in "predominately Caucasian neighborhoods, while systematically destroying and denying the same financial assistance to African American residents."

Plaintiffs argue that the City's "actionable double standard" was a conscious scheme made possible by its "arbitrary selection process." They allege that Kinston "has no guidelines" for selecting properties to condemn and demolish. Instead, plaintiffs contend, the City makes "arbitrary decisions" about which properties are chosen for demolition, which ones are actually demolished, and when those demolitions move forward. From plaintiffs' perspective, the City selected sites for demolition that do not fit any standardized criteria. It has "removed properties from the list of demolition without following any guidelines." According to plaintiffs, then, Kinston did not pick "which buildings would be demolished based on the condition of, or degree of disrepair of the buildings." And guidelines proffered by the City were, plaintiffs assert, crafted "to specifically justify the decision to target the African American buildings in Kinston for demolition."

In short, plaintiffs urge that Kinston has weaponized "a local blight ordinance to target low-income African American Kinston residents, so the [C]ity can take their property and resell it to high-end developers without paying compensation to the African American owners." And when Kinston placed plaintiffs' properties on the demolition list, they allege, it did so because of their race.

C. Kinston's Process for Condemning Properties and the Administrative Relief Available to Property Owners

Kinston asserts that it relied on then-existing blight statutes to condemn the chosen properties—including plaintiffs'—and schedule them for demolition.[2] Those provisions allowed the City's building inspectors

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2. In 2019, the General Assembly repealed Article 19 of Chapter 160A of the General Statutes and added Chapter 160D. *See* An Act to Clarify, Consolidate, and Reorganize the Land-Use Regulatory Laws of the State, S.L. 2019-111, §§ 2.1(a), 2.3, 2019 N.C. Sess. Laws 424, 439. However, Article 19 of Chapter 160A remained in effect during the events relevant to the claims in this case. *Id.* § 3.2, 2019 N.C. Sess. Laws at 547 ("[B]ecomes effective on January 1, 2021, and applies to local government development regulation decisions made on or after that date.").

to condemn a structure as "especially dangerous to life because of its liability to fire or because of bad condition of walls, overloaded floors, defective construction, decay, unsafe wiring or heating system, inadequate means of egress, or other causes." N.C.G.S. § 160A-426(a) (2019) (repealed 2019). An inspector must post a notice in a "conspicuous place" on the building. N.C.G.S. § 160A-426(c) (2019) (repealed 2019). That notice, in turn, must specify the structure's dangerous condition. N.C.G.S. § 160A-428 (2019) (repealed 2019).

It need also alert the property's owner of a hearing before the inspector. *Id.* During that hearing, the owner is "entitled to be heard in person or by counsel," and may "present arguments and evidence" against condemnation. *Id.* The inspector may then order the owner to "remedy the defective conditions by repairing, closing, vacating, or demolishing" the structure, or by "taking other necessary steps" to fix the problem. N.C.G.S. § 160A-429 (2019) (repealed 2019).

An administrative process allows property owners to challenge a condemnation decision. Within ten days of the inspector's written order, an owner may appeal it to the city council. N.C.G.S. § 160A-430 (2019) (repealed 2019). The council, in turn, reviews the inspector's decision and—after hearing from the owner—may "affirm, modify and affirm, or revoke the order." *Id.* The owner may then challenge the council's decision by petitioning the superior court for writ of certiorari. N.C.G.S. § 160A-393(f) (2019) (repealed 2019).

On review, the superior court examines whether the challenged order is "[i]n violation of constitutional provisions," "[a]rbitrary or capricious," or "[a]ffected by other error of law." N.C.G.S. § 160A-393(k)(1) (2019) (repealed 2019). It makes that decision based on the record, statutorily defined as the documents, exhibits, and other materials submitted to the city council. N.C.G.S. § 160A-393(i) (2019) (repealed 2019). But if the court deems the record "not adequate to allow an appropriate determination" of the legal merits, it may supplement the record with affidavits, witness testimony, or documentary and other evidence as needed. N.C.G.S. § 160A-393(j) (2019) (repealed 2019).

After examining a condemnation order, the superior court may affirm the council's decision, reverse it and remand the case with instructions, or remand the case for further proceedings. N.C.G.S. § 160A-393(l) (2019) (repealed 2019). If, for instance, the court finds that a condemnation was "based upon an error of law," it may "remand the case with an order that directs the decision-making board to take

whatever action should have been taken had the error not been committed or to take such other action as is necessary to correct the error." N.C.G.S. § 160A-393(l)(3) (repealed 2019). Ancillary injunctive relief is also available—the court may enjoin a "party to th[e] proceeding to take certain action or refrain from taking action that is consistent with the court's decision on the merits of the appeal." N.C.G.S. § 160A-393(m) (2019) (repealed 2019).

D. Kinston Condemns Plaintiffs' Properties

In late November 2017, Kinston condemned two of Mr. Askew's properties citing fire hazards, decay, structural problems, and unsafe wiring. After a hearing, the building inspector issued orders to abate and directed Mr. Askew to "remedy the defective conditions" by repairing or demolishing the buildings within set timeframes. Mr. Askew appealed neither order.

City inspectors revisited the sites at the agreed-upon intervals. For the first property, they saw no "observable improvement to the condition" and so recommended "[m]oving forward with the condemnation process." Mr. Askew sought a hearing from the Kinston City Council and appeared at a meeting in January 2019. The council upheld the condemnation order. Mr. Askew never petitioned the superior court for writ of certiorari, as allowed by statute.

For Mr. Askew's second property, city inspectors visited the lot and noted improvements. As requested, they gave Mr. Askew more time to continue repairs. But when inspectors returned to the site the next year, they elected to condemn it because Mr. Askew had "failed to stabilize the structure or protect the building from water damage that continues to cause rot and decay."

In 2018, Kinston condemned Mr. Washington's property citing fire hazards, decay, structural problems, and a collapsing roof. The building inspector issued an abatement order, but Mr. Washington did not appeal it to the Kinston City Council or superior court.

In 2019, Mr. Askew and Mr. Washington jointly sued Kinston in federal court, alleging "violations of their [Fourteenth] amendment, substantial due process, equal protection rights, discrimination, disparity and condemnation of a historical home." *Askew v. City of Kinston*, No. 4:19-CV-13-D, 2019 WL 2126690, at *1 (E.D.N.C. May 15, 2019) (alteration in original). A federal district court dismissed the complaint for lack of subject-matter jurisdiction. *Id.* at *4.

E. Plaintiffs Bring *Corum* Claims Against Kinston

Mr. Askew and Mr. Washington then filed *Corum* claims against Kinston in the Superior Court, Lenoir County. According to plaintiffs, the City's discriminatory and arbitrary decisions violated the equal protection and due process guarantees of North Carolina's Constitution. That meant, plaintiffs continued, that the administrative process could not offer an "adequate remedy at state law." For Kinston's constitutional breaches, plaintiffs sought a declaratory judgment, injunctive relief, and damages over $25,000.

In its answer, Kinston generally denied the complaint's allegation. It later moved for summary judgment, arguing that plaintiffs failed to exhaust administrative remedies. The superior court granted summary judgment for Kinston on all claims. Mr. Askew and Mr. Washington appealed.

F. The Court of Appeals Rules Against Plaintiffs on Jurisdictional Grounds

The Court of Appeals also dispensed with plaintiffs' claims. *See Askew*, 287 N.C. App. at 229–30. But rather than examine the summary judgment ruling, the Court of Appeals focused on jurisdiction. *See id.* at 229. This Court has explained:

> As a general rule, where the legislature has provided by statute an effective administrative remedy, that remedy is exclusive and its relief must be exhausted before recourse may be had to the courts. This is especially true where a statute establishes . . . a procedure whereby matters of regulation and control are first addressed by commissions or agencies particularly qualified for the purpose.

Presnell v. Pell, 298 N.C. 715, 721 (1979) (citations omitted). The Court of Appeals imported that exhaustion requirement into the framework for *Corum* claims. *See Askew*, 287 N.C. App. at 229–30. It held, in essence, that a court cannot hear a direct constitutional suit unless the plaintiff depletes all avenues of administrative relief. *See id.*

In the court's view, plaintiffs "primarily seek to enjoin [Kinston] from demolishing [their] properties." *Id.* at 229. They did "not allege that exhaustion would be futile." *Id.* And since the administrative process allows "the city council and the superior court to review [p]laintiffs' injuries and grant the relief [they] seek," the court reasoned, they "are not excused from exhausting their administrative remedies." *Id.* Because

plaintiffs bypassed the administrative scheme before raising their *Corum* claims, the court explained, their failure to exhaust administrative relief deprived the trial court of jurisdiction. *Id.* at 230. The Court of Appeals thus directed the trial court to dismiss plaintiffs' *Corum* claims without prejudice for lack of subject-matter jurisdiction. *Id.*

II. Analysis

The Court of Appeals' analysis was doubly flawed. It failed to disaggregate and examine plaintiffs' distinct constitutional claims. On top of that, the court tied administrative exhaustion to subject-matter jurisdiction over *Corum* suits, transplanting the rules for run-of-the-mill agency disputes into *Corum*'s unique framework.

A. Plaintiffs' Discrete *Corum* Claims

Corum embodies a "time-honored" legal principle: "[W]here there is a right, there must be a remedy." *See Washington*, 898 S.E.2d at 668–69 (cleaned up). To "ensure that every right does indeed have a remedy in our court system," *id.*, *Corum* offers a common law cause of action when existing relief does not sufficiently redress "a violation of a *particular* constitutional right," *Corum*, 330 N.C. at 784 (emphasis added). Our post-*Corum* cases have elaborated on that point, explaining that "an adequate remedy is one that meaningfully addresses the constitutional violation, even if the plaintiff might prefer a different form of relief." *See Washington*, 898 S.E.2d at 671; *see also id.* at 672 (explaining that *Corum* "applies when one's rights are violated, and the law offers either no remedy or a remedy that is meaningless").

The "power to fashion an appropriate remedy" turns on "the right violated and the facts of the particular case." *Simeon v. Hardin*, 339 N.C. 358, 373 (1994) (quoting *Corum*, 330 N.C. at 784). That is because different rights "protect persons from injuries to particular interests." *Carey v. Piphus*, 435 U.S. 247, 254 (1978). And so "[v]arious rights" in various contexts may "require greater or lesser relief to rectify" their breach. *Corum*, 330 N.C. at 784; *see also Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) ("[E]very right, when withheld, must have a remedy, and every injury its proper redress." (cleaned up)).

Across our *Corum* precedent, then, we have parsed the different constitutional injuries—and thus the different modes of relief—at play when the state infringes the "[v]arious rights" protected by our Constitution. *See Corum*, 330 N.C. at 782 (free speech); *Copper v. Denlinger*, 363 N.C. 784, 788 (2010) (procedural due process); *Deminski v. State Bd. of Educ.*, 377 N.C. 406, 413 (2021) (opportunity to

receive a sound basic education); *Tully v. City of Wilmington*, 370 N.C. 527, 535 (2018) (pursuit of "one's profession free from unreasonable governmental action"); *Washington*, 898 S.E.2d at 672 (speedy trial).

If a plaintiff brings distinct *Corum* actions for the violation of distinct constitutional rights, courts may not lump those claims together. That cookie-cutter approach to rights and remedies strays from *Corum*'s flexible inquiry. As a legal and logical matter, the scope and nature of the constitutional wrong dictate whether existing modes of redress "apply to the facts alleged" or "provide for the type of remedy sought." *Craig*, 363 N.C. at 340, 342. To thus accord "every injury its proper redress," *Washington*, 898 S.E.2d at 670 (quoting *Marbury*, 5 U.S. (1 Cranch) at 163), *Corum* requires courts to disaggregate "the right[s] violated," the constitutional harms alleged, and the "appropriate remedy" on "the facts of the particular case," *Simeon*, 339 N.C. at 373 (quoting *Corum*, 330 N.C. at 784).

The Court of Appeals, however, collapsed plaintiffs' claims into a monolith without examining the contours, injuries, and theories underpinning each. Plaintiffs brought two *Corum* suits—one based on substantive due process, the other on equal protection. Both are rooted in Article I, Section 19, often called the Law of the Land Clause. In full, that provision reads:

> No person shall be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land. 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.

N.C. Const., art. I, § 19. Despite their shared constitutional origins, plaintiffs' *Corum* claims assert different rights, raise different injuries, and envision different modes of relief.

Substantive due process "is a guaranty against arbitrary legislation, demanding that the law be substantially related to the valid object sought to be obtained." *Lowe v. Tarble*, 313 N.C. 460, 461 (1985). In essence, it guards against unreasonable government actions that deprive people of life, liberty, or property. *See Halikierra Cmty. Servs. LLC v. N.C. Dep't of Health & Hum. Servs.*, 898 S.E.2d 685, 689 (N.C. 2024). Invoking that guarantee, plaintiffs contend that Kinston's decisions to condemn and demolish their properties were "unreasonable, arbitrary or capricious."

See State v. Joyner, 286 N.C. 366, 371 (1975). For their substantive due process claim, then, plaintiffs' alleged constitutional injury is the "arbitrary and unduly discriminatory interference" with their rights as property owners. *See In re Ellis*, 277 N.C. 419, 424 (1970). If their argument holds, plaintiffs can remedy that harm by stopping the City from following through on its condemnation orders and demolishing their lots.

But plaintiffs advance another *Corum* claim—an equal protection challenge to Kinston's condemnation scheme. They argue that the City chose properties based on race—that it singled out black-owned properties in majority-black neighborhoods, while ignoring similarly dilapidated white-owned homes in predominately white neighborhoods. That racially disparate treatment, plaintiffs urge, violates the Equal Protection Clause, which "guarantees equal treatment of those who are similarly situated." *Grace Baptist Church v. City of Oxford*, 320 N.C. 439, 447 (1987) (cleaned up).

For plaintiffs' equal protection claim, then, the constitutional violation is Kinston's alleged discrimination based on race. That harm springs from plaintiffs' right to evenhanded treatment from the government. Plaintiffs' ultimate complaint, in other words, is not about what happens to their land but the alleged racial targeting that tainted the proceedings from the start. *Cf. Shaw v. Reno*, 509 U.S. 630, 641, 643 (1993) ("An understanding of the nature of appellants' claim is critical to our resolution of the case . . . Classifications of citizens solely on the basis of race are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." (cleaned up)); *Heckler v. Mathews*, 465 U.S. 728, 739–40 (1984) (explaining that discrimination harms "persons who are personally denied equal treatment" by "perpetuating archaic and stereotypic notions or by stigmatizing members of the disfavored group as innately inferior and therefore as less worthy participants in the political community" (cleaned up)).

If plaintiffs carry the day, their equal protection claim contemplates a distinct form of relief—equal treatment from Kinston, not a specific outcome as to their properties. Said differently, this claim focuses on the journey—how the City chose properties—rather than the destination—whether Kinston may ultimately condemn and demolish plaintiffs' lots. When "the right invoked is that to equal treatment, the appropriate remedy is a *mandate* of equal treatment." *See id.* at 740; *cf. State v. Cofield*, 320 N.C. 297, 309 (1987) (invoking Equal Protection Clause to set aside conviction based on racial discrimination in grand jury selection but allowing the State to reindict defendant through nondiscriminatory procedures). For instance, if plaintiffs come forward with enough evidence

to prove that Kinston chose properties using impermissible race-based criteria in violation of the Equal Protection Clause, the appropriate remedy would be to prohibit the City from engaging in race-based discrimination. Even then, plaintiffs' properties might ultimately be selected for condemnation using race-neutral criteria. *See S. S. Kresge Co. v. Davis*, 277 N.C. 654, 663 (1971) (holding that a city violated Equal Protection Clause by selectively enforcing ordinance and awarding plaintiffs injunction "so long as [city officials] continue the discriminatory practices" but limiting relief so that the city could "inaugurat[e] and carry[ ] out a nondiscriminatory enforcement policy and program"). But merely stopping Kinston from demolishing plaintiffs' specific lots would not fix the asserted racial targeting that undergirded the City's condemnation plan. In other words, no administrative decision would redress the alleged race-based discrimination at the threshold.

The Court of Appeals grasped one of plaintiffs' *Corum* claims. It squarely addressed their substantive due process challenge to Kinston's demolition of their individual properties. But the court overlooked plaintiffs' equal protection suit and the contours of that asserted right. It recast the constitutional harm as the mere condemnation of plaintiffs' land and the resulting interference with their property rights. *See Askew*, 287 N.C. App. at 229. So framed, the proper relief for that injury, the court continued, is "to enjoin [Kinston] from demolishing [p]laintiffs' properties." *Id.* And if plaintiffs' constitutional injuries are reduced to disputes about their individual lots, the administrative process seems suited to the task. The Court of Appeals thought so. In its view, the administrative remedy allowed "the city council and the superior court to review [p]laintiffs' injuries and grant the relief [they] seek"—i.e., quashing the condemnation orders for their properties and stopping Kinston's demolitions. *Id.*

But though that summation may fairly characterize plaintiffs' substantive due process claim, it sidesteps their equal protection challenge. For the latter, plaintiffs assert a different injury—Kinston's alleged racial discrimination—which requires a different species of relief—a "*mandate* of equal treatment." *See Heckler*, 465 U.S. at 740. According to plaintiffs, then, the administrative process is miscalibrated for their equal protection claims. It can only halt the condemnation of atomized parcels, they contend, not strike at Kinston's alleged systemic discrimination. Plaintiffs thus urge that forcing them to exhaust administrative channels would only prolong the inequality they assert.

We leave the merits of those arguments for remand. But methodologically, plaintiffs' challenges to the administrative process highlight

the missteps in the opinion below. By treating plaintiffs' separate constitutional claims as the same, the Court of Appeals dislocated the *Corum* analysis from the discrete "right[s] violated and the facts of the particular case." *Simeon*, 339 N.C. at 373 (quoting *Corum*, 330 N.C. at 784).

B. Subject-Matter Jurisdiction

A second flaw built on the first. The Court of Appeals tied administrative exhaustion to subject-matter jurisdiction over direct constitutional suits, holding that a court's power to hear *Corum* claims hinges on whether the plaintiff first depleted administrative relief. That was error. In so holding, the Court of Appeals drew from a distinct class of cases—those dealing with routine administrative grievances reviewable through statutory channels. But the rules for garden variety agency disputes cannot be unflinchingly transplanted into the universe of *Corum*.

We start with first principles. Subject-matter jurisdiction is a court's "power to pass on the merits of a case." *Slattery v. Appy City, LLC*, 898 S.E.2d 700, 704 (N.C. 2024) (cleaned up). It is "conferred by the Constitution, statutes and the law of the land, that is, by sovereign authority." *Stafford v. Gallops*, 123 N.C. 19, 22 (1898). Subject-matter jurisdiction is also "fundamental." *Henderson County v. Smyth*, 216 N.C. 421, 424 (1939). In "its absence a court has no power to act." *In re T.R.P.*, 360 N.C. 588, 590 (2006).

As we have explained, the "allegations of a complaint determine a court's jurisdiction over the subject matter of the action." *In re K.J.L.*, 363 N.C. 343, 345 (2009). Because the "nature of the case and the type of relief sought" differ between administrative disputes and *Corum* claims, a court's jurisdiction over those matters is triggered by different allegations and governed by different rules. *See In re T.R.P.*, 360 N.C. at 590 (cleaned up).

1. Subject-Matter Jurisdiction in Administrative Law

In the administrative realm, jurisdiction over agency disputes turns on whether a party channeled their claim through prescribed administrative avenues. *See Presnell*, 298 N.C. at 722. If the legislature has "explicitly provided" a vehicle to "seek effective judicial review of [a] particular administrative action," *id.* at 722, that "relief must be exhausted before recourse may be had to the courts," *id.* at 721. That rule serves pragmatic aims. *See Elmore v. Lanier*, 270 N.C. 674, 678 (1967). It recognizes that an agency is well-suited to resolve and review "matters it customarily handles, and can apply distinctive knowledge to." *Axon Enter. v. FTC*, 143 S. Ct. 890, 901 (2023). And it fosters efficient and informed

decision-making, giving the "entity most concerned with a particular matter the first chance to discover and rectify error," gather facts, and decide matters within its specialized domain. *Presnell*, 298 N.C. at 721.

A court's power to review administrative decisions is—like agencies themselves—an "artificial creature of statute." *High Rock Lake Partners, LLC v. N.C. Dep't. of Transp.*, 366 N.C. 315, 318–19 (2012) (cleaned up). When "jurisdiction is statutory and the [l]egislature requires the [c]ourt to exercise its jurisdiction in a certain manner, to follow a certain procedure, or otherwise subjects the [c]ourt to certain limitations, an act of the [c]ourt beyond these limits is in excess of its jurisdiction." *In re T.R.P.*, 360 N.C. at 590 (cleaned up). In those cases, the "procedures established by law for the determination of juridical disputes" are like ships, "fashioned by lawmakers to carry legal controversies into judicial ports for decision." *See Brissie v. Craig*, 232 N.C. 701, 707 (1950). Litigants who deviate from statutorily prescribed routes will end up "shipwrecked on procedural reefs." *Id.*

To avoid those treacherous shoals, parties challenging administrative matters must adhere to statutory criteria as a "condition[ ] precedent to obtaining a review by the courts." *In re State ex rel. Emp. Sec. Comm'n*, 234 N.C. 651, 653 (1951); *cf. In re T.R.P.*, 360 N.C. at 590 (noting that pleading requirements for "certain causes of action created by statute" are "not a matter of form, but substance, and a defect therein is jurisdictional" (cleaned up)). Said differently, courts may examine agency disputes within legislative parameters, or not at all. *See id.* Administrative exhaustion—if statutorily required and "followed by effective judicial review"—thus "acquires the status of a jurisdictional prerequisite." *Presnell*, 298 N.C. at 722. Courts may hear such claims only after plaintiffs deplete "their available administrative remedies or demonstrate[ ] that doing so would [be] futile." *See Abrons Fam. Prac. & Urgent Care, PA v. N.C. Dep't of Health & Hum. Servs.*, 370 N.C. 443, 453 (2018).

2. Subject-Matter Jurisdiction Over Corum *Claims*

But agencies are not courts. *See Ocean Hill Joint Venture v. N.C. Dep't of Env't, Health & Nat. Res.*, 333 N.C. 318, 321 (1993). And *Corum* claims are not administrative grievances. While subject-matter jurisdiction over administrative matters is legislatively devised and statutorily defined, the judiciary's power to hear *Corum* claims flows from the "authority granted to it by the Constitution." *See Henderson County*, 216 N.C. at 423. That is, in part, because our "Constitution opens the courthouse doors to all who suffer injury." *Fearrington v. City of Greenville*,

No. 89PA22, slip op. at 10 (N.C. May. 23, 2024). It also enshrines a "foundational principle of every common law legal system"—that "[w]here there is a right, there is a remedy." *Washington*, 898 S.E.2d at 668 (citing N.C. Const. art. I, § 18). Because it is "the state judiciary that has the responsibility to protect the state constitutional rights of the citizens," *Corum*, 330 N.C. at 783, the power to hear and redress constitutional violations is "conferred by the Constitution," *Stafford*, 123 N.C. at 22; *see also Meads v. N.C. Dep't of Agric.*, 349 N.C. 656, 670 (1998) ("[I]t is the province of the judiciary to make constitutional determinations . . . ."); *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 . . . .").

A complaint thus activates a court's subject-matter jurisdiction if it alleges the "infringement of a legal right" secured by the Constitution and presents a justiciable controversy. *See Comm. to Elect Dan Forest v. Emps. Pol. Action Comm.*, 376 N.C. 558, 608 (2021). Said another way, a court has jurisdiction if "the right of [plaintiffs] to recover under their complaint will be sustained if the Constitution" is "given one construction and will be defeated" if "given another." *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89 (1998) (quoting *Bell v. Hood*, 327 U.S. 678, 685 (1946)); *cf. Bell*, 327 U.S. at 681–82 ("[W]here the complaint, as here, is so drawn as to seek recovery directly under the Constitution or laws of the United States, the federal court, but for two possible exceptions later noted, must entertain the suit.").

The Court of Appeals, however, appeared to conflate two concepts: jurisdiction versus a cause of action. The difference between those is key. Jurisdiction concerns a court's authority to hear and decide a case. *See Slattery*, 898 S.E.2d at 704. A cause of action, on the other hand, is the set of facts or allegations that create a legal right to sue. *See Cause of Action*, *Black's Law Dictionary* (11th ed. 2019) (defining "cause of action" as "[a] group of operative facts giving rise to one or more bases for suing"). It captures the theory on which a plaintiff builds their suit, pointing to the wrong done and the remedy sought. In specific cases, *Corum* provides a "direct cause of action under the State Constitution," allowing a plaintiff to raise and redress a constitutional violation when existing mechanisms fall short. *Corum*, 330 N.C. at 786.

As a unique species of common law suit, *Corum* claims depend on the Constitution for both substance and a vehicle into court. They are born of necessity, taking root in the interstices between rights and remedies. *Corum* grounded its precepts in a simple truth: the "very purpose of the Declaration of Rights is to ensure that the violation of these

rights is never permitted by anyone who might be invested under the Constitution with the powers of the State." *Id.* at 783. Our Constitution thus secures the people's "rights against state officials and shifting political majorities." *Id.* at 787. It also tasks the courts with the "responsibility to guard and protect" constitutional guarantees. *Id.* at 785. To fulfill their duty and "ensure that every right does indeed have a remedy in our court system," *Washington*, 898 S.E.2d at 668, courts may draw on their "inherent constitutional power to fashion a common law remedy for a violation of a particular constitutional right," *Corum*, 330 N.C. at 784. Thus, *Corum*'s promise: "[I]n the absence of an adequate state remedy, one whose state constitutional rights have been abridged has a direct claim against the State under our Constitution." *Id.* at 782.

But *Corum* also recognized the prudential and structural parameters of that "extraordinary" authority. *Id.* at 784. It thus set two "critical limitations" on direct constitutional suits. *Id.* Courts must "bow to established claims and remedies" when adequate. *Id.*; *see also In re Alamance Cnty. Court Facilities*, 329 N.C. 84, 101 (1991) (urging judicial respect of existing "statutory remedies and constraints when the[y] do not stand in the way of obtaining what is reasonably necessary for the proper administration of justice"). And courts must minimize interbranch friction by crafting the "least intrusive remedy available and necessary to right the wrong." *Corum*, 330 N.C. at 784; *see also In re Alamance Cnty.*, 329 N.C. at 99 (cautioning that the use of inherent powers "must be no more forceful or invasive than the exigency of the circumstances requires"). *Corum* thus furnishes a court-created claim in specific circumstances: when existing channels do not adequately redress "a violation of a particular constitutional right." *Corum*, 330 N.C. at 784; *see also In re Alamance Cnty.*, 329 N.C. at 100 (reserving inherent powers for cases where "other means to rectify" the problem "are unavailable or ineffectual").

Consistent with those limits, the inadequacy of "established claims and remedies" is an element of a *Corum* cause of action. *Corum*, 330 N.C. at 784; *see also Deminski*, 377 N.C. at 413. It marks the conditions in which the judiciary will step into the breach and fashion a vehicle for a plaintiff to "have the merits of his case heard and his injury redressed if successful." *Craig*, 363 N.C. at 341. And it "ensures that an adequate remedy must provide the possibility of relief under the circumstances." *Id.* at 340. As part of a *Corum* cause of action, then, the sufficiency of existing relief—including administrative remedies—does not dictate subject-matter jurisdiction. *See Steel Co.*, 523 U.S. at 89 ("[T]he absence of a valid (as opposed to arguable) cause of action does not implicate

subject-matter jurisdiction."). The "courts' statutory or constitutional *power* to adjudicate the case" is "not defeated by the possibility that the averments [in the complaint] might fail to state a cause of action on which petitioners could actually recover." *Id.* (cleaned up). If the complaint places the dispute within the "authority granted to [the court] by the Constitution and laws of the sovereignty," *Henderson County*, 216 N.C. at 423, that court has "jurisdiction to decide whether the allegations state a cause of action on which [it] can grant relief as well as to determine issues of fact arising in the controversy," *Bell*, 327 U.S. at 682.

By those lights, administrative exhaustion does not imbue or divest a court with jurisdiction over *Corum* claims. The availability of agency relief goes to an element of a plaintiff's cause of action—i.e., whether *Corum* offers a direct constitutional claim because existing relief falls short. *Corum*, 330 N.C. at 782. That a court may hear the case does not, of course, mean the plaintiff will "win other pretrial motions, defeat affirmative defenses, or ultimately succeed on the merits of his case." *Craig*, 363 N.C. at 340. But those eventualities turn on the merits of the claim, not the courts' power to hear it at all. For that reason, *Corum* does not shut the courthouse doors merely because a plaintiff did not deplete administrative relief.

3. Remedial Adequacy and Administrative Exhaustion

The question instead is whether the administrative process is an adequate proxy for a direct constitutional suit. *Cf. Lloyd v. Babb*, 296 N.C. 416, 428 (1979) ("[W]hen an *effective* administrative remedy exists, that remedy is exclusive."). Courts must examine the interplay between the specific administrative regime, the asserted constitutional right, and "the wrongs of which [a plaintiff] complain[s]." *See id.* In general terms, an administrative process is adequate if it allows the plaintiff to enter the courthouse doors, meaningfully air their constitutional claim, and if successful, secure substantive redress for their injuries. *See Craig*, 363 N.C. 339–40 ("[T]o 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."); *see also id.* at 340 ("[A]n adequate remedy must provide the possibility of relief under the circumstances."). We decline to set a checklist, as each case will turn on the fit between the administrative scheme, the asserted constitutional violation, and the facts alleged. In substance, though, an adequate administrative remedy must offer a fair "turn at bat"—it may not doom *Corum* claims to echo into a bureaucratic void. *See Goldston v. State*, 361 N.C. 26, 35 (2006) (cleaned up); *cf. Charlotte-Mecklenburg Hosp. Auth. v. N.C. Indus. Comm'n*, 336 N.C. 200, 209–10 (1993) (finding

administrative remedy inadequate because plaintiffs challenged the facial validity of agency rule and the statute only allowed review of individual disputes and awards on "*specific claims* for compensation").

This Court has followed that case-by-case approach. In *Deminski*, for instance, the plaintiff—a mother of public school students—brought *Corum* claims against a school board for its deliberate indifference to harassment in the classroom. *See Deminski*, 377 N.C. at 407. The board urged us to withhold *Corum* relief because the plaintiff enjoyed an adequate administrative remedy under N.C.G.S. § 115C-45. According to the board, that statute provided a right to appeal a final administrative decision of a school employee—first to the local school board and then to superior court. Since the plaintiff could eventually challenge the school's inaction or violation of state law, the board argued, the administrative process was good enough to bar her *Corum* suit.

We disagreed, holding that the plaintiff "alleged a colorable constitutional claim for which no other adequate state law remedy exists." *Id.* at 415. Necessarily, then, we rejected the adequacy of the administrative remedy and excused the plaintiff from exhausting it. *See id.* Our opinion acknowledged that the administrative process could protract the ongoing harassment. *See id.* at 409. We noted, for instance, that the plaintiff and her children repeatedly alerted the school of the bullying. *Id.* In response, school personnel alluded to the administrative protocol in place, "insist[ing] that there was a process that would take time." *Id.* (cleaned up). But despite those assurances, "the bullying and harassment continued with no real change." *Id.*

When the plaintiff sued, she alleged that the school—and thus the board—failed "to take adequate action to address" known harassment in the classroom. *Id.* at 414. Given the nature of the claim and the board's history of inaction, forcing the plaintiff to deplete essentially irrelevant administrative remedies would prolong the cycle of deliberate indifference she sought to end. Reasoning that the constitutional violation "cannot be redressed through other means," we allowed the plaintiff to seek *Corum* relief. *Id.* at 415.

In other cases, too, we have allowed *Corum* claims that assert constitutional harm in the administrative process itself. *See Tully*, 370 N.C. at 536 (allowing *Corum* claim under Article I, Section I when the plaintiff's government employer "arbitrarily and capriciously denied him the ability to appeal an aspect of the promotional process" by ignoring its own policies and "summarily denying his grievance petition without any reason or rationale other than that the examination answers were not

a grievable item" (cleaned up)). That approach is not an outlier. The Supreme Court of the United States, for instance, has allowed parties to bypass the usual administrative course when raising "structural constitutional claims," *see Axon*, 143 S. Ct. at 904, that allege harm in "being subjected to unconstitutional agency authority," *see id.* at 903 (cleaned up). If a plaintiff challenges their "subjection to an illegitimate" administrative process "irrespective of its outcome," the Court explained, they "will lose their rights not to undergo the complained-of agency proceedings if they cannot assert those rights until the proceedings are over." *Id.* at 903–04.

That precedent imparts a clear lesson: conditioning *Corum* claims on administrative exhaustion would ignore the special status of constitutional rights and the courts' special role in protecting them from state encroachment. In some cases, a particular agency process may allow meaningful ventilation of a particular constitutional claim on particular facts. *See, e.g.*, *Copper*, 363 N.C. at 788–89. In others, administrative channels may prove unavailing. *See, e.g.*, *Deminski*, 377 N.C. at 414. But the adequacy of administrative relief is, at bottom, a flexible inquiry that a court must weigh. *See, e.g.*, *Craig*, 363 N.C. at 342 (affirming the denial of summary judgment award and allowing *Corum* claim to proceed because plaintiff lacked an adequate remedy); *see also Washington*, 898 S.E.2d at 673 (affirming entry of summary judgment against *Corum* claimant because an existing statutory remedy provided adequate relief for speedy trial violation). Flatly tying administrative exhaustion to jurisdiction is inappropriate for *Corum* claims and the constitutional rights under their aegis.

C. Application

So examined, the Court of Appeals' errors are clear. It merged plaintiffs' separate claims under the Law of the Land Clause, treating their substantive due process and equal protection challenges as one and the same. The court's analysis thus overlooked the distinct constitutional injuries and theories of recovery raised by plaintiffs' separate *Corum* claims. That distinction (or lack thereof) matters. According to plaintiffs, *Corum* relief is needed precisely because the administrative process cannot meaningfully redress their discrete constitutional harms.

The Court of Appeals did not grapple with plaintiffs' adequacy arguments, much less the City's responses. Instead, it imported the administrative exhaustion requirement into *Corum*'s unique realm. Building on its first analytical shortfall, the court surmised that the crux of plaintiffs' constitutional claims—the unjustified condemnation of their

properties—could be reviewed and redressed through the administrative process. *Askew*, 287 N.C. App. at 229. For that reason, it held that plaintiffs' failure to exhaust extinguished the trial court's subject-matter jurisdiction. *Id*. at 230. That was error, as explained above. On remand, the Court of Appeals must revisit the administrative scheme and reevaluate its congruence with plaintiffs' discrete *Corum* claims.

III. Conclusion

The trial court granted summary judgment to Kinston on all claims against it. But because the Court of Appeals resolved the case on jurisdictional grounds, it vacated the trial court's ruling without reaching its substance. We vacate the Court of Appeals decision and remand to that court to conduct a standard de novo review of the merits of the trial court's summary judgment order. *See Est. of Graham v. Lambert*, 385 N.C. 644, 650 (2024).

Because plaintiffs are the nonmovants, the Court of Appeals must view the evidence in their favor and ask whether "there is any genuine issue as to any material fact, and whether any party is entitled to a judgment as a matter of law." *See Kessing v. Nat'l Mortg. Corp.*, 278 N.C. 523, 535 (1971). The trial court did not specify its rationale for granting summary judgment. On remand, then, the Court of Appeals should first ask whether the administrative process provides an adequate state law remedy for plaintiffs' discrete constitutional challenges. After disaggregating plaintiffs' *Corum* suits, the court should affirm the summary judgment order if there is no genuine factual question that the administrative process "meaningfully addresses the constitutional violation." *See Washington*, 898 S.E.2d at 671. If "established claims or remedies" are inadequate for plaintiffs' equal protection or substantive due process challenges, *see Corum*, 330 N.C. at 784, the Court of Appeals should then examine whether a genuine factual dispute exists on the merits of the surviving *Corum* claims.

VACATED AND REMANDED.

IN RE A.J.L.H.

[386 N.C. 305 (2024)]

IN THE MATTER OF A.J.L.H., C.A.L.W., M.J.L.H.

No. 35PA21-2

Filed 28 June 2024

Child Abuse, Dependency, and Neglect—abuse and neglect—visitation—dispositional evidence and factual findings—principles for appellate review

In an abuse and neglect matter involving four biological parents (a mother and three men who each fathered one of her children), the Supreme Court reversed a decision by the Court of Appeals, which after prior remand from the higher court reversed the trial court's dispositional order denying visitation to all but one parent, and remanded the case directly to the trial court for any further proceedings. In doing so, the Supreme Court reiterated the following principles: on appeal, dispositional findings of fact are reviewed for whether they are supported by competent evidence; the Juvenile Code permits trial courts to consider hearsay evidence at disposition hearings; here, the trial court was not required to make specific findings for each parent regarding their parental fitness or any conduct inconsistent with their parental rights before determining whether visitation was in the children's best interest; because the issue of each parent's constitutionally protected parental status was not raised at trial, it could not be addressed on appeal; both the evidence and the unchallenged factual findings supported the trial court's disposition; and the trial court was not required to enter separate factual findings and legal conclusions for each parent before making its disposition.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 289 N.C. App. 644 (2023), vacating the dispositional portions of the adjudication and disposition order entered on 13 December 2019 by Judge Tonia A. Cutchin in District Court, Guilford County. On 1 September 2023, the Supreme Court allowed petitioner and guardian ad litem's amended joint petition for discretionary review. Heard in the Supreme Court on 17 April 2024.

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Matthew D. Wunsche for petitioner-appellant Guardian ad Litem.

Wendy C. Sotolongo, Parent Defender, by J. Lee Gilliam, Assistant Parent Defender, for respondent-appellee mother.

BARRINGER, Justice.

The issue before this Court is whether the Court of Appeals correctly determined that the trial court erred in denying visitation to respondent-mother. "The assessment of the juvenile's best interests concerning visitation is left to the sound discretion of the trial court and 'appellate courts review the trial court's assessment of a juvenile's best interests solely for an abuse of discretion.' " *In re A.J.L.H.*, 384 N.C. 45, 57 (2023).

It is difficult to overstate the Court of Appeals' multitude of errors in this case. The Court of Appeals ignored decades of precedent, cited authority which provides no support for its position, and disregarded our explicit directions in our previous opinion in this case, *In re A.J.L.H.*, 384 N.C. 45 (2023). For the following reasons, we reverse the Court of Appeals and remand this case directly to the trial court for any further proceedings.

I. Background

The underlying facts in this case are fully set out in a prior opinion of this Court, *In re A.J.L.H.*, 384 N.C. 45 (2023). For ease of reading, we briefly review the relevant facts. Respondent-mother and the father[1] of Anna were the subjects of an investigation by the Guilford County Department of Health and Human Services (DHHS) for maintaining an injurious environment and for neglecting Anna, Chris, and Margaret[2] by using improper discipline. *Id.* at 48–50.

Respondents admitted that they forced Margaret to stand in a corner for many hours at a time; whipped her with a belt, leaving bruises and marks on her neck and back; and made her sleep on a bare floor. Respondents claimed their actions were appropriate disciplinary measures due to Margaret's misbehavior. Respondents also informed social workers that they would continue to use that type of discipline until Margaret's behavior improved. *Id.* The trial court adjudicated Margaret abused and neglected, Anna as neglected, and Chris as neglected.

Immediately after the adjudication hearing, the trial court held a disposition hearing. The trial court received a court summary prepared

1. Anna's father is not a party to this appeal.

2. A pseudonym is used to protect the identities of the juveniles and for ease of reading.

by DHHS, a letter prepared by Margaret, and heard testimony from the current and previous foster care social workers.

Even though all three children entered nonsecure DHHS custody in August 2019, respondent-mother had not entered a case plan with DHHS for reunification with any of her children by the time of the November 2019 disposition order. Respondent-mother's case plan focused on improving her parenting skills, such as completing the PATE parenting education program and implementing the skills learned with her own children; completing and implementing recommendations made during a psychological evaluation; attending visits with her children once the trial court approved a schedule; "participat[ing] in shared parenting once per week via email"; completing substance abuse and mental health assessments; completing an anger management class; voluntarily agreeing to child support; actively seeking employment; and maintaining contact with her social worker.

DHHS requested that respondent-mother complete her parenting psychological and mental health assessment prior to DHHS making a recommendation regarding visitation between Margaret and respondent-mother. DHHS also requested that Margaret's "therapist have input regarding visits before a decision is made regarding visits and that if [Margaret] does not want to attend visits that her request[ ] be honored." Margaret wrote a letter to the trial court stating that she did not want to visit respondent-mother.

Respondents[3] appealed the decision of the trial court which adjudicated Margaret as an abused and neglected juvenile. The Court of Appeals reversed the order entered by the trial court, stating that "the trial court improperly admitted some hearsay evidence." *In re A.J.L.H.*, 384 N.C. at 47. The Court of Appeals held that the trial court's reasoning was so " 'heavily reliant and intertwined with' the hearsay evidence that the proper remedy was to vacate the trial court's order and remand for a new hearing with respect to Margaret." *Id.* "The Court of Appeals also ordered the trial court to dismiss the petitions directed at Margaret's younger siblings." *Id.* "Finally, the Court of Appeals instructed the trial court that, if it once again adjudicated Margaret as abused or neglected, the trial court must 'order generous and increasing visitation between Margaret and her mother.' " *Id.*

3. Respondent-mother and respondent-fathers previously appealed the trial court's decision. However, the only respondent currently before this Court is respondent-mother.

This Court allowed "discretionary review to reaffirm the proper role of an appellate court in reviewing a trial court's adjudication and disposition in a juvenile proceeding." *Id.* at 48. This Court determined that the trial court's order contained "sufficient findings, supported by clear, cogent, and convincing evidence, to support" the trial court's adjudications of the minor children. *Id.* The Court of Appeals decision was reversed and remanded "for that court to properly address respondents' arguments concerning the disposition order." *Id.*

On remand to the Court of Appeals, the court reversed "the orders of the trial court regarding visitation and remand[ed] for further findings of facts and conclusions of law." *In re A.J.L.H.*, 289 N.C. App. 644, 645 (2023).

The Court of Appeals reviewed whether the trial court abused its discretion with respect to not allowing visitation between respondents and their children. *Id.* at 649. Respondents argued that the trial court abused its discretion when: "(1) it prohibited any visitation between [r]espondent parents and their three children; and, (2) it concluded DHHS had made reasonable efforts to avoid taking custody of the children." *Id.* Respondents also asserted that "it was not reasonable for DHHS to seek custody of these children because of the parents' refusal to agree with the blanket accusation DHHS leveled against them." *Id.* Respondents also argued "the trial court abused its discretion and erred by failing to consider and make the required factors [sic] and determinations to support any finding it was in the children's best interests to deny visitation." *Id.*

The Court of Appeals held that, in previous cases in which it had denied visitation, it has required the trial court to find factors such as: (1) whether the parent denied visitation has a long history with Child Protective Services (CPS); (2) whether the issues which led to the removal of the current child are related to previous issues which led to the removal of another child; (3) whether a parent minimally participated, or failed to participate, in their case plan; (4) whether the parent failed to consistently utilize current visitation; and, (5) whether the parent relinquished their parental rights. *Id.* at 650 (citing *In re J.L.*, 264 N.C. App. 408, 422 (2019)).

The Court of Appeals further stated that the trial court was "constitutionally and statutorily required to assess whether and to the extent visitation should be awarded to four different parents for each of their respective children." *Id.* The trial court considered, but denied, visitation between respondent-mother and the three children and between

Anna and her father; the trial court considered and allowed visitation between Chris and his father. When the DHHS attorney asked the trial court about visitation for Margaret's father, the trial court responded with "[n]o visits." *Id.* at 651.

The Court of Appeals determined:

> The trial court failed to make specific determinations for each parent regarding unfitness or conduct inconsistent with their parental rights and, only after then, to determine whether parental visitation was in the best interests of each of their children. This absence demonstrates the trial court failed to make the required findings and conclusions and prejudicially erred in disposition. These failures: [sic] render the order manifestly unsupported by reason, demonstrate the conclusions of law were unsupported, lack legal validity, and constitutes an abuse of discretion.

Id. at 652.

The Court of Appeals held that the trial court "failed to make required and specific determinations of fact to demonstrate the trial court made supported conclusions of law. Upon remand, the trial court is to make the required findings of fact and conclusions of law concerning visitation, family placement, and parental involvement in medical treatment in the best interests of *each child for each respective parent of each child*." *Id.*

Petitioners filed a petition for discretionary review of the Court of Appeals' opinion. In their amended petition for discretionary review,[4] petitioners brought forth the following issues: (1) the Court of Appeals' published opinion misstated that clear, cogent, and convincing evidence was the dispositional standard of proof, which is contrary to this Court's well-settled caselaw; (2) the Court of Appeals took on the role of fact-finder and acted inconsistently with this Court's mandate when it reweighed the evidence and considered only the "properly admitted" evidence; and (3) the Court of Appeals' published opinion erroneously required the trial court to find that the parents had acted inconsistently with their constitutionally protected rights to order no visitation.

4. Petitioners amended the petition for discretionary review to clarify that they are seeking review only as it relates to Margaret.

II. Standard of Review

> [Appellate courts] review the trial court's dispositional findings of fact to determine whether they are supported by competent evidence. The trial court's assessment of a juvenile's best interests at the dispositional stage is reviewed solely for abuse of discretion. 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.

In re T.A.M., 378 N.C. 64, 76 (2021) (extraneity excluded); *accord In re A.J.L.H.*, 384 N.C. at 57.

We have repeatedly used this standard of review when reviewing a trial court's disposition order, as has the Court of Appeals. *In re M.S.E.*, 378 N.C. 40, 60 (2021); *In re K.N.K.*, 374 N.C. 50, 57 (2020); *In re A.J.A-D.*, No. COA19-270, slip op. at 11 (Feb. 4, 2020) (unpublished) (Dietz, J., with Stroud and Hampson, J.J.) ("However, when making its best interests determination, the trial court need only make dispositional findings that are 'supported by competent evidence.' By employing the heightened 'clear, cogent and convincing standard of proof in making its dispositional findings, the trial court misapplied the relevant evidentiary standard.' " (extraneity excluded)).

However, in the present case, the Court of Appeals deviated from this standard. The Court of Appeals stated instead that, "Dispositional findings must be based upon properly admitted and clear cogent and convincing evidence." *In re A.J.L.H.*, 289 N.C. App. at 650 (citing *In re B.C.T.*, 265 N.C. App. 176, 185 (2019)). Not only is this the incorrect standard of review, but *In re B.C.T.*—the very case that the Court of Appeals cited for support—does not support the Court of Appeals' assertion. Moreover, N.C.G.S. § 7B-901(a) states, "The [trial] court may consider any evidence, including hearsay evidence . . . including testimony or evidence from any person who is not a party, that the court finds to be relevant, reliable, and necessary to determine the needs of the juvenile and the most appropriate disposition." N.C.G.S § 7B-901(a) (2023). Accordingly, the Court of Appeals erred.

III. Analysis

Petitioners advanced several arguments as to why the Court of Appeals erred: (1) the Court of Appeals utilized the wrong standard of review when it analyzed the trial court's evidentiary rulings; (2) the

Court of Appeals erroneously required the trial court to find that the parents acted inconsistently with their constitutionally protected status to order no visitation; (3) the Court of Appeals erroneously abrogated N.C.G.S. § 7B-905.1 and created a novel constitutional rights analysis; (4) the Court of Appeals erroneously determined that there was not sufficient evidence to support the trial court's findings of fact; and (5) the Court of Appeals erred by holding that errors in findings of fact relating to other, non-appealing parties requires reversal of the trial court. We agree with all of petitioners' arguments. Accordingly, we reverse the Court of Appeals and remand this case directly to the trial court.

The Court of Appeals held, "The trial court failed to make specific determinations for each parent regarding unfitness or conduct inconsistent with their parental rights and, only after then, to determine whether parental visitation was in the best interests of each of their children." *In re A.J.L.H.*, 289 N.C. App. at 652. In doing so, the Court of Appeals established a novel two-step analysis for visitation. First, the Court of Appeals would require the trial court to enter findings of fact on each parent's fitness to parent or "conduct inconsistent with their parental rights." *Id.* Only after making this determination could a trial court analyze a child's best interests, according to the Court of Appeals' opinion.

Yet, the Juvenile Code provides: "An order that removes custody of a juvenile from a parent, guardian, or custodian or that continues the juvenile's placement outside the home shall provide for visitation that is in the *best interests of the juvenile* consistent with the juvenile's health and safety, including *no visitation*." N.C.G.S. § 7B-905.1(a) (2023) (emphasis added). Notably absent from the statute is any requirement that the trial court make findings on a parent's fitness to parent. It appears that the Court of Appeals drew this requirement from how this Court reviews a parent's constitutionally protected status as a parent. *See Price v. Howard*, 346 N.C. 68, 79 (1997). This was error.

In our first opinion in this case, we specifically stated, "Here, respondents did not assert a constitutional challenge on this basis in the trial court and did not raise the issue in their appellate briefing at the Court of Appeals. Accordingly, on remand, the Court of Appeals should not address this constitutional issue." *In re A.J.L.H.*, 384 N.C. at 57, n.2. Not only did we direct the Court of Appeals to avoid this issue in our last opinion, it was not preserved at the trial court. In other words—the Court of Appeals erred when it sua sponte raised a constitutional issue. It merely compounded its error when it continued to discuss this non-preserved issue in the face of a direct statement from this Court directing the Court of Appeals to "not address [the] constitutional issue." *Id.*

Not only did the Court of Appeals choose to address the non-preserved issue in spite of our opinion, it did so without any briefing or argument from the parties.

The Court of Appeals should have focused its review on whether the trial court abused its discretion instead of performing a pseudo-constitutional analysis on the respondents' parental rights. As we already stated in our previous opinion:

> The assessment of the juvenile's best interests concerning visitation is left to the sound discretion of the trial court and "appellate courts review the trial court's assessment of a juvenile's best interests solely for an abuse of discretion." *In re K.N.L.P.*, 380 N.C. 756, 759 (2022). "Under this 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." *Id.* Moreover, even in the rare cases in which we determine that a trial court acted arbitrarily and unreasonably, the remedy is to vacate the disposition order but to "express no opinion as to the ultimate result of the best interests determination on remand, as that decision must be made by the trial court." *In re R.D.*, 376 N.C. 244, 264 (2020).

In re A.J.L.H., 384 N.C. at 57.

We now turn to the trial court's dispositional order and apply the correct standard of review.[5] The trial court's order contained several unchallenged findings of fact demonstrating that it did not abuse its discretion in denying visitation. Unchallenged findings of fact are binding on appeal. *In re J.M.*, 384 N.C. 584, 591 (2023). Furthermore, a trial court's "decisions as to the weight and credibility of the evidence, and the inferences drawn from the evidence, are not subject to appellate review." *Id.* (extraneity excluded).

The following unchallenged facts were found by the trial court. Respondent-mother "has extensive Child Protective Services (CPS) history" involving inappropriate discipline of Margaret and an older sibling. In May of 2017, respondent admitted using corporal punishment

5. We have already affirmed the trial court's adjudication order. *In re A.J.L.H.*, 384 N.C. 45, 57 (2023).

that left "marks" on Margaret's arms. In May of 2010, Guilford County CPS substantiated a report of abuse by respondent-mother's boyfriend on then four-month-old Margaret, who "presented to the Emergency Room with bruises on her forehead, both cheeks, and a scratch under her chin." In April of 2013, respondent-mother's boyfriend took Margaret to a babysitter and respondent-mother did not pick her up for several days. Respondent-mother failed to admit or understand that her discipline of Margaret was inappropriate and subjected Margaret to trauma. Respondent-mother defended the use of such punishment.

Furthermore, Margaret wrote a letter to the trial court saying:

> I don't want to visit my mom because I don't want to be hurt. I like it with grandma . . . because she treat[s] me great. I like where my sisters are. It wasn't only my mom who whooped me it was [Anna's father] to[o]. [Anna's father] gave me scabs when he was whooping me. Only once my mom tried to choke me.

Although this letter was challenged on hearsay grounds, N.C.G.S § 7B-901(a) specifically allows hearsay evidence to be considered in disposition hearings.

As explained above,

> The assessment of the juvenile's best interests concerning visitation is left to the sound discretion of the trial court and "appellate courts review the trial court's assessment of a juvenile's best interests solely for an abuse of discretion." *In re K.N.L.P.*, 380 N.C. 756, 759 (2022). "Under this 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." *Id.*

In re A.J.L.H., 384 N.C. at 57. Upon reviewing the facts of this case, it cannot be said that the trial court's order was "manifestly unsupported by reason" or was "so arbitrary that it could not have been the result of a reasoned decision." *Id.*

The Court of Appeals also held that, the "trial court failed to find and make conclusions of law addressing the factors applicable to visitation for *each child with each parent*." *In re A.J.L.H.*, 289 N.C. App. at 651. Further, "[t]he trial court made no findings or conclusions regarding why only one parent, Chris's biological father, was entitled to supervised visitation with his child, but the other three biological parents were

denied any and all visitation, placement with children's family or relatives, or presence and participation in their medical care." *Id.* Notably, Chris's biological father and Margaret's biological father did not appeal the trial court's decision. As DHHS aptly notes, "[t]here is no precedent which allows the Court of Appeals to assert an appeal on behalf of a non-appealing party." Moreover, even if they had appealed, no statutory provision or caselaw requires a trial court make findings differentiating between the parties.

IV. Conclusion

The first time this case was before this Court, we remanded to the Court of Appeals. On remand, the Court of Appeals made numerous and significant errors. First, the Court of Appeals erred when it stated that the dispositional findings must be based upon properly admitted and clear, cogent, and convincing evidence. Second, the Court of Appeals erred when it stated it can only review "properly admitted evidence" in disposition hearings. Third, the Court of Appeals erred when it required the trial court to make specific findings for each parent regarding unfitness or conduct inconsistent with their parental rights. Fourth, the Court of Appeals erred when it addressed, sua sponte, the constitutional rights of respondents. Fifth, the Court of Appeals erred when it determined there was insufficient evidence to support the trial court's order denying visitation. Sixth, finally, the Court of Appeals erred when it held the trial court was required to differentiate between respondents when no such requirement exists by statute or caselaw. Accordingly, we reverse the Court of Appeals' opinion.

REVERSED.

COOPER v. BERGER

[386 N.C. 315 (2024)]

ROY A. COOPER, III, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF NORTH CAROLINA

v.

PHILIP E. BERGER, IN HIS OFFICIAL CAPACITY AS PRESIDENT PRO TEMPORE OF THE NORTH CAROLINA SENATE; TIMOTHY K. MOORE, IN HIS OFFICIAL CAPACITY AS SPEAKER OF THE NORTH CAROLINA HOUSE OF REPRESENTATIVES; THE STATE OF NORTH CAROLINA; NORTH CAROLINA ENVIRONMENTAL MANAGEMENT COMMISSION; AND JOHN (JD) SOLOMON, IN HIS OFFICIAL CAPACITY AS CHAIR OF THE NORTH CAROLINA ENVIRONMENTAL MANAGEMENT COMMISSION; CHRISTOPHER M. DUGGAN, IN HIS OFFICIAL CAPACITY AS VICE-CHAIR OF THE NORTH CAROLINA ENVIRONMENTAL MANAGEMENT COMMISSION; AND YVONNE C. BAILEY, TIMOTHY M. BAUMGARTNER, CHARLES S. CARTER, MARION DEERHAKE, MICHAEL S. ELLISON, STEVEN P. KEEN, H. KIM LYERLY, JACQUELINE M. GIBSON, JOSEPH REARDON, ROBIN SMITH, KEVIN L. TWEEDY, ELIZABETH J. WEESE, AND BILL YARBOROUGH, IN THEIR OFFICIAL CAPACITIES AS COMMISSIONERS OF THE NORTH CAROLINA ENVIRONMENTAL MANAGEMENT COMMISSION

From N.C. Court of Appeals
24-440

From Wake
23CV28505-910

No. 131P24

ORDER

Plaintiff moved the undersigned and this Court to consider whether recusal is required in a motion filed 11 June 2024. A response was filed 18 June 2024. Pursuant to an administrative order entered by this Court on 23 December 2021, the undersigned refers the motion to the Court for resolution.

This the 24th day of June 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 24th day of June 2024.

s/Grant E. Buckner

Grant E. Buckner
Clerk of the Supreme Court

COOPER v. BERGER

[386 N.C. 317 (2024)]

ROY A. COOPER, III, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF NORTH CAROLINA

v.

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

From N.C. Court of Appeals
24-406

From Wake
23CV29308-910

No. 132P24

ORDER

Plaintiff moved the undersigned and this Court to consider whether recusal is required in a motion filed 11 June 2024. A response was filed 18 June 2024. Pursuant to an administrative order entered by this Court on 23 December 2021, the undersigned refers the motion to the Court for resolution.

This the 24th day of June 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 24th day of June 2024.

s/Grant E. Buckner

Grant E. Buckner
Clerk of the Supreme Court

IN THE MATTER OF CUSTODIAL LAW ENFORCEMENT AGENCY RECORDINGS SOUGHT BY:

APG-EAST LLC D/B/A THE DAILY ADVANCE; SCRIPPS BROADCAST HOLDINGS, LLC D/B/A WTKR-TV AND WGNT-TV; CAPITAL BROADCASTING COMPANY, INC. D/B/A WRAL-TV; THE MCCLATCHY COMPANY, LLC D/B/A THE NEWS AND OBSERVER AND THE CHARLOTTE OBSERVER; CAROLINA PUBLIC PRESS, INC. D/B/A CAROLINA PUBLIC PRESS; GREY MEDIA GROUP, INC. D/B/A WBTV, WECT AND WITN; WUNC, LLC D/B/A WUNC-FM; DTH MEDIA CO. D/B/A THE DAILY TARHEEL; NEXSTAR MEDIA, INC. D/B/A WAVY-TV AND WVBT-TV; CABLE NEWS NETWORK, INC. D/B/A CNN; WTVD TELEVISION, LLC D/B/A WTVD-ABC11; THE ASSOCIATED PRESS; WP COMPANY, LLC D/B/A THE WASHINGTON POST; CHARTER COMMUNICATIONS D/B/A SPECTRUM NEWS; CHATHAM MEDIA GROUP, LLC D/B/A CHATHAM NEWS + RECORD; AND GANNETT CO., INC. D/B/A WILMINGTON STAR NEWS AND USA TODAY, THE NEW YORK TIMES CO. D/B/A THE NEW YORK TIMES, MEDIA CONVERGENCE GROUP, D/B/A NEWSY COURT TV MEDIA, LLC D/B/A COURT TV

From N.C. Court of Appeals
22-446

From Pasquotank
21CVS262

No. 81P23

ORDER

The petitioners' petition for discretionary review is allowed for the limited purpose of remanding this case to the Court of Appeals for reconsideration in light of this Court's decision in *In re The McClatchy Co.*, No. 29A23 (N.C. May 23, 2024).

By order of the Court in Conference, this the 26th day of June 2024.

/s/ Riggs, J.
For the Court

Allen, J., recused.

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 28th day of June 2024.

s/Grant E. Buckner

Grant E. Buckner
Clerk of the Supreme Court

IN RE CUSTODIAL L. ENF'T AGENCY RECORDING

[386 N.C. 320 (2024)]

IN THE MATTER OF:

CUSTODIAL LAW ENFORCEMENT AGENCY RECORDING SOUGHT BY:

CAPITOL BROADCASTING COMPANY, INCORPORATED, D/B/A WRAL-TV; NEXSTAR BROADCASTING, INC., D/B/A WNCN-TV; WTVD TELEVISION LLC, D/B/A WTVD-TV; THE MCCLATCHY COMPANY D/B/A THE NEWS & OBSERVER; AND GANNETT NC, D/B/A WILMINGTON STARNEWS

From N.C. Court of Appeals
22-399

From Orange
21CVS1454

No. 126P23

ORDER

The petitioners' petition for discretionary review is allowed for the limited purpose of remanding this case to the Court of Appeals for reconsideration in light of this Court's decision in *In re The McClatchy Co.*, No. 29A23 (N.C. May 23, 2024).

By order of the Court in Conference, this the 26th day of June 2024.

/s/ Riggs, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 28th day of June 2024.

s/Grant E. Buckner

Grant E. Buckner
Clerk of the Supreme Court

JONES v. J. KIM HATCHER INS. AGENCIES INC.

[386 N.C. 321 (2024)]

DANIEL JONES

v.

J. KIM HATCHER INSURANCE AGENCIES INC.; HXS HOLDINGS, INC.; GEOVERA SPECIALTY INSURANCE COMPANY; AND GEOVERA ADVANTAGE INSURANCE SERVICES, INC.

From N.C. Court of Appeals
22-1030

From New Hanover
20CVS2374

No. 264A23

ORDER

Upon consideration of the petition filed on the 10th of October 2023 by the plaintiff in this matter for discretionary review of the decision of the North Carolina Court of Appeals pursuant to N.C.G.S. § 7A-31, the petition is allowed as to Issue III. The petition is denied as to Issues I and II.

By order of the Court in Conference, this the 26th day of June 2024.

/s/ Riggs, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 28th day of June 2024.

s/Grant E. Buckner

Grant E. Buckner
Clerk of the Supreme Court

JAY SINGLETON, D.O., AND SINGLETON VISION CENTER, P.A.

v.

NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES; ROY COOPER, GOVERNOR OF THE STATE OF NORTH CAROLINA, IN HIS OFFICIAL CAPACITY; MANDY COHEN, NORTH CAROLINA SECRETARY OF HEALTH AND HUMAN SERVICES, IN HER OFFICIAL CAPACITY; PHIL BERGER, PRESIDENT PRO TEMPORE OF THE NORTH CAROLINA SENATE, IN HIS OFFICIAL CAPACITY; AND TIM MOORE, SPEAKER OF THE NORTH CAROLINA HOUSE OF REPRESENTATIVES, IN HIS OFFICIAL CAPACITY

From N.C. Court of Appeals
21-558

From Wake
20CVS5150

No. 260PA22

ORDER

The parties are directed to file supplemental briefs within thirty days addressing the following issues:

1. Whether plaintiffs were required to exhaust administrative remedies in light of this Court's decision in No. 55A23, *Askew v. City of Kinston*, __ N.C. __ (June 28, 2024).

2. Whether plaintiffs' constitutional claims, based on the facts alleged in the complaint, are facial challenges, as-applied challenges, or both, and what implications this has for our review of the Court of Appeals' decision and the trial court's order.

By order of the Court in Conference, this the 26th day of June 2024.

/s/ Riggs, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 28th day of June 2024.

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. 173PA23

ORDER

This matter is before this Court on plaintiffs' and defendants' joint motion for a limited remand to Superior Court, Wake County. The parties request that this Court issue a limited remand to allow the trial court to implement the specific-performance remedy as set forth in the trial court's amended judgment on 26 May 2022. This matter is remanded to the trial court for the limited purpose of implementing the specific performance of the contract between the parties. Save and except the limited remand herein, the prior orders of this Court remain in full force and effect.

By order of the Court in Conference, this the 26th day of June 2024.

/s/ Riggs, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 28th day of June 2024.

s/Grant E. Buckner

Grant E. Buckner
Clerk of the Supreme Court

STATE v. CORNWELL

[386 N.C. 324 (2024)]

STATE OF NORTH CAROLINA	From N.C. Court of Appeals 23-36
v.	
JARON MONTE CORNWELL	From Catawba 18CRS1848-49 18CRS52417

No. 96P24

ORDER

The State's petition for discretionary review is allowed for the limited purpose of remanding this case to the Court of Appeals for reconsideration in light of this Court's decision in *State v. Singleton*, No. 318PA22 (N.C. May 23, 2024).

By order of the Court in Conference, this the 26th day of June 2024.

/s/ Riggs, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 28th day of June 2024.

s/Grant E. Buckner

Grant E. Buckner
Clerk of the Supreme Court

STATE v. HAMILTON

[386 N.C. 325 (2024)]

STATE OF NORTH CAROLINA	From N.C. Court of Appeals 22-847
v.	
KAJUAN DYSHAWN HAMILTON	From Davidson County 17CRS51616

No. 331P23

ORDER

The State's petition for discretionary review is allowed for the limited purpose of remanding this matter to the Court of Appeals to reconsider the instructional issue in light of this Court's decision in *State v. Reber*, 900 S.E.2d 781 (N.C. 2024).

By order of the Court in Conference, this the 26th day of June 2024.

/s/ Allen, J.
For the Court

Earls, J., and Riggs, J., dissent from this order.

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 28th day of June 2024.

s/Grant E. Buckner

Grant E. Buckner
Clerk of the Supreme Court

STATE v. MILLER

[386 N.C. 326 (2024)]

STATE OF NORTH CAROLINA	From N.C. Court of Appeals 22-689
v.	
MARK ALAN MILLER	From Henderson 18CRS54778 19CRS367

No. 81A24

ORDER

Defendant's petition for discretionary review as to additional issues is allowed in part and denied in part. The Court will review the following issues:

1. Did the Court of Appeals err affirming the trial court's denial of Miller's motion to dismiss the charge of trafficking opium by possession of hydrocodone, on the grounds hydrocodone is an opioid and opioids are included in N.C.G.S. § 90-95(h)(4)?

2. Did the Court of Appeals err by finding the trial court's instruction to the jury that opioids are included in N.C.G.S. § 90-95(h)(4) was a correct statement of the law?

By order of the Court in Conference, this the 26th day of June 2024.

/s/ Riggs, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 28th day of June 2024.

s/Grant E. Buckner

Grant E. Buckner
Clerk of the Supreme Court

STATE OF NORTH CAROLINA	From N.C. Court of Appeals P19-123
v.	
JUSTIN ALEXANDER VANDERGRIFF	From Wake 12CR735488

No. 74P19

ORDER

The following order has been entered on the motion to seal filed on the 6th of March 2024 by Defendant:

Motion Denied by order of the Court in conference, this the 26th of June 2024.

s/ Allen, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 28th day of June 2024.

Grant E. Buckner
Clerk of the Supreme Court

s/M.C.Hackney
Assistant Clerk

Justice DIETZ concurring.

I agree with my dissenting colleague that expunging criminal records serves laudable goals. *See post* (Earls, J., dissenting). In fact, I agree with most of what is in the dissent. I write to address what is *not* in it.

The dissent portrays this motion to seal as a straightforward matter that needs no briefing, no argument, no adversarial process. All we need to do is seal the requested records and move on. But spend a moment contemplating this motion and what emerges are deeply complicated and novel legal questions with strong arguments on both sides. This is anything but simple.

Take, for example, the dissent's insistence that this Court's authority to seal the records is obvious. That authority, according to the dissent,

comes from our constitutional power to create rules of procedure for the appellate courts. *See* N.C. Const., art. IV, § 13(2).

But is it that simple? What if there were no laws governing expunction? Could this Court, on its own initiative, seal the records of certain criminal defendants solely because we believed they were worthy of expunction? I don't think so. Choosing who is entitled to have their records expunged, and choosing which records should be expunged, are policy questions for lawmakers, not legal questions for judges.

That is where things get tricky, because there is ambiguity in what our lawmakers intended. The statutes described by the dissent only reference records of trial courts and state agencies. *See* N.C.G.S. §§ 15A-145 to 15A-153 (2023). This Court is neither of those.

Moreover, our decisions are not the same as those of trial courts. Our opinions are more than mere court records; they are part of the law, serving to hone past decisions or to fill the gaps in other positive law. *See* Benjamin N. Cardozo, *The Nature of the Judicial Process* (1921). We cannot seal that away from the public. We could no more hide our precedential decisions than we could mask the contents of the General Statutes.

Even sealing the remainder of an appellate record (everything but the opinion) creates problems. Our opinions frequently reference what the parties did or did not argue in their briefing, and almost always describe facts from the appellate record. As a result, future litigants use the appellate record of a decision to help interpret the decision's meaning and to explain why that decision is the same as, or different from, their own case. We do the same. *See*, *e.g.*, *State v. Richardson*, 385 N.C. 101, 200 (2023) (examining record in previous decision to determine if an issue not mentioned in the decision had been raised in the case).

Of course, not every case before this Court yields a written opinion—here, for example, we dismissed the defendant's petition in a boilerplate order. But that does not mean we should reflexively seal the record here. Why would the General Assembly intend for us to expunge *some* defendants' appellate records but not others, based solely on whether this Court happened to issue an opinion? That is something far beyond any defendant's control. Nothing in the language of the expunction statutes supports that sort of unjust, bifurcated approach.

Still, though, the dissent makes fair points. If this Court's records remain public, sealing the corresponding trial court records accomplishes little. After all, at present, this Court's decisions and records are

more readily available through our online search functionality than those of the trial courts. But, again to be fair, there is limited ability to scrape our database for information. It is designed for individual searches, not mass data collection.

Is there a solution to this dilemma? Perhaps. In juvenile cases that come to our appellate courts, we have a procedure that requires litigants to replace party names with pseudonyms. *See* N.C. R. App. P. 42(b). We could create a similar procedure for litigants whose records are expunged, permitting them to submit filings that replace identifying information with pseudonyms or redactions. Other states use this approach. *See*, *e.g.*, Ind. Code § 35-38-9-1(f)(4). Notably, though, these other states enacted the process by *statute*—meaning policymakers, not judges, chose it.

In sum, this is not a straightforward matter. Without further legislative guidance, it remains unclear whether this Court's records are covered by the new expunction laws and, if so, which of our records the General Assembly intended to be expunged. The defendant did not address these statutory interpretation issues in the motion. There is no response from an opposing party. The limited filings before us simply do not provide a vehicle to resolve the difficult legal questions we face. Thus, I join the majority's order. When these questions are answered, if the defendant in this case is entitled to have his appellate record expunged, I see nothing in the Court's order today preventing him from applying for that relief.

Justices BERGER and ALLEN join in this concurring opinion.

Justice EARLS dissenting.

Mr. Vandergriff moves to seal appellate records linked to an expunged misdemeanor conviction. Beyond question, this Court can grant that relief—we are constitutionally vested with "exclusive authority to make rules of procedure and practice for the Appellate Division." N.C. Const., art. IV, § 13(2). That rule-making power reaches the sealing of appellate records. *See* N.C. R. App. P. 42. Today, however, the Court denies Mr. Vandergriff's modest request—not for lack of power, but for lack of will. That is regrettable.

Recent statutory changes allow North Carolinians to expunge certain convictions from their records. *See generally* N.C.G.S. §§ 15A-145 to -173 (2023). The purpose of those provisions is laudable. Recognizing the longstanding barriers that often attach to a criminal conviction, an

expungement "legally eliminates the record" of a past offense, thus "offer[ing] the possibility of sweeping aside a wide range of legal and socioeconomic consequences at once." *See* J.J. Prescott and Sonja B. Starr, *Expungement of Criminal Convictions: An Empirical Study*, 133(8) Harv. L. Rev. 2460, 2463 n.10 (2020); *see also id.* at 2468 (canvassing the sprawling harms of a criminal record, such as "exclusion from employment, obstacles to social integration, and a vast array of collateral legal consequences that often last a lifetime"). But by declining to seal the appellate records linked to an already-expunged conviction, this Court undermines the legislature's efforts to give people with criminal records a second chance. As logic dictates and scholarship confirms, an expunction has far less practical value if vestiges of the offense remain enshrined in publicly accessible appellate websites and databases. *See id.* at 2470.

In my view, when a party asks to seal appellate records for an expunged conviction, granting that relief is within this Court's constitutional authority and faithful to the purpose of expunctions. It ensures that North Carolinians have the second chance our legislature promised them. Because I would thus allow Mr. Vandergriff's request, I dissent from the denial of his motion.

Justice RIGGS joins in this dissenting opinion.

STATE v. VANDERGRIFF

[386 N.C. 331 (2024)]

STATE OF NORTH CAROLINA	From N.C. Court of Appeals P19-112
v.	
JUSTIN ALEXANDER VANDERGRIFF	From Wake 15CR721399

No. 97P19

ORDER

The following order has been entered on the motion to seal filed on the 6th of March 2024 by Defendant:

Motion Denied by order of the Court in conference, this the 26th of June 2024.

s/ Allen, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 28th day of June 2024.

Grant E. Buckner
Clerk of the Supreme Court

s/M.C. Hackney
Assistant Clerk

Justice DIETZ concurring.

I agree with my dissenting colleague that expunging criminal records serves laudable goals. *See post* (Earls, J., dissenting). In fact, I agree with most of what is in the dissent. I write to address what is *not* in it.

The dissent portrays this motion to seal as a straightforward matter that needs no briefing, no argument, no adversarial process. All we need to do is seal the requested records and move on. But spend a moment contemplating this motion and what emerges are deeply complicated and novel legal questions with strong arguments on both sides. This is anything but simple.

Take, for example, the dissent's insistence that this Court's authority to seal the records is obvious. That authority, according to the dissent,

comes from our constitutional power to create rules of procedure for the appellate courts. *See* N.C. Const., art. IV, § 13(2).

But is it that simple? What if there were no laws governing expunction? Could this Court, on its own initiative, seal the records of certain criminal defendants solely because we believed they were worthy of expunction? I don't think so. Choosing who is entitled to have their records expunged, and choosing which records should be expunged, are policy questions for lawmakers, not legal questions for judges.

That is where things get tricky, because there is ambiguity in what our lawmakers intended. The statutes described by the dissent only reference records of trial courts and state agencies. *See* N.C.G.S. §§ 15A-145 to 15A-153 (2023). This Court is neither of those.

Moreover, our decisions are not the same as those of trial courts. Our opinions are more than mere court records; they are part of the law, serving to hone past decisions or to fill the gaps in other positive law. *See* Benjamin N. Cardozo, *The Nature of the Judicial Process* (1921). We cannot seal that away from the public. We could no more hide our precedential decisions than we could mask the contents of the General Statutes.

Even sealing the remainder of an appellate record (everything but the opinion) creates problems. Our opinions frequently reference what the parties did or did not argue in their briefing, and almost always describe facts from the appellate record. As a result, future litigants use the appellate record of a decision to help interpret the decision's meaning and to explain why that decision is the same as, or different from, their own case. We do the same. *See*, *e.g.*, *State v. Richardson*, 385 N.C. 101, 200 (2023) (examining record in previous decision to determine if an issue not mentioned in the decision had been raised in the case).

Of course, not every case before this Court yields a written opinion—here, for example, we dismissed the defendant's petition in a boilerplate order. But that does not mean we should reflexively seal the record here. Why would the General Assembly intend for us to expunge *some* defendants' appellate records but not others, based solely on whether this Court happened to issue an opinion? That is something far beyond any defendant's control. Nothing in the language of the expunction statutes supports that sort of unjust, bifurcated approach.

Still, though, the dissent makes fair points. If this Court's records remain public, sealing the corresponding trial court records accomplishes little. After all, at present, this Court's decisions and records

are more readily available through our online search functionality than those of the trial courts. But, again to be fair, there is limited ability to scrape our database for information. It is designed for individual searches, not mass data collection.

Is there a solution to this dilemma? Perhaps. In juvenile cases that come to our appellate courts, we have a procedure that requires litigants to replace party names with pseudonyms. *See* N.C. R. App. P. 42(b). We could create a similar procedure for litigants whose records are expunged, permitting them to submit filings that replace identifying information with pseudonyms or redactions. Other states use this approach. *See*, *e.g.*, Ind. Code § 35-38-9-1(f)(4). Notably, though, these other states enacted the process by *statute*—meaning policymakers, not judges, chose it.

In sum, this is not a straightforward matter. Without further legislative guidance, it remains unclear whether this Court's records are covered by the new expunction laws and, if so, which of our records the General Assembly intended to be expunged. The defendant did not address these statutory interpretation issues in the motion. There is no response from an opposing party. The limited filings before us simply do not provide a vehicle to resolve the difficult legal questions we face. Thus, I join the majority's order. When these questions are answered, if the defendant in this case is entitled to have his appellate record expunged, I see nothing in the Court's order today preventing him from applying for that relief.

Justices BERGER and ALLEN join in this concurring opinion.

Justice EARLS dissenting.

Mr. Vandergriff moves to seal appellate records linked to an expunged misdemeanor conviction. Beyond question, this Court can grant that relief—we are constitutionally vested with "exclusive authority to make rules of procedure and practice for the Appellate Division." N.C. Const., art. IV, § 13(2). That rule-making power reaches the sealing of appellate records. *See* N.C. R. App. P. 42. Today, however, the Court denies Mr. Vandergriff's modest request—not for lack of power, but for lack of will. That is regrettable.

Recent statutory changes allow North Carolinians to expunge certain convictions from their records. *See generally* N.C.G.S. §§ 15A-145 to -173 (2023). The purpose of those provisions is laudable. Recognizing the longstanding barriers that often attach to a criminal conviction,

an expungement "legally eliminates the record" of a past offense, thus "offer[ing] the possibility of sweeping aside a wide range of legal and socioeconomic consequences at once." *See* J.J. Prescott and Sonja B. Starr, *Expungement of Criminal Convictions: An Empirical Study*, 133(8) Harv. L. Rev. 2460, 2463 n.10 (2020); *see also id.* at 2468 (canvassing the sprawling harms of a criminal record, such as "exclusion from employment, obstacles to social integration, and a vast array of collateral legal consequences that often last a lifetime"). But by declining to seal the appellate records linked to an already-expunged conviction, this Court undermines the legislature's efforts to give people with criminal records a second chance. As logic dictates and scholarship confirms, an expunction has far less practical value if vestiges of the offense remain enshrined in publicly accessible appellate websites and databases. *See id.* at 2470.

In my view, when a party asks to seal appellate records for an expunged conviction, granting that relief is within this Court's constitutional authority and faithful to the purpose of expunctions. It ensures that North Carolinians have the second chance our legislature promised them. Because I would thus allow Mr. Vandergriff's request, I dissent from the denial of his motion.

Justice RIGGS joins in this dissenting opinion.

STATE v. VANDERGRIFF

[386 N.C. 335 (2024)]

STATE OF NORTH CAROLINA	From N.C. Court of Appeals P19-121
v.	
JUSTIN ALEXANDER VANDERGRIFF	From Wake 14CR730526

No. 128P19

ORDER

The following order has been entered on the motion to seal filed on the 6th of March 2024 by Defendant:

Motion Denied by order of the Court in conference, this the 26th of June 2024.

s/ Allen, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 28th day of June 2024.

Grant E. Buckner
Clerk of the Supreme Court

s/M.C. Hackney
Assistant Clerk

Justice DIETZ concurring.

I agree with my dissenting colleague that expunging criminal records serves laudable goals. *See post* (Earls, J., dissenting). In fact, I agree with most of what is in the dissent. I write to address what is *not* in it.

The dissent portrays this motion to seal as a straightforward matter that needs no briefing, no argument, no adversarial process. All we need to do is seal the requested records and move on. But spend a moment contemplating this motion and what emerges are deeply complicated and novel legal questions with strong arguments on both sides. This is anything but simple.

Take, for example, the dissent's insistence that this Court's authority to seal the records is obvious. That authority, according to the dissent,

comes from our constitutional power to create rules of procedure for the appellate courts. *See* N.C. Const., art. IV, § 13(2).

But is it that simple? What if there were no laws governing expunction? Could this Court, on its own initiative, seal the records of certain criminal defendants solely because we believed they were worthy of expunction? I don't think so. Choosing who is entitled to have their records expunged, and choosing which records should be expunged, are policy questions for lawmakers, not legal questions for judges.

That is where things get tricky, because there is ambiguity in what our lawmakers intended. The statutes described by the dissent only reference records of trial courts and state agencies. *See* N.C.G.S. §§ 15A-145 to 15A-153 (2023). This Court is neither of those.

Moreover, our decisions are not the same as those of trial courts. Our opinions are more than mere court records; they are part of the law, serving to hone past decisions or to fill the gaps in other positive law. *See* Benjamin N. Cardozo, *The Nature of the Judicial Process* (1921). We cannot seal that away from the public. We could no more hide our precedential decisions than we could mask the contents of the General Statutes.

Even sealing the remainder of an appellate record (everything but the opinion) creates problems. Our opinions frequently reference what the parties did or did not argue in their briefing, and almost always describe facts from the appellate record. As a result, future litigants use the appellate record of a decision to help interpret the decision's meaning and to explain why that decision is the same as, or different from, their own case. We do the same. *See*, *e.g.*, *State v. Richardson*, 385 N.C. 101, 200 (2023) (examining record in previous decision to determine if an issue not mentioned in the decision had been raised in the case).

Of course, not every case before this Court yields a written opinion—here, for example, we dismissed the defendant's petition in a boilerplate order. But that does not mean we should reflexively seal the record here. Why would the General Assembly intend for us to expunge *some* defendants' appellate records but not others, based solely on whether this Court happened to issue an opinion? That is something far beyond any defendant's control. Nothing in the language of the expunction statutes supports that sort of unjust, bifurcated approach.

Still, though, the dissent makes fair points. If this Court's records remain public, sealing the corresponding trial court records accomplishes little. After all, at present, this Court's decisions and records

are more readily available through our online search functionality than those of the trial courts. But, again to be fair, there is limited ability to scrape our database for information. It is designed for individual searches, not mass data collection.

Is there a solution to this dilemma? Perhaps. In juvenile cases that come to our appellate courts, we have a procedure that requires litigants to replace party names with pseudonyms. *See* N.C. R. App. P. 42(b). We could create a similar procedure for litigants whose records are expunged, permitting them to submit filings that replace identifying information with pseudonyms or redactions. Other states use this approach. *See*, *e.g.*, Ind. Code § 35-38-9-1(f)(4). Notably, though, these other states enacted the process by *statute*—meaning policymakers, not judges, chose it.

In sum, this is not a straightforward matter. Without further legislative guidance, it remains unclear whether this Court's records are covered by the new expunction laws and, if so, which of our records the General Assembly intended to be expunged. The defendant did not address these statutory interpretation issues in the motion. There is no response from an opposing party. The limited filings before us simply do not provide a vehicle to resolve the difficult legal questions we face. Thus, I join the majority's order. When these questions are answered, if the defendant in this case is entitled to have his appellate record expunged, I see nothing in the Court's order today preventing him from applying for that relief.

Justices BERGER and ALLEN join in this concurring opinion.

Justice EARLS dissenting.

Mr. Vandergriff moves to seal appellate records linked to an expunged misdemeanor conviction. Beyond question, this Court can grant that relief—we are constitutionally vested with "exclusive authority to make rules of procedure and practice for the Appellate Division." N.C. Const., art. IV, § 13(2). That rule-making power reaches the sealing of appellate records. *See* N.C. R. App. P. 42. Today, however, the Court denies Mr. Vandergriff's modest request—not for lack of power, but for lack of will. That is regrettable.

Recent statutory changes allow North Carolinians to expunge certain convictions from their records. *See generally* N.C.G.S. §§ 15A-145 to -173 (2023). The purpose of those provisions is laudable. Recognizing the longstanding barriers that often attach to a criminal conviction,

an expungement "legally eliminates the record" of a past offense, thus "offer[ing] the possibility of sweeping aside a wide range of legal and socioeconomic consequences at once." *See* J.J. Prescott and Sonja B. Starr, *Expungement of Criminal Convictions: An Empirical Study*, 133(8) Harv. L. Rev. 2460, 2463 n.10 (2020); *see also id.* at 2468 (canvassing the sprawling harms of a criminal record, such as "exclusion from employment, obstacles to social integration, and a vast array of collateral legal consequences that often last a lifetime"). But by declining to seal the appellate records linked to an already-expunged conviction, this Court undermines the legislature's efforts to give people with criminal records a second chance. As logic dictates and scholarship confirms, an expunction has far less practical value if vestiges of the offense remain enshrined in publicly accessible appellate websites and databases. *See id.* at 2470.

In my view, when a party asks to seal appellate records for an expunged conviction, granting that relief is within this Court's constitutional authority and faithful to the purpose of expunctions. It ensures that North Carolinians have the second chance our legislature promised them. Because I would thus allow Mr. Vandergriff's request, I dissent from the denial of his motion.

Justice RIGGS joins in this dissenting opinion.

UNIVERSAL LIFE INSURANCE COMPANY	From N.C. Court of Appeals 23-274
v.	From Durham 22CVS2507
GREG E. LINDBERG	

No. 344PA23

ORDER

This matter is before the Court on plaintiff's motion for leave to withdraw its pending appeal. Defendant does not oppose the motion.

Plaintiff's motion for leave to withdraw its pending appeal is allowed. The Court of Appeals' decision is left undisturbed but stands without precedential value.

By order of the Court in Conference, this the 26th day of June 2024.

/s/ Riggs, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 28th day of June 2024.

s/Grant E. Buckner

Grant E. Buckner
Clerk of the Supreme Court

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

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2P24	State v. Steven Forrest Wade	Def's Pro Se PDR Under N.C.G.S. § 7A-31 (COA23-492)	Denied
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** Dissolved 2. Denied 3. Denied
6P23	Jose Cabrera and Jose Cabrera, Jr. v. Harvest Street Holdings, Inc., Shop & Go, LLC, Walter Cabrera, Luciano Cabrera, and Gregorio Paz	1. Plts' Petition for Writ of Certiorari to Review Decision of COA (COA21-328) 2. Plts' Petition for Writ of Certiorari to Review Order of Superior Court, Durham County 3. Plts' Motion for Withdrawal of Petition for Writ of Certiorari to Review Decision of the COA and Petition for Writ of Certiorari to Review Order of the Superior Court	1. --- 2. --- 3. Allowed
9P24	State v. Donte Derell Shine	Def's PDR Under N.C.G.S. § 7A-31 (COA23-106)	Denied
19P24	Joel Robertson v. Zaxby's of Knightdale	1. Plt's Pro Se Notice of Appeal Based Upon a Constitutional Question (COA23-513) 2. Plt's Pro Se PDR Under N.C.G.S. § 7A-31 3. Def's Motion to Dismiss Appeal 4. Def's Motion to Strike New Brief 5. Plt's Pro Se Motion for Appropriate Relief and Sanctions 6. Plt's Pro Se Motion for Sanctions	1. --- 2. Denied 3. Allowed 4. Dismissed as moot 5. Dismissed 6. Dismissed
22P24	State v. Bryan Aaron Berryman	Def's PDR Under N.C.G.S. § 7A-31 (COA23-225)	Denied
23A24	State v. Kendrick Keyanti Gregory	1. Def's Notice of Appeal Based Upon a Dissent (COA22-1034) 2. Def's PDR as to Additional Issues	1. 2. Denied
24P24	State v. Desmond Jakeem Bethea	Def's PDR Under N.C.G.S. § 7A-31 (COA22-932)	Denied
25P24	State v. Luis Fernando Saldana	1. Def's PDR Under N.C.G.S. § 7A-31 (COA23-51) 2. Def's Petition for Writ of Certiorari to Review Decision of the COA	1. Dismissed 2. Denied

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42P24	State v. Sha'le Monique Glenn	Def's Pro Se PDR Under N.C.G.S. § 7A-31 (COA23-201)	Denied
43P18-4	Jonathan H. Bynum v. Lincoln County Department of Social Services	1. Plt's Pro Se Motion to Proceed as a Veteran 2. Plt's Pro Se Motion for Cause of Action	1. Dismissed 2. Dismissed
47P24-2	In the Matter of M.M., E.M., J.M., S.M., C.M.	Respondent-Father's Pro Se Petition for Writ of Certiorari	Dismissed
52P24	State v. Thomas D. Alexander	1. Def's Pro Se Motion for Notice of Appeal (COAP23-750) 2. Def's Pro Se Motion for PDR 3. Def's Pro Se Petition for Writ of Certiorari to Review Order of the COA 4. Def's Pro Se Motion for Appointment of Appellant Counsel	1. Dismissed 2. Dismissed 3. Dismissed 4. Dismissed as moot
56P24	State v. Eric Ramond Chambers	1. State's Motion for Temporary Stay (COA22-1063) 2. State's Petition for Writ of Supersedeas 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **03/07/2024** 2. Allowed 3. Allowed
57P24	State v. Chad Coffey	1. State's Motion for Temporary Stay (COA22-883) 2. State's Petition for Writ of Supersedeas 3. State's PDR Under N.C.G.S. § 7A-31 4. Def's Notice of Appeal Based Upon a Constitutional Question 5. Def's PDR Under N.C.G.S. § 7A-31 6. State's Motion to Dismiss Appeal	1. Allowed **03/08/2024** Dissolved 2. Denied 3. Denied 4. --- 5. Denied 6. Allowed
60P24	State v. Phillip Daniel Hills	1. Def's Petition for Writ of Certiorari to Review Order of the COA (COA22-1001) 2. Def's Motion to Supplement Petition for Writ of Certiorari	1. Denied 2. Allowed
62P24	State v. Lorenzo Marcel Ingram	Def's Pro Se PDR Under N.C.G.S. § 7A-31 (COA23-207)	Denied

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69P24	True Homes, LLC and D.R. Horton, Inc., on behalf of themselves and all others similarly situated v. City of Greensboro	Def's PDR Under N.C.G.S. § 7A-31 (COA23-48)	Denied **Berger, J., recused**
74P19	State v. Justin Alexander Vandergriff	Def's Motion to Seal (COAP19-123)	Denied
74P24	State v. Jamario Clinton	Def's Pro Se PDR Under N.C.G.S. § 7A-31 (COA23-463)	Denied
76P24	State v. Christopher Dale Tate	Def's PDR Under N.C.G.S. § 7A-31 (COA23-11)	Denied
80P23-2	State v. Jim Robinson, III	1. Def's Pro Se Motion for Appropriate Relief 2. Def's Pro Se Motion to Proceed In Forma Pauperis	1. Dismissed 2. Allowed
81P23	In re Custodial Law Enforcement Agency Recordings	1. Petitioners' PDR Under N.C.G.S. § 7A-31 (COA22-446) 2. Petitioners' Motion to Amend PDR	1. Special Order 2. Dismissed as moot **Allen, J., recused**
81A24	State v. Mark Alan Miller	1. Def's Notice of Appeal Based Upon a Dissent (COA22-689) 2. Def's PDR as to Additional Issues	1. 2. Special Order
83P24	In the Matter of the Foreclosure of a Deed of Trust Executed by Raymond Carpenter and Rachel Carpenter in the Original Amount of $395,100.00 Dated March 21, 2005 Recorded in the Book 11298 at Page 02021 in the Wake County Registry, North Carolina, Substitute Trustee Services, Inc., Substitute Trustee	1. Respondent's Pro Se Motion for Petition for Discretionary Review 2. Respondent's Pro Se Motion to Withdraw	1. --- 2. Allowed

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91P24	Jordan N. Mitchell v. Sheriff Danny Rogers and Deputy Tim Patterson	Plt's Pro Se Motion for Notice of Appeal Upon Discretionary Review	Denied
92P24	Solomon Nimrod Butler v. North Carolina Department of Justice	1. Plt's Pro Se Petition for Writ of Mandamus 2. Plt's Pro Se Petition for Writ of Certiorari	1. Dismissed 2. Dismissed
95P24	State v. Monte Lovette Hudson	Def's PDR Under N.C.G.S. § 7A-31 (COA23-336)	Denied
96P24	State v. Jaron Monte Cornwell	1. State's Motion for Temporary Stay (COA23-36) 2. State's Petition for Writ of Supersedeas 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **04/22/2024** Dissolved 2. Denied 3. Special Order
97P19	State v. Justin Alexander Vandergriff	Def's Motion to Seal (COAP19-112)	Denied
103P17-4	State v. Earl Wayne Flowers	Def's Pro Se Petition for Writ of Habeas Corpus	Denied **05/23/2024**
105P24	State v. Neeadre Sonay Legen Chandler	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA23-634) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed
106P24	State v. Christopher D. Cromartie, Jr.	Def's Pro Se Motion for Writ of Certiorari	Dismissed
112P24	Franklin Garland, Plaintiff v. Orange County, Orange County Board of Commissioners, Defendants and Terra Equity, Inc., Defendant-Intervenor	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA23-588) 2. Plt's Motion for Temporary Stay 3. Plt's Petition for Writ of Supersedeas	1. 2. Allowed **05/23/2024** 3.
115P24	State v. Eric James Ducker	Def's PDR Prior to a Determination by the COA (COA24-373)	Denied
117P24	State v. Chad Julius Clark	Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Yancey County	Dismissed

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118P24	State v. Albert M. Anderson	Def's Pro Se Motion for Emergency Relief	Dismissed
120P24	Daniel T. Bryan and Lisa D. Bryan v. Barbara Snow Adams and Pamela Frederes	1. Plts' Pro Se Motion for Notice of Appeal (COA23-714) 2. Plt's Pro Se Motion for Extension of Time to File Brief	1. Dismissed *ex mero motu* 2. Dismissed as moot
122P24	State v. Jessiah James Hubbard	Def's Pro Se Petition for Writ of Habeas Corpus (COAP23-420)	Denied **05/24/2024**
126P23	In re Custodial Law Enforcement Agency Recording	1. Petitioners' PDR Under N.C.G.S. § 7A-31 (COA22-399) 2. Petitioners' Motion to Consolidate Appeals 3. Petitioners' Motion to Amend PDR	1. Special Order 2. Dismissed as moot 3. Dismissed as moot
126PA24	North Carolina Bar and Tavern Association, et al. v. Roy A. Cooper, III, in His Official Capacity as Governor of North Carolina	1. Def's PDR Under N.C.G.S. § 7A-31 (COA22-725) 2. Plts' Conditional PDR Under N.C.G.S. § 7A-31 3. Parties' Joint Motion to Set Briefing Schedule	1. Allowed **06/05/2024** 2. Allowed **06/05/2024** 3. Allowed **06/12/2024**
127P24	State v. Wallace Lyndale Hawthorne	1. Def's PDR Under N.C.G.S. § 7A-31 (COA23-906) 2. Def's Motion for Temporary Stay 3. Def's Petition for Writ of Supersedeas	1. Denied **05/29/2024** 2. Denied **05/29/2024** 3. Denied **05/29/2024**
128P19	State v. Justin Alexander Vandergriff	Def's Motion to Seal (COAP19-121)	Denied
128P24	In re The Matter of the Petition for Reinstatement of: Gregory Bartko	Petitioner's Pro Se PDR Under N.C.G.S. § 7A-31 (COA23-980)	Denied
129P24	Kenneth Hayes v. Hutchens Law Firm/PNC Bank/ Substitute Trustee Services	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 Certiorari to Review Order of Superior Court, Moore County	1. Denied **05/28/2024** 2. Denied **05/28/2024** 3. Denied **05/28/2024**

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130P24	Jason M. Sneed v. Charity A. Johnston	1. Plt's Motion for Temporary Stay (COA23-446) 2. Plt's Petition for Writ of Supersedeas 3. Plt's PDR Under N.C.G.S. § 7A-31	1. Allowed **05/30/2024** 2. 3.
133P24	State v. Leonard Roy Dean Holland	1. Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Davie 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
134P24	In re Earl J. Watson	Petitioner's Pro Se Motion for Notice and Petition for Redress Grievance and or Issue a Remedial Prerogative Writ	Dismissed
135P22-2	In the Matter of Jacqualyn Lanier	Petitioner's Pro Se Petition for Writ of Certiorari	Denied
135P24	Rudolph I. Lofton v. Brianna J. Virgil	Plt's Pro Se Petition for Writ of Habeas Corpus	Denied **06/05/2024**
137P24	State v. Joseph John Radomski, III	1. State's Motion for Temporary Stay (COA23-340) 2. State's Petition for Writ of Supersedeas	1. Allowed **06/07/2024** 2.
143P24	The North Carolina State Bar v. Mark Cummings	1. Def's Motion for Temporary Stay (COAP24-328) 2. Def's Petition for Writ of Supersedeas 3. Plt's Motion to Dissolve the Stay	1. Allowed **06/11/2024** 2. 3.
144P21-2	State v. Derrick Jervon Lindsay	1. Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Stanly County 2. Def's Pro Se Motion for Request f or Admissions	1. Denied 2. Dismissed
144P24	Dr. Darren Masier v. North Carolina State University	1. Respondent's Motion for Temporary Stay (COAP24-318) 2. Respondent's Petition for Writ of Supersedeas	1. Allowed **06/13/2024** 2.
149P24	State v. Matthew Thomas Primm	1. Def's Motion for Temporary Stay (COA23-949) 2. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed **06/12/2024** 2.

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153A23	Carl E. Merrell, et al. v. James M. Smith, et al. ——————— Jeffery A. Strack, et al. v. James M. Smith et al. ——————— Jeffrey Neal Cochrane and Gary Alan Cochrane, Administrators of the Estate of Ralph Neal Cochrane v. James M. Smith, et al. ——————— Charles David Short v. James M. Smith, et al.	Plts' Motion to Dismiss Appeals	Allowed **05/23/2024**
159P24	The North Carolina State Bar v. Martin Musinguzi, Attorney	1. Def's Motion for Temporary Stay (COAP24-92) 2. Def's Petition for Writ of Supersedeas	1. Allowed **06/14/2024** 2.
165P24	State of North Carolina v. Philip Anthony Montanino	1. State's Motion for Temporary Stay (COA23-409) 2. State's Petition for Writ of Supersedeas	1. Allowed **06/21/2024** 2.
166A24	State v. Jonathan Ray Lail	1. State's Motion for Temporary Stay (COA23-845) 2. State's Petition for Writ of Supersedeas	1. Allowed **06/26/2024** 2.
169P23-3	State v. Christopher Leon Minor	1. Def's Pro Se Petition for Writ of Habeas Corpus 2. Def's Pro Se Motion to Dismiss 3. Def's Pro Se Motion to Proceed as Indigent 4. Def's Pro Se Motion for Custody Hearing 5. Def's Pro Se Motion for Post Conviction Discovery	1. Denied **06/05/2024** 2. Dismissed **06/05/2024** 3. Allowed **06/05/2024** 4. Dismissed **06/05/2024** 5. Dismissed **06/05/2024** **Riggs, J., recused**

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169P24	State v. Jeanie Kassandra Ditty	1. Def's Motion for Temporary Stay (COA23-141) 2. Def's Petition for Writ of Supersedeas	1. Allowed **06/26/2024** 2. **Riggs, J., recused**
173PA23	Southland National Insurance Corporation, et al. v. Lindberg, et al.	Parties' Joint Motion for Limited Remand (COA22-1049)	Special Order
216P23	State v. Scott Lee Bridges	Def's PDR Under N.C.G.S. § 7A-31 (COA22-208)	Denied
238A23	State v. Pedro Isaias Calderon	1. State's Motion for Temporary Stay (COA22-822) 2. State's Petition for Writ of Supersedeas 3. State's Notice of Appeal Based Upon a Dissent 4. State's PDR as to Additional Issues 5. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed **09/20/2023** 2. Allowed **09/28/2023** 3. --- 4. Allowed 5. Allowed
239P23	Wilson County Board of Education v. Retirement Systems Division, Department of State Treasurer, TSERS Board of Trustees; Tim Moore, North Carolina Speaker of the House; and Philip E. Berger, President Pro Tempore of the North Carolina Senate	1. Petitioner's Notice of Appeal Based Upon a Constitutional Question (COA22-1027) 2. Petitioner's PDR Under N.C.G.S. § 7A-31 3. Respondents' Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed
243P19-3	State v. Gregory K. Parks	1. Def's Pro Se Motion for PDR (COAP21-277) 2. Def's Pro Se Petition for Writ of Certiorari to Review Order of the COA	1. Dismissed 2. Dismissed
252A23	Tiffany Howell, et al. v. Roy A. Cooper, III, et al.	1. Notice of Appeal Based Upon a Dissent 2. Defs' (State of North Carolina and Roy A. Cooper III) PDR as to Additional Issues (COA22-571)	1. --- 2. Allowed **05/30/2024**

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264A23	Daniel Jones v. J. Kim Hatcher Insurance Agencies Inc.; HXS Holdings, Inc.; GeoVera Specialty Insurance Company; and GeoVera Advantage Insurance Services, Inc.	1. Def's (J. Kim Hatcher Insurance Agencies Inc.) Notice of Appeal Based Upon a Dissent (COA22-1030) 2. Plt's PDR Under N.C.G.S. § 7A-31	1. 2. Special Order
293P23-2	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 PDR Under N.C.G.S. § 7A-31 4. Def's Conditional PDR Under N.C.G.S. § 7A-31 5. Def's Motion to Dissolve Temporary Stay	1. Allowed **12/13/2023** 2. Allowed 3. Allowed 4. Denied 5. Denied **05/28/2024**
305P97-11	State of North Carolina v. Egbert Francis, Jr.	Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Wake County	Dismissed
310P23-2	State v. Rocky J. Bryant	Def's Pro Se Motion for Removal of Senior Resident Superior Court Judge	Dismissed **Riggs, J., recused**
315P23	Philip Richard Bulliard, Philip Richard Bulliard, Trustee for the PRB Living Trust v. Highland Gate Homeowners Association, Inc., et al.	Plt's Pro Se PDR Under N.C.G.S. § 7A-31 (COA23-452)	Denied
316P23	State v. David Mark Fields	Def's PDR Under N.C.G.S. § 7A-31 (COA23-155)	Denied
317PA14-3	State v. Rodney Nigee Pledger Taylor	Def's Petition for Writ of Certiorari to Review Order of the COA (COA23-5921)	Dismissed
318P23	Harnett County Board of Education v. Retirement Systems Division, Department of State Treasurer	Petitioner's PDR Under N.C.G.S. § 7A-31 (COA22-750)	Denied

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323P23-3	Hamza Tebib v. Judge Caroline Burnette	1. Plt's Pro Se Motion for Complaint 2. Plt's Pro Se Petition for Writ of Certiorari 3. Plt's Pro Se Motion for PDR	1. Dismissed 2. Dismissed 3. Dismissed
325P23	Traci C. Kirkman, as Administrator of the Estate of Chad Wayne Kirkman, Deceased v. Rowan Regional Medical Center, Inc., d/b/a Novant Health Rowan Medical Center; and Mindy P. France, LPC	Plt's PDR Under N.C.G.S. § 7A-31 (COA23-282)	Denied **Riggs, J., recused**
327P22-2	Stephen Lawing and Donna Lawing v. Chadwick P. Miller, C.P. Miller, Inc., Danny Edward Eaton, II, and Danny Eaton Plumbing, LLC	1. Plts' Pro Se Motion to Stay All Other Proceedings in this Action 2. Plts' Pro Se PDR Under N.C.G.S. § 7A-31 (COA22-99)	1. Denied **05/01/2024** 2. Denied
329A09-7	State v. Martinez Orlando Black	Def's Pro Se Petition for Writ of Certiorari to Review Order of the COA (COAP23-10)	Dismissed **Riggs, J., recused**
330P23	State v. Sean Ruffolo	Def's PDR Under N.C.G.S. § 7A-31 (COA23-178)	Denied
331P23	State v. Kajuan Dyshawn Hamilton	1. State's Motion for Temporary Stay (COA22-847) 2. State's Petition for Writ of Supersedeas 3. Def's Notice of Appeal Based Upon a Constitutional Question 4. Def's PDR Under N.C.G.S. § 7A-31 5. State's Motion to Dismiss Appeal 6. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **12/11/2023** Dissolved 2. Denied 3. --- 4. Denied 5. Allowed 6. Special Order
343P23-2	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)	Dismissed

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344PA23	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 4. Plt's Motion for Leave to Withdraw Appeal	1. Allowed **12/22/2023** Dissolved 2. Allowed **05/21/2024** Dissolved 3. Special Order **05/21/2024** 4. Special Order
368A22-2	U.S. Bank Trust, as Trustee for LSF10 Master Participation Trust v. Raleigh G. Rogers, Dreama Louise Rogers, & Jonathan J. Rogers	1. Def's (Raleigh Rogers) Pro Se Motion for Notice of Appeal Constitutional Question (COA23-326) 2. Def's (Raleigh Rogers) Pro Se Motion for Notice of Appeal Discretionary Review 3. Def's Pro Se Motion to Amend Notice of Appeal 4. Def's Pro Se Conditional Petition for Writ of Certiorari to Review Order of the COA	1. Dismissed *ex mero motu* 2. Denied 3. Dismissed as moot 4. Dismissed as moot
387P18-3	State v. Jashawn Arnez Summers	1. Def's PDR Under N.C.G.S. § 7A-31 (COA22-980) 2. Attorney J. Clark Fischer's Motion to Withdraw as Counsel of Record for Defendant	1. Denied 2. Allowed **Riggs, J., recused**
442PA20-2	State v. James Ryan Kelliher	1. State's Motion for Temporary Stay (COA23-691) 2. State's Petition for Writ of Supersedeas 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **06/14/2024** 2. 3.
449P11-29	In re Charles Everette Hinton	Petitioner's Pro Se Motion for Petition to Depose Adverse Witnesses and to Perpetuate Testimonies by Written Interrogatories	Dismissed
469P09-3	State v. James Edward Downey	Def's Pro Se Motion for Reconsideration of Order	Dismissed
536P20-3	State v. Siddhanth Sharma	Def's Pro Se Petition for Writ of Certiorari to Review Order of the COA (COAP24-247)	Denied

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

28 JUNE 2024

580P05-31	In re David Lee Smith	1. Def's Pro Se Motion for Justice Allen's Recommendation for Governor Cooper's Executive Order for Declaration and Order of Transfer to (3) Judge Panel for Process (COA04-1033)	1. Dismissed
		2. Def's Pro Se Motion for Demand for Chief Justice Newby to Issue Emergency Recommendation that N.C. Governor Cooper Issue an Emergency Executive Order Declaring Act of Attempted Genocide	2. Dismissed
		3. Def's Pro Se Motion for PDR	3. Dismissed **Riggs, J., recused**

ALISON ARTER
v.
ORANGE COUNTY, STEPHEN M. BURT, SHARON C. BURT,
JODI BAKST, AND REAL ESTATE EXPERTS

No. 229A23

Filed 23 August 2024

Zoning—ordinance—land use buffer—conflicting text and table—interpretive provision—text controls

A county board of adjustment properly decided against installing a buffer between petitioner's property and a road being built next to an adjacent residential subdivision, where the county's zoning ordinance only required buffers between properties from different zoning districts and both of the properties involved here were in the same "R-1 residential" zoning district. Although the ordinance included a table suggesting that buffers were required based on either the zoning districts or the land uses of the subject and adjacent properties, the ordinance's introductory provision eliminated any internal ambiguity by clarifying that where the text and a table contradicted each other, the text would control.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 290 N.C. App. 128 (2023), affirming an order entered on 23 June 2022 by Judge R. Allen Baddour, Jr. in Superior Court, Orange County. Heard in the Supreme Court on 10 April 2024.

Petesch Law, by Andrew J. Petesch, for petitioner-appellant.

James Bryan and Joseph Herrin for respondent-appellee Orange County.

The Brough Law Firm, PLLC, by Robert E. Hornik, Jr., for respondent-appellees Stephen M. Burt, Sharon C. Burt, Jodi Bakst, and Real Estate Experts.

DIETZ, Justice.

Local governments have a responsibility to enact clear, unambiguous zoning rules. The increasing complexity of many local zoning ordinances

can make that a difficult task. Zoning ordinances often contain pages upon pages of indices, headings, text, tables, and illustrative figures, all cross-referencing each other. Ensuring that this thicket of rules is free from ambiguity and internal inconsistency is a daunting task.

Orange County sought to address this dilemma through an interpretive rule in its zoning ordinances. An introductory provision in those ordinances states that the many headings, tables, figures, and illustrations contained within are merely "provided for convenience and reference" and if there is "any difference of meaning or implication between the text of this Ordinance and any heading, drawing, table, figure, or illustration, the text controls."

This case concerns a conflict between the text and a corresponding table in Orange County's zoning ordinances. As explained in more detail below, we agree with the Court of Appeals majority, which held that the interpretive instruction quoted above resolves the conflict, leaving no ambiguity in meaning. We therefore affirm the decision of the Court of Appeals.

Facts and Procedural History

In the mid-2000s, Alison Arter purchased land from Stephen and Sharon Burt in Orange County. The property had a home and a horse farm. Arter continued to operate the horse farm after buying the property. The Burts continued to own an adjacent property.

In 2020, a real estate developer applied to subdivide the Burts' property and construct a number of homes. At the time, both Arter's property and the Burts' property were zoned "R-1" residential under Orange County's zoning ordinances. Because of topography and water features on the Burts' property, the developer planned to build the main road leading to the new subdivision along the Burts' side of the property line separating that property from Arter's property.

Upon learning of the plans for the subdivision and, in particular, the road next to her property line, Arter raised concerns that the road would disrupt activities on her horse farm. Arter submitted letters to Orange County asserting that the developer had an obligation, based on the applicable zoning ordinances, to build a thirty-foot buffer between the subdivision's road and her property.

The Orange County Planning & Inspections Department rejected Arter's arguments, determining that the county's zoning ordinances did not "require the establishment of a land use buffer when parcels have the same/similar general use zoning designations."

Arter appealed to the Orange County Board of Adjustment, which entered a written order upholding the department's decision. Arter then sought judicial review in Superior Court. After a hearing, the court affirmed. Arter then appealed to the Court of Appeals.

The Court of Appeals issued a divided decision. The majority held that the county's zoning ordinances only required buffers between different zoning districts and, because both properties were in the same R-1 zoning district, no buffers were required. *Arter v. Orange County*, 290 N.C. App. 128, 131 (2023). The majority therefore affirmed the lower court decision.

The dissent argued that, when also considering a table accompanying the text that offered contradictory guidance, buffers are required "based on the zoning districts *or* land uses of the subject and adjacent properties." *Id.* at 136 (Carpenter, J., dissenting). Thus, the dissent argued, the case should be remanded for further fact-finding concerning the land use of the properties. *Id.*

Arter then filed a notice of appeal with this Court based on the dissent.

Analysis

In this type of zoning appeal, the trial court sits as an appellate court and applies "de novo review to alleged errors of law, including challenges to a board of adjustment's interpretation of a term in a municipal ordinance." *Morris Commc'ns Corp. v. City of Bessemer City Zoning Bd. of Adjustment*, 365 N.C. 152, 155 (2011). On further appellate review, both the Court of Appeals and this Court likewise apply de novo review to legal questions concerning the proper interpretation of a disputed provision in a zoning ordinance. *Id.*

Courts interpret zoning ordinances largely in the same manner as statutes and other written laws. *Westminster Homes, Inc. v. Town of Cary Zoning Bd. of Adjustment*, 354 N.C. 298, 303 (2001). We begin with the text of the statute and, if that text is clear and unambiguous, we "conclude that the legislature intended the statute to be implemented according to the plain meaning of its terms." *Lanvale Props., LLC v. County of Cabarrus*, 366 N.C. 142, 154 (2012).

When a zoning ordinance's language is ambiguous, we resort to other accepted tools of statutory construction to "ascertain and effectuate the intent of the legislative body." *Coastal Ready-Mix Concrete Co. v. Bd. of Comm'rs*, 299 N.C. 620, 629 (1980). The only difference between traditional statutory interpretation and the interpretation of

zoning laws is a special rule of construction: because zoning laws "are in derogation of common law rights," they "cannot be construed to include or exclude by implication that which is not clearly their express terms." *Yancey v. Heafner*, 268 N.C. 263, 266 (1966). Moreover, when there are "well-founded doubts" about the proper meaning of a zoning law—that is to say, an ambiguity—courts must choose the reasonable interpretation that favors "the free use of property." *Id.*

With these principles in mind, we turn to the disputed portions of Orange County's zoning ordinances. The crux of this case is a conflict between the text of the applicable ordinance and the contents of a corresponding table that purports to complement that text.

Section 6.8.6 of Orange County's zoning ordinances is titled "Land Use Buffers." Subsection (A) contains a purpose statement indicating the buffers are intended to screen certain land uses from other "incompatible" uses. Subsection (B) contains the operative text stating that buffers are required based on the respective zoning districts of the properties:

> **6.8.6 Land Use Buffers**
>
> **(A) Purpose**
>
> Land use buffers are intended to screen and buffer lower intensity/density uses from incompatible higher intensity/density land uses. Buffers reduce adverse visual effects, as well as noise, dust, and odor.
>
> **(B) Applicability**
>
> Land use buffers will be required based on the zoning district of the proposed use and the zoning district of the adjacent uses.

Orange County Unified Development Ordinance (UDO) art. 6, § 6.8.6.

Following another subsection discussing the location of required buffers, the ordinance then contains subsection (D) which is titled "Land Use Buffer Table" and includes the following table:

TABLE 6.8.6.D: LAND USE BUFFERS

		ZONING OR USE OF ADJACENT PROPERTIES											
		RB, AR, RI	R-2, R-3	R-4, R-5	R-8, R-13	HP-CD	O/RM, NC-2, LC-1	CC-3,GC-4, EC-5	EI, I-1, I-2, I-3, PID	INTERSTATE HIGHWAY	ARTERIAL STREET	COLLECTOR STREET	ACTIVE FARM/ AGRICULTURE
ZONING OR USE OF SUBJECT PROPERTY	RB, AR, R1	-	A	A	B	F	E	F	F	F	E	B	B
	R-2 & R-3	A	-	A	B	F	D	F	F	F	D	B	B
	R-4 & R-5	A	A	-	B	F	C	E	E	F	C	B	B
	R-8 & R-13	B	B	B	-	F	B	D	D	F	C	B	B
	HP-CD	F	F	F	F	-	F	F	F	F	F	F	F
	O/RM, NC-2, LC-1	E	D	C	B	F	-	-	-	F	B	B	D
	CC-3, GC-4, EC-5	F	F	E	D	F	-	-	-	F	B	B	D
	EI, I-1, I-2, I-3, PID	F	F	E	E	F	-	-	-	F	B	B	D
	AS, ASE-CD	D	A	A	A	F	A	A	A	F	B	B	B

Note: MPD-CD, R-CD, and NR-CD buffers to be determined at time of approval.

Id. § 6.8.6(D).

This table lists each of the zoning districts identified in other portions of the ordinances. *See id.* art. 3. The rows represent the zoning districts of the "subject property" and the columns represent the zoning districts of the "adjacent properties." The letters in the table correspond to the type of buffer required for each possible combination of zoning districts. *Id.* § 6.8.6(F).

There are two noteworthy points about this Land Use Buffer Table in subsection (D). First, when comparing zoning districts to each other, the table is consistent with the operative text in subsection (B), which states that buffers are "required based on the zoning district of the proposed use and the zoning district of the adjacent uses." *Id.* § 6.8.6(B). The table identifies the type of buffer required for each possible combination of zoning districts. Additionally, whenever the table compares a zoning district to itself, the notation in the table is simply a dash, indicating that no buffer is required. *Id.* All of this is consistent with the text of subsection (B).

But there is a second, conflicting portion of the table. In addition to listing each possible zoning district in the columns, the table also includes four categories that are not zoning districts: Interstate

Highway, Arterial Street, Collector Street, and Active Farm/Agriculture. *Id.* § 6.8.6(D). This sets up an internal conflict within the table. Suppose a property is zoned R-4 and the adjacent property is zoned R-2. The table indicates that this combination requires buffer type "A". But what if that adjacent R-2 property is an active farm? The table requires buffer type "B" between a property zoned R-4 and an active farm. Thus, in this example, the table is internally inconsistent, requiring both buffer types "A" and "B".

Moreover, there is a broader conflict between the table and the text in subsection (B). The text states that buffers are required based on the *zoning districts* of the properties. *Id.* § 6.8.6(B). The additional categories in the table—highways, active farms, and so on—are not zoning districts. Thus, requiring a buffer based on these additional categories conflicts with the textual requirement of subsection (B).

Ordinarily, these types of internal inconsistencies would create ambiguity that courts must resolve through the interpretive rules described above. But a "fundamental rule of statutory construction is that when the legislature has erected within the statute itself a guide to its interpretation, that guide must be considered by the courts in the construction of other provisions of the act which, in themselves, are not clear and explicit." *Williams v. Williams*, 299 N.C. 174, 180 (1980).

Of course, these interpretive guides cannot override this Court's precedent governing how we interpret the law, because it is exclusively the judiciary's role "to say what the law is." *White v. Worth*, 126 N.C. 570, 583 (1900) (quoting *Marbury v. Madison*, 5 U.S. 137, 177 (1803)); *see also* N.C. Const. art. IV, § 12. But legislative bodies are free to define terms, provide grammatical rules, and take other steps to eliminate potential ambiguity in the text of written laws. *See Williams*, 299 N.C. at 179–80.

Here, Orange County's zoning ordinances contain this sort of permissible interpretive guide. Section 1.1.12 states that when there is a conflict between the text of an ordinance and a table, the text controls:

> Headings and illustrations contained herein are provided for convenience and reference only and do not define or limit the scope of any provision of this Ordinance. In case of any difference of meaning or implication between the text of this Ordinance and any heading, drawing, table, figure, or illustration, the text controls.

Orange County UDO art. 1, § 1.1.12 (2024).

This interpretive provision removes any potential conflict between the text and the table. As the provision plainly states, "the text controls." The text of the ordinance provides that buffers are "based on the zoning district of the proposed use and the zoning district of the adjacent uses." *Id.* § 6.8.6(B). Thus, in discerning the meaning of these ordinances, we ignore the four columns of the table that are not zoning districts. A landowner's obligation to install a "land use buffer" under this ordinance is based solely on the zoning district of the landowner's property and the zoning district of the adjacent property.

Here, the parties do not dispute that the Burts' property and Arter's property are both zoned R-1. Consulting the corresponding portion of the Land Use Buffer Table that governs buffers between zoning districts, no buffer is required because the zoning districts are the same. *Id.* § 6.8.6(D).

Accordingly, the Court of Appeals majority properly held that the unambiguous language of the relevant zoning ordinances did not require any buffer between these two properties.

Conclusion

We affirm the decision of the Court of Appeals.

AFFIRMED.

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

BOTTOMS TOWING & RECOVERY, LLC
v.
CIRCLE OF SEVEN, LLC

No. 189A22

Filed 23 August 2024

Appeal and Error—appeal to Supreme Court—based on Court of Appeals dissent—new theory asserted in dissent—review declined

In an appeal to the Supreme Court based on a dissent from the Court of Appeals, where a business sought to overturn the trial court's order upholding a towing company's statutory lien on one of the business's trucks and authorizing the sale of the truck, the Supreme Court declined to review the dissent's theory of the case—that the towing company unlawfully converted the truck for personal use and, therefore, the lien should have been reduced based on the truck's loss in fair market value—because it was not first raised and argued by the parties and addressing it would require access to evidence that no party presented at trial and findings of fact that the trial court never made.

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, 283 N.C. App. 446 (2022), affirming an order and judgment entered on 26 February 2021 by Judge Quentin T. Sumner in Superior Court, Nash County. Heard in the Supreme Court on 18 April 2024.

Fields & Cooper, PLLC, by Ryan S. King and John S. Williford Jr., for petitioner-appellee.

Q Byrd Law, by Quintin D. Byrd, for respondent-appellant.

DIETZ, Justice.

This appeal involves a dispute over a few thousand dollars for a truck that got towed. In the trial court and the Court of Appeals, the truck's owner raised a series of straightforward legal arguments about

the validity and amount of the towing company's lien. The lower courts rejected those arguments.

The appeal then came to this Court based on a dissent at the Court of Appeals that does not have anything to do with the party's arguments. The dissent concocted a new theory for the truck owner and reasoned that, based on that new theory, the trial court erred.

The dissent's theory of the case is not properly before this Court. We do not review issues raised by a Court of Appeals dissent that were not first raised and argued by the parties. *See M.E. v. T.J.*, 380 N.C. 539, 562 (2022). This rule is particularly apt here because addressing the dissent's theory requires evidence that no party presented below and fact-finding that never took place in the trial court. Accordingly, we decline to address the matters raised by the dissent and affirm the decision of the Court of Appeals.

Facts and Procedural History

Circle of Seven is a limited liability company that has now ceased operations. Several years ago, Circle of Seven left a Dodge Ram truck on property that it lost in a foreclosure sale. At the time, Circle of Seven's sole managing member, Sainte Deon Robinson, was incarcerated after pleading guilty to federal crimes. Robinson left Eulanda Elliot, a Circle of Seven employee, in charge of the company's affairs when he went to prison.

The purchaser of the foreclosed property hired Bottoms Towing & Recovery to tow the Dodge Ram away from the property. Bottoms Towing later petitioned to sell the truck to satisfy the lien for unpaid towing and storage expenses. Circle of Seven opposed the sale and challenged the amount of the purported lien.

The trial court held a hearing to address the contested issues. Relevant to this appeal, Circle of Seven presented the testimony of both Robinson and Elliot. Elliot testified that she repeatedly attempted to pick up the truck from Bottoms Towing but was unable to do so because Bottoms Towing did not believe she had sufficient proof that she was authorized to take the truck. Circle of Seven asked the trial court to reduce the amount of the lien by removing storage costs for the period after Bottoms Towing refused to release the truck to Elliot.

In addition, Robinson testified that he had the truck serviced shortly before it was towed and had documentation indicating the truck's mileage at that time was roughly 81,000 miles. Later, when Circle of Seven sought to reacquire the truck, the mileage was roughly 90,000 miles. Bottoms Towing also had the truck serviced and made cosmetic changes such as

adding chrome wheel covers and removing vinyl decals. Circle of Seven argued that this evidence proved Bottoms Towing had used the truck without authorization. It argued that the lien amount should be reduced because Bottoms Towing cannot charge for storage time when the towing company was improperly using the truck rather than simply storing it.

After the hearing, the trial court entered an order and judgment reducing the lien amount by $1,427.14 due to unnecessary maintenance and cosmetic alterations. The trial court also found that Bottoms Towing drove the truck for approximately 250 miles when the truck should have been stored, and therefore further reduced the lien by $62.50 to account for the time when Bottoms Towing used the truck.

Circle of Seven appealed, arguing that the trial court had not reduced the lien by a sufficient amount based on the evidence. The Court of Appeals issued a divided opinion affirming the trial court's order and judgment. *Bottoms Towing & Recovery, LLC v. Circle of Seven, LLC*, 283 N.C. App. 446 (2022). The majority held that competent evidence supported the trial court's findings and corresponding conclusions concerning the appropriate amount of the lien. *Id.* at 455–56.

The dissent argued that Bottoms Towing unlawfully converted the truck for personal use and that the case should be remanded for the trial court to reduce the lien based on the truck's loss in fair market value as a result of the conversion. *Id.* at 457–58 (Tyson, J., concurring in the result in part and dissenting in part).

Circle of Seven timely filed a notice of appeal to this Court based on the dissent. It also petitioned for discretionary review, asking this Court to review the issues that it raised in the lower courts but that the dissent did not address. This Court denied the petition for discretionary review as to additional issues.

Analysis

We begin our analysis by examining the scope of the issues brought before us based on the dissent. Because we denied Circle of Seven's petition for discretionary review, the sole basis for our appellate jurisdiction in this case is the dissent at the Court of Appeals. *See* N.C.G.S. § 7A-30(2) (2023).[1]

1. The General Assembly repealed the portion of N.C.G.S. § 7A-30 that conferred a right to appeal to the Supreme Court based on a Court of Appeals dissent. Current Operations Appropriations Act of 2023, S.L. 2023-134, § 16.21(d). This appeal was filed and docketed at the Court of Appeals before the effective date of that act.

Under Rule 16(b) of the Rules of Appellate Procedure, our jurisdiction in this circumstance is limited to those issues "specifically set out in the dissenting opinion as the basis for that dissent." N.C. R. App. P. 16(b). We recently emphasized that this requirement limits our review solely to those issues for which the dissent provides "reasoning." *Cryan v. Nat'l Council of YMCAs*, 384 N.C. 569, 575 (2023); *Morris v. Rodeberg*, 385 N.C. 405, 415 (2023). On matters where the dissent does not provide any reasoning, this Court lacks jurisdiction unless we separately allow discretionary review of those additional issues. *See Cryan*, 384 N.C. at 575.

Here, the dissenting judge concurred in the majority's "conclusion that petitioner possesses a valid statutory lien" but asserted that the trial court "erred in its calculation of the offset to reduce the lien amount due to Bottoms' unlawful conversion and personal use" of the truck. *Bottoms Towing*, 283 N.C. App. at 456 (Tyson, J., concurring in the result in part and dissenting in part). The dissent reasoned that Bottoms Towing's unauthorized use of the truck while it should have been stored awaiting pickup was a form of unlawful "conversion." *Id.* at 457. "Our General Statutes should provide a statutory remedy and offset" for this unlawful conversion, the dissent reasoned. *Id.*

Because the dissent believed the trial court's reduction of the claimed lien amount was not a permissible way to "compute this offset value against the lien," the dissent would have reversed the trial court's order and judgment and remanded for the trial court to assess "the loss in value" of the truck—in other words, an offset based on the reduction in the truck's "book value" due to Bottoms Towing's unauthorized use. *Id.* at 457–58.

The dissent provided extensive reasoning for this position, and we therefore have appellate jurisdiction over the issue. *See Cryan*, 384 N.C. at 575. But possessing appellate jurisdiction does not automatically mean the issue is one that we can properly address. It is well-settled that "the Court of Appeals may not address an issue not raised or argued by [the appellant] for it is not the role of the appellate courts to create an appeal for an appellant." *In re R.A.F.*, 384 N.C. 505, 512 (2023) (cleaned up). This rule applies equally to both the Court of Appeals majority and the dissent.

Indeed, even where the dissent raises issues that would void the trial court's judgment, this Court has declined to examine those issues because the parties did not raise them at the Court of Appeals. *See M.E.*, 380 N.C. at 564. In *M.E.*, for example, the dissent argued that the plaintiff failed to join necessary parties under Rule 19 of the Rules of Civil

Procedure, which rendered the trial court's order void *ab initio*. *Id.* at 551–52. We held that "the necessary joinder issue was raised neither by defendant nor by the trial court *ex meru motu* and was not mentioned until the Court of Appeals dissent. Accordingly, this issue is not properly before this Court, and we therefore decline to consider it." *Id.* at 564.

Here, Circle of Seven never raised a conversion argument, never argued that Bottoms Towing's unauthorized use had reduced the value of the truck, and never presented any evidence as to the value of the truck. This makes sense because Circle of Seven operated under entirely different legal theories in the courts below. The company argued that the applicable statute only permitted a lien for unpaid amounts related to the towing and storing of the truck. *See* N.C.G.S. § 44A-2 (2023). As a result, Circle of Seven argued that the lien must be reduced for two reasons.

First, it argued that it sent Elliott, its authorized representative, to pick up the truck, but Bottoms Towing refused to release it. Thus, it argued that the lien "amount is limited to the period of 5 March 2021 through 27 March 2021, representing the date of the tow through the date Ms. Elliott contacted Petitioner to retrieve the Truck."

Second, Circle of Seven argued that the truck's mileage and other evidence showed Bottoms Towing had driven the truck for personal use. This, it argued, meant the trial court should determine when the truck was being used, rather than stored, and "reduce the amount of the lien" because Bottoms Towing "could not be said to have been storing the Truck when using it for personal use."

Importantly, Circle of Seven did not bring a claim for conversion and did not make any argument that Bottoms Towing diminished the value of the truck—the sole basis for the dissent in this case. That issue "was not mentioned until the Court of Appeals dissent." *See M.E.*, 380 N.C. at 564.

If we were to review this issue, it would be unjust for a number of reasons. First, and most obviously, it would require departing from the well-settled procedural rule that appellate courts may not address issues not raised by the parties because "it is not the role of the appellate courts to create an appeal for an appellant." *In re R.A.F.*, 384 N.C. at 512 (cleaned up). The public, and other jurisdictions that may be called upon to recognize our state's court judgments, expect us to apply these procedural rules uniformly to all litigants who appear before us.

Second, Bottoms Towing never had an opportunity to disprove the fact-intensive assertions made by the dissent. There is no evidence in

the record concerning the "book value" of the truck or how much that value depreciated, or any of the other facts necessary to calculate the "damages" that the dissent describes based on "the difference between the market value immediately before the injury and the market value immediately afterwards." *Bottoms Towing*, 283 N.C. App. at 457–58.

The dissent's approach to this case would effectively require the trial court to start over from the beginning—conduct another hearing, receive evidence on the change in the truck's fair market value, and then enter an entirely different order. Our rules of preservation exist precisely to discourage this sort of unfair do-over in the trial court. Circle of Seven had the opportunity to present this evidence to the trial court and the opportunity to raise this issue in its appellate briefing to the Court of Appeals. It did neither—understandably so, because Circle of Seven had different (and, to be fair, more appropriate) arguments to contest the claimed storage charges under the language of the applicable statute. *See* N.C.G.S. § 44A-2. This is a statutory proceeding to authorize the sale of a motor vehicle under a lien. The dissent's theory concerns affirmative claims for conversion or negligence on the part of a bailee. These are claims that must be raised in a complaint or counterclaim, not as statutory defenses to the sale proceeding.

Accordingly, the conversion theory raised by the dissent is not properly before us and we decline to address it. Because this is the only issue before this Court (as we denied Circle of Seven's petition for discretionary review as to additional issues), our review is at an end.

Conclusion

We affirm the decision of the Court of Appeals.

AFFIRMED.

Justice EARLS dissenting.

Circle of Seven, LLC and Bottoms Towing & Recovery, LLC have a genuine property dispute which is properly before this Court based on a dissent in the Court of Appeals pursuant to N.C.G.S. § 7A-30(2), a statute that has now been amended to eliminate such appeals in the future. *See* N.C.G.S. § 7A-30(2) (2023); Current Operations Appropriations Act of 2023, S.L. 2023-134, § 16.21(d)–(e), 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).

Bottoms Towing contends that it acted in good faith when it towed and stored Circle of Seven's truck and that it properly seeks reimbursement for the associated fees by way of a lien on the truck. Circle of Seven contends that despite repeated attempts to recover possession of the truck, Bottoms Towing improperly refused to release it and not only purposefully amassed months of storage fees, which it then used as the basis for the lien, but also made unauthorized changes to the truck and used it extensively for personal purposes, driving it almost 10,000 miles while it was supposedly in storage. At the trial level, considerable evidence was introduced by Circle of Seven to support its version of events. The legal question for the appellate courts is whether the trial court applied the law correctly to the facts it found to be established by the evidence. I dissent because in my view this Court takes a hyper-technical and unjustifiably narrow approach to determining whether Circle of Seven made the necessary legal arguments regarding conversion at trial and whether the dissenting opinion in the Court of Appeals legitimately addressed issues properly before it.

The majority declines to reach the merits of the appeal because, in its view, Circle of Seven's evidence about Glenn Bottoms's unauthorized personal use of the truck and the impact that should have on the proper amount of any lien on the truck did not raise the issue of conversion. However, in fact, Circle of Seven did raise the issue of conversion at the trial court and with the Court of Appeals, it just did not use that specific terminology. Recently, this Court professed a disinclination to rest on mere technicalities of this nature. *See State v. Singleton*, 900 S.E.2d 802, 823–24 (N.C. 2024) ("As we recognized in 1898, we reiterate that '[t]he practical sense of the age demands' that technicalities should not carry the day . . . ." (first alteration in original) (quoting *State v. Hester*, 122 N.C. 1047, 1050 (1898))). It is unfair to do so here.

In addition, the majority's decision not to reach the merits of this case rests on a principle that is only selectively followed. Contrary to the majority's authoritative-sounding recitation of a supposedly cardinal rule of appellate practice, this Court does address issues and decide cases on grounds that were not raised or argued below. *See*, *e.g.*, *Stark ex rel. Jacobsen v. Ford Motor Co.*, 365 N.C. 468, 480, 483 (2012) (engaging in a sufficiency of the evidence analysis not ruled on by the Court of Appeals); *Ha v. Nationwide Gen. Ins. Co.*, No. 312A19-2, slip op. at 10 (N.C. Aug. 23, 2024) (deciding the case on "narrower grounds" not raised by the parties); *Old Republic Nat'l Title Ins. Co. v. Hartford Fire Ins. Co.*, 369 N.C. 500, 507, 510 (2017) (analyzing a judicial estoppel issue that was not briefed or argued by the parties); *N.C. Farm Bureau Mut.*

Ins. Co. v. Hebert, 385 N.C. 705, 715–16 (2024) (addressing "whether [a] defendant may stack and compare in order to activate his [underinsured motorist] coverage" despite the parties never having briefed or argued this theory below). This makes the majority's decision not to rule on the merits in this case all that more egregious.

I. Background

In 2018, Sainte Deon Robinson—the head of Circle of Seven, LLC—was charged with and pled guilty to a federal tax crime. On 22 March 2019, Robinson was sentenced to a thirty-month active sentence, which commenced on 10 September 2019. Before entering prison, Robinson gave Eulanda Elliot, a Circle of Seven employee, express authority to handle the company's affairs.

In July 2018, Anne Cliett, one of Robinson's creditors, started foreclosure proceedings against Robinson for a property located on Wesleyan Boulevard in Rocky Mount, North Carolina. Cliett subsequently purchased this property at a judicial sale. Because Robinson had left personal belongings on the Wesleyan property—including the 2018 Dodge truck, which is the subject of this dispute—Elliot contacted Dan Howell, who oversaw Cliett's affairs, to arrange for the retrieval of Robinson's property. However, Howell instructed Elliot to make those arrangements with Cliett's attorney, John Williford.

As was agreed, Elliot arrived at the Wesleyan property on 28 February 2020 with a U-Haul truck to retrieve Robinson's remaining items. While Robinson testified that he had left one key in the truck's ignition before locking up the Wesleyan property and beginning his period of incarceration, that key was not available to Elliot when she arrived to retrieve Robinson's belongings. The existence of the truck's key remains disputed as Mr. Bottoms testified that because he was unable to locate a key for the Dodge truck, he incurred a $150 fee to contract with a locksmith to create one. Since Elliot did not have a key for the truck, she was unable to start it, let alone remove it from the Wesleyan property. Elliot communicated this to Howell, and the two arranged for her to retrieve the truck at a later, undetermined date.

Eight days later, on 5 March 2020, Cliett contracted with Bottoms Towing & Recovery, LLC to remove the Dodge truck from the Wesleyan property for $150 and to store it for $40 per day. Accordingly, Mr. Bottoms towed the truck and stored it at his place of business on May Drive in Rocky Mount, North Carolina. On 13 March 2020, Mr. Bottoms filed the necessary documents with the North Carolina Division of

Motor Vehicles (DMV) to sell the truck under a possessory lien pursuant to N.C.G.S. § 44A-2(d).

Elliott made several attempts to retrieve the Dodge truck. In doing so, she placed five calls to Williford's law firm, Fields & Cooper, PLLC; sixteen calls to Howell; and eight calls to Mr. Bottoms. Elliot's repeated attempts to regain possession of the truck yielded differing responses from Mr. Bottoms.

On 27 March 2020 when Elliot contacted Mr. Bottoms the first time, he directed her to speak with Howell. Then on 30 March 2020, Mr. Bottoms informed Elliot that he was required to hear from the DMV before releasing the truck. Later, on 9 April 2020, Elliot received a letter from the North Carolina Department of Transportation stating that Mr. Bottoms had submitted an unclaimed vehicle report for the truck. In response, Elliot placed four calls to Mr. Bottoms, informed him of the letter she received, and asked again about obtaining the truck. This time, Mr. Bottoms explained that he could not release the truck until he heard back from the bank. Then, in a fourth attempt to retrieve the truck, on 17 April 2020, Elliot placed two calls to Mr. Bottoms who stated that he could not release the truck because the bank had instructed him not to.

On 24 April 2020, Mr. Bottoms completed DMV Form LT-262, titled Notice of Intent to Sell a Vehicle to Satisfy Storage and/or Mechanic's Lien. Circle of Seven subsequently received a letter dated 10 September 2020, which indicated that Bottoms Tire & Auto[1] had claimed a lien in the amount of $2,230. Because Bottoms Tire & Auto failed to secure delivery by certified mail, the Department of Transportation informed it that a judicial hearing was required for authorization to sell the truck.

After Robinson finished his term of imprisonment on 13 October 2020 and learned that Bottoms Towing still had possession of his truck, he too made an attempt to regain possession of the vehicle. But Mr. Bottoms refused to release the truck unless Robinson provided "some paperwork from the bank." On 9 November 2020, Robinson visited Bottoms Towing and noticed that his truck had undergone a number of changes since he last saw it: his company's business decals and logos had been removed, the rims on the truck's tires had been replaced, there was damage to the truck's bumper and passenger side fender, the fifth tire and tools inside the truck had been removed, and transport tags had been placed on the vehicle. Mr. Bottoms admitted to making changes to

1. Mr. Bottoms has two businesses, Bottoms Towing & Recovery and Bottoms Tire & Auto.

the truck and reported he incurred the following charges to prepare the truck for sale:

2 Interstate batteries	379.00
Right front tire	129.65
Bottom fuel filter	89.40
Def fluid	16.95
12 quarts oil	59.40
Oil filter	12.50
Chrome wheel covers	395.00
Shop supplies	20.00
Fuel	50.00
Install two batteries	28.00
Remove and replace fuel filters	98.00
Change oil and filter	35.00
Sales tax	114.24

The total for these expenses was $1,427.14.

Additionally, Mr. Bottoms testified that he only drove the truck five or six times, for a total of about 250 miles, "to make sure everything was running good." However, Robinson presented evidence—receipts from an oil change and tire replacement that detailed the truck's odometer reading—that the Dodge truck had almost 10,000 more miles on it than when he left it parked at the Wesleyan property. When Robinson visited Mr. Bottoms on 9 November 2020, he also noticed laundry and a coffee cup inside the Dodge truck.

Moreover, while Mr. Bottoms asserted that Robinson owed him $10,000 for the work he had completed on the vehicle, he never provided Robinson with an invoice. Similarly, Mr. Bottoms never communicated to Elliot the $150 towing fee or the $40 per day storage fee or provided her with an invoice.

On 17 November 2020, Bottoms Towing filed a petition in the trial court to sell the Dodge truck under a towing and storage lien. Circle of Seven objected to the sale and filed its response on 16 December 2020. The trial court entered its order and judgment in the matter on 26 February 2021, concluding that Bottoms Towing was "entitled to a possessory lien on the Truck," pursuant to subsection 44A-2(d), "in the amount of $13,557.50." Because the trial court found the expenses Bottoms Towing incurred in preparing the truck for the sale were "unnecessary," the court calculated the lien based only on (1) the towing

charge and storage for 333 days, from 5 March 2020 to 1 February 2021; and (2) "the locksmith key creation charge." This amount was then reduced by $62.50 to account for the 250 miles Mr. Bottoms drove the truck while it was stored.

Circle of Seven raised three arguments at the Court of Appeals. First, it questioned the validity of Bottoms Towing's contract with Cliett because Cliett was not the legal possessor of the truck. *Bottoms Towing & Recovery, LLC v. Circle of Seven, LLC*, 283 N.C. App. 446, 452 (2022). Second, it challenged the possessory lien on the truck, claiming that N.C.G.S. § 44A-4(a) only allows a lien to be enforced if towing and storage charges are unpaid for "10 days following the maturity of the obligation to pay any such charges." *Id.* at 454 (quoting N.C.G.S. § 44A-4(a) (2021)). In support of this, Circle of Seven claimed that a reviewing court could not find that the lien had remained unpaid because Bottoms Towing had "never communicated or attempted to communicate" an obligation to pay until November 2020—after it had claimed a lien and amassed months of storage fees. *Id.*

Third, and most importantly for the purposes of this appeal, Circle of Seven contended that even if the lien was valid, its amount should only reflect the costs accumulated in the days prior to Elliot's first attempt to retrieve the truck and "*should be substantially reduced by Bottoms's personal use of the Truck*." *Id.* at 455 (emphasis added). To support its argument that the lien should be reduced based on Mr. Bottoms's personal use of the truck, Circle of Seven provided the following facts: "[Mr.] Bottoms drove the Truck, kept personal items inside, made alterations, and . . . increased [the Truck's mileage] by approximately ten thousand miles during the storage period." *Id.*

While the dissent at the Court of Appeals ultimately agreed that the statutory lien on the truck was valid, it disagreed with the trial court's calculation of that lien. *Id.* at 456 (Tyson, J., concurring in the result in part and dissenting in part). In doing so, the dissent explained that "diminished market value" has been applied "as a measure of damages for conversion and physical harm to property." *Id.* at 457. Thus, in the dissent's view, Mr. Bottoms's personal use of the Dodge truck resulted in a diminution of the truck's value, and the lien amount should be reduced based on that resulting monetary loss. *Id.* at 458.

II. Conversion

Conversion is defined as "an unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the alteration of their condition or the exclusion of

an owner's rights." *Wall v. Colvard, Inc.*, 268 N.C. 43, 49 (1966) (quoting *Peed v. Burleson's, Inc.*, 244 N.C. 437, 439 (1956)). This means that there are "two essential elements of a conversion claim: ownership in the plaintiff and wrongful possession or conversion by the defendant." *Variety Wholesalers, Inc. v. Salem Logistics Traffic Servs., LLC*, 365 N.C. 520, 523 (2012).

The majority's refusal to reach the merits of this case because "a conversion argument" was not raised below is unsupported by both the Court of Appeals opinion and the trial court's order. First, the Court of Appeals opinion explicitly states that Circle of Seven argued that the "lien should be limited by [Mr.] Bottoms's personal use of the Truck," which included that "[Mr.] Bottoms drove the Truck, kept personal items inside, made alternations, and that the Truck's mileage increased by approximately ten thousand miles during the storage period." *Bottoms Towing*, 283 N.C. App. at 455. Similarly, the trial court's order compensated Circle of Seven for Mr. Bottoms's unlawful use of the Dodge truck.

Taking this information into consideration, it is clear that the Court of Appeals dissent did not "create an appeal for an appellant." Indeed, Circle of Seven did raise the issue discussed by the dissent: that the amount of Bottoms Towing's lien should be reduced based on Mr. Bottoms's personal use of the truck, which included driving the truck, leaving personal items inside the truck, and making alterations to the truck. *Id.* Because conversion occurs when one party exercises a right of ownership over another party's property and either alters that property or excludes the rightful owner of their rights in that property, *Wall*, 268 N.C. at 49, the crux of Circle of Seven's claim is the conversion of the Dodge truck by Mr. Bottoms. Accordingly, the unauthorized use of the Dodge truck and the resulting diminution in value based on that use provides a method for calculating damages, which would reduce the amount of Bottoms Towing's lien. *See Bottoms Towing*, 283 N.C. App. at 457–58 (Tyson, J., concurring in the result in part and dissenting in part) (citing *Phillips v. Chesson*, 231 N.C. 556, 571 (1950)).

In holding otherwise, the majority elevates form over substance, effectively determining that because Circle of Seven framed its argument using plain English, rather than legal terminology, the dissent was not permitted to address Circle of Seven's argument using its legal name: conversion. This is contrary to this Court's constitutional mandate under Article I, Section 18 of the North Carolina Constitution, unfair to the parties, and an unfortunate waste of this Court's and the parties' time and resources.

III. This Court's Duty to Reach the Merits of a Claim

"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." N.C. Const. art. I, § 18. Litigants in this state must have free access to courts as a means to settle private claims and disputes. *Petrou v. Hale*, 43 N.C. App. 655, 658 (1979). This means that "the courts of North Carolina cannot fail to provide a forum to determine a valid cause of action." *Coman v. Thomas Mfg. Co.*, 325 N.C. 172, 174 (1989).

"Appellate courts perform two important functions: (a) correcting errors that occurred at the trial level, and (b) clarifying, standardizing, and developing the rules and principles of law that apply in the jurisdiction." Thomas L. Fowler, *Appellate Rule 16(b): The Scope of Review in an Appeal Based Solely Upon a Dissent in the Court of Appeals*, 24 N.C. Cent. L. Rev. 1, 1 (2001). While N.C.G.S. § 7A-30(2) has now been repealed, Current Operations Appropriations Act of 2023 § 16.21(d), its enactment furthered this Court's error-correcting function. For when a three-judge panel at the Court of Appeals disagrees on the correct outcome of a case, the likelihood that an error has been committed below increases. This notion is supported by our caselaw, which limits the scope of these appeals to only those issues that the three-judge panel disagreed on. *See, e.g.*, *State v. Farmer*, 376 N.C. 407, 413 (2020). The majority's failure to reach the merits of this case leaves an open question: was error committed below?

While the majority states that it would be "unjust" to review this issue, it does not address the injustice that necessarily results from not addressing the issue. Although this Court could disagree with the Court of Appeals' dissent or either of the parties' arguments on the matter, failure to conclusively rule on the issue presented harms not only the parties in this case but also North Carolinians more generally. *See Mole' v. City of Durham*, 384 N.C. 78, 100 (2023) (Earls, J., dissenting). The parties in this action both filed briefs and participated in oral argument before this Court, no doubt expending a considerable amount of time, effort, and money to present their respective positions. As it pertains to Circle of Seven, this Court's failure to address the merits of this claim allows the Court of Appeals' conclusion to stand, without so much as an explanation or ruling on whether the majority opinion or dissenting opinion was correct in its application of the law.

Similarly, by declining to reach the merits of this claim, this Court has also failed to establish binding precedent on the legal issue raised by

the dissent. A holding in favor of either party on the merits would give litigants in this state a greater understanding of the tort of conversion and the proper procedure for calculating damages based on a diminution of value that may later be used to offset a lien. *See id.*

Additionally, although the majority states that addressing the merits of this case would deprive Bottoms Towing of the opportunity "to disprove the fact-intensive assertions made by the dissent," this concern is illusory because the facts necessary to resolve this claim were introduced at the hearing in this case and Bottoms Towing had the opportunity to contest the evidence at that time. Because Circle of Seven argued below that the value of Bottoms Towing's lien should be reduced by Mr. Bottoms's personal use of the truck, there would be no "unfair do-over in the trial court," and our preservation rules do not act as a bar to a proper resolution of this case on the merits. *See M.E. v. T.J.*, 380 N.C. 539, 563 (2022).

IV. Conclusion

For appeals arising under N.C.G.S. § 7A-30(2), this Court should reach the merits of the dissent so long as it addresses the substance of a party's claims and sets out the dissenting judge's reasoning for breaking with the majority. *See Cryan v. Nat'l Council of YMCAs*, 384 N.C. 569, 579 (2023). Judge Tyson's dissent clears that hurdle. Accordingly, I dissent from the majority's decision to affirm the Court of Appeals' holding without reaching the merits of this case.

DEBRA CULLEN
v.
LOGAN DEVELOPERS, INC.

No. 155PA23

Filed 23 August 2024

1. Negligence—contributory negligence—fall through attic floor —open and obvious risk—failure to exercise reasonable care

Plaintiff was barred from asserting a negligence claim against defendant, who was the builder of her newly constructed home, for injuries plaintiff suffered when she was walking through her attic, stepped backward off of a plywood walkway without looking, and fell through a scuttle hole that defendant had cut into the attic floor. Plaintiff's failure to exercise reasonable care to avoid an open and obvious risk, particularly given her acknowledgment that she knew the attic floor was unsafe, contributed to her injuries as a matter of law; therefore, summary judgment was properly entered in favor of defendant.

2. Negligence—gross negligence—unsafe condition—alleged building code violation—conscious disregard for safety not shown

Plaintiff failed to show that defendant, the builder of her newly constructed home, acted with a bad purpose or reckless indifference to plaintiff's rights by constructing a scuttle hole in the attic floor—through which plaintiff fell to the floor below and severely injured herself—and, therefore, defendant was entitled to summary judgment on plaintiff's claim of gross negligence. Even if defendant violated the building code by covering over the hole in the lower floor's ceiling with drywall, there was no indication that defendant acted with conscious disregard for plaintiff's safety, and the scuttle hole presented the same amount of risk as the other insulation-covered areas of the attic that were unsafe to walk on.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 289 N.C. App. 1 (2023), vacating and remanding an order entered on 14 October 2021 by Judge Henry L. Stevens in Superior Court, Brunswick County. Heard in the Supreme Court on 10 April 2024.

Ricci Law Firm, P.A., by Meredith S. Hinton, for plaintiff-appellee.

McAngus Goudelock & Courie, by Jeffery I. Stoddard and Walt Rapp, for defendant-appellant.

Ann C. Ochsner and Gabriel E. Zeller for North Carolina Advocates for Justice, amicus curiae.

ALLEN, Justice.

The law expects individuals to take reasonable steps to protect themselves from open and obvious risks. For this reason, plaintiffs ordinarily cannot recover damages from defendants who created such risks if the plaintiffs could have avoided harm through due regard for their own safety.

Plaintiff Debra Cullen sued defendant Logan Developers, Inc. for injuries she sustained when she fell through a hole that defendant had cut into the plywood flooring of plaintiff's attic to provide access to the home's air handler. By her own admission, plaintiff did not look before she stepped backwards into the hole, even though she knew that it was unsafe to walk on any part of the attic that was not covered by flooring. Because the hole presented an open and obvious risk and plaintiff failed to exercise reasonable care under the circumstances, plaintiff cannot prevail on her negligence claim against defendant.

Furthermore, plaintiff's claim against defendant for gross negligence fails as a matter of law. Even if we assume that defendant violated the North Carolina Building Code as plaintiff alleges, defendant did not display the conscious disregard for plaintiff's safety necessary to prove gross negligence. The trial court properly granted defendant's motion for summary judgment on all claims, and we therefore reverse the decision of the Court of Appeals vacating the trial court's order.

I. Background

In June 2018, plaintiff and her husband (the Cullens) contracted with defendant to build a new home in Southport. During construction, the Cullens rented a nearby residence and frequently visited the construction site to check on the status of their home and speak with the project superintendent.

Construction included installation of the mechanical air handler for the home's heating, ventilation, and air conditioning system. To reach the air handler, which was located in the attic, a person had to walk on plywood flooring that ran between rows of trusses and was surrounded

by insulation. Anyone who stepped off the flooring and onto insulation risked falling through the ceiling.

On 28 December 2018, a mechanical rough-in inspection conducted by a Brunswick County building inspector determined that defendant had installed the air handler too far from the entrance to the attic. As interpreted by the inspector, the North Carolina Building Code required the air handler to be located not more than twenty feet from the attic's entrance.[1]

To comply with the inspector's interpretation of the Building Code, defendant decided to install a second opening to the attic, this one within twenty feet of the air handler. Defendant concluded that the only suitable spot for the second opening was in the master bathroom. Installing the second opening—a so-called "scuttle hole"—entailed cutting a section out of the master bathroom's ceiling and out of the attic's flooring above it. Defendant filled the gap in the attic's flooring with insulation. Thereafter, the house passed reinspection.

The Cullens disapproved of the scuttle hole in the master bathroom. They had expected an entirely smooth ceiling. To resolve the issue, defendant covered the scuttle hole's opening in the master bathroom with drywall, giving it the smooth appearance the Cullens wanted. Defendant did not replace the section that had been cut out of the attic's flooring, however, out of concern that doing so would completely close the scuttle hole in violation of the Building Code.

The parties disagree over whether defendant told the Cullens that installing the scuttle hole had involved removing a section of the attic's flooring. Plaintiff insists that defendant did not. The project superintendent testified that he took the Cullens into the attic, pointed out the missing section, and explained why he was unwilling to close the scuttle hole on the attic side.

On 1 May 2019, shortly after the Cullens moved into their home, plaintiff entered the attic to take photographs of the attic's interior. The Cullens had hired a handyman and wanted to add more flooring to the attic to increase its storage space.

While in the attic, plaintiff stepped into the scuttle hole, falling through the master bathroom's ceiling and onto the bathroom floor. The

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1. The relevant provision is 2018 North Carolina State Building Code: Mechanical Code § 306.3 (2018), which states in part: "The passageway shall be not . . . more than 20 feet (6096 mm) in length measured along the centerline of the passageway from the opening to the appliance."

fall left plaintiff with a concussion, a broken heel on her right foot, and a broken thumb. It also aggravated preexisting back injuries.

Plaintiff later testified that she understood when she entered the attic that it was unsafe to step off the flooring and onto insulation. Although plaintiff denied remembering exactly how she fell, both she and Mr. Cullen concluded that she must have stepped backwards into the scuttle hole. Plaintiff admitted that nothing would have prevented her from seeing the insulation covering the scuttle hole if she had looked before she stepped.

On 16 July 2020, plaintiff filed suit against defendant in the Superior Court, Brunswick County, alleging claims of negligence and gross negligence based on the "dangerous condition of the attic floor." The parties engaged in discovery, after which defendant filed a motion for summary judgment on the grounds that (1) plaintiff's own negligence in stepping backwards into the scuttle hole barred plaintiff's negligence claim and (2) plaintiff had not set forth facts sufficient to establish gross negligence.

On 14 October 2021, the trial court granted defendant's summary judgment motion. The court ruled that plaintiff had "clearly contributed to her accident and the injuries she sustained by failing to keep a proper lookout for her own safety while stepping backwards and off the plywood walking path in the attic and into an area that she knew was unsafe." The trial court further determined that "insufficient facts" existed to support a claim of gross negligence.

The Court of Appeals vacated the trial court's summary judgment order. *Cullen v. Logan Devs., Inc.*, 289 N.C. App. 1, 12 (2023). On the issue of contributory negligence, the appellate court held that "the evidence [viewed] in the light most favorable to [p]laintiff . . . create[s] a genuine issue of material fact as to whether [p]laintiff knew the [scuttle hole] area [in the attic] remained unsafe such that she was negligent in failing to look out for her safety while walking." *Id.* at 7. Similarly, the Court of Appeals held that the trial court should not have granted defendant summary judgment on plaintiff's gross negligence claim because "[t]he forecasted evidence . . . contains allegations and averments which, if taken as true, show [d]efendant knew concealing the appearance of the scuttle hole from the side of the master bathroom ceiling violated applicable building code, and otherwise knew concealing the hole posed a hazard, but did it anyway." *Id.* at 11.

Defendant subsequently filed a petition for discretionary review with this Court pursuant to N.C.G.S. § 7A-31. We allowed the petition.

II. Standard of Review

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C.G.S. § 1A-1, Rule 56(c) (2023). "The summary judgment standard requires the trial court to construe evidence in the light most favorable to the nonmoving party[,]" in this case, plaintiff. *Draughon v. Evening Star Holiness Church of Dunn*, 374 N.C. 479, 482 (2020). "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." *N.C. Farm Bureau Mut. Ins. Co. v. Herring*, 385 N.C. 419, 422 (2023) (internal quotation marks and citations omitted).

III. Plaintiff's Contributory Negligence

[1] "Negligence is the failure to exercise proper care in the performance of a legal duty which the defendant owed the plaintiff under the circumstances surrounding them." *Moore v. Moore*, 268 N.C. 110, 112 (1966). Contributory negligence is a defense to negligence claims. The defense arises from the duty that the law imposes on us all to take reasonable care to protect ourselves. *Draughon*, 374 N.C. at 480.

With certain exceptions, contributory negligence will bar a plaintiff's negligence claim if the defendant shows that the plaintiff could have avoided injury by exercising reasonable care for the plaintiff's own safety.[2] *Sorrells v. M.Y.B. Hosp. Ventures of Asheville*, 332 N.C. 645, 648 (1992); *Holderfield v. Rummage Brothers Trucking Co.*, 232 N.C. 623, 625 (1950). Significantly, "the existence of contributory negligence does not depend on [the] plaintiff's *subjective* appreciation of danger; rather, contributory negligence consists of conduct which fails to conform to an *objective* standard of behavior—the care an ordinarily prudent person would exercise under the same or similar circumstances to avoid injury." *Smith v. Fiber Controls Corp.*, 300 N.C. 669, 673 (1980) (internal quotation marks and citation omitted).

Whether the trial court properly granted defendant's motion for summary judgment on plaintiff's negligence claim turns on whether

2. The last clear chance doctrine offers one such exception. It allows a contributorily negligent plaintiff to recover when "the conduct of [the] defendant[,] after his negligence and the plaintiff's contributory negligence have had their play, still leav[es] the defendant time and opportunity to avoid the injury notwithstanding what both parties have previously done, or failed to do." *McMillan v. Horne*, 259 N.C. 159, 160 (1963).

plaintiff was contributorily negligent as a matter of law. *See* Mark W. Morris, *North Carolina Law of Torts* § 19.20[1][c][iv] (3d ed. 2023) ("[I]t is rare that the court will decide the issue of contributory negligence . . . as a matter of law. But when the plaintiff's evidence fails to raise any issue of material fact and the evidence of contributory negligence is uncontradicted, summary judgment for the defendant is appropriate.").

"[O]ur case law has made it clear that when the condition that allegedly caused the injury, viewed objectively, is open and obvious, judgment as a matter of law is appropriate." *Draughon*, 374 N.C. at 482–83. "A condition is open and obvious if it would be detected by 'any ordinarily intelligent person using his eyes in an ordinary manner.' " *Id.* at 483 (quoting *Coleman v. Colonial Stores, Inc.*, 259 N.C. 241, 242 (1963) (per curiam)).

We recently dealt with an instance of contributory negligence in the context of an open and obvious condition. In *Draughon*, the plaintiff helped carry a casket up a set of stairs and into a church. *Id.* at 480. "[W]atch[ing] the doorway instead of where he was stepping[,] [the plaintiff] tripped near the top of the steps, fell into the church building, and was injured." *Id.* The top step was covered with a layer of brick that raised it several inches higher than the other steps. *Id.* at 481. The plaintiff sued the church, alleging among other things that it had "failed to keep its premises in a reasonably safe condition and failed to warn [the] plaintiff of a dangerous and defective condition on the property." *Id.* at 482. In concluding that the trial court had properly granted the church's motion for summary judgment, this Court explained: "The distinct height and appearance of the step, the clear visibility of the set of stairs, and plaintiff's previous experience walking down the set of stairs show that a reasonable person in [the] plaintiff's position would have been aware of the step's condition and taken greater care." *Id.* at 485.

Plaintiff tries to distinguish her case from *Draughon* by noting that the *Draughon* plaintiff "had walked down the steps just before his accident." *Id.* at 486. Because he had just used the stairs, the *Draughon* plaintiff had a chance to appreciate the danger posed by the top step before he walked up the steps while carrying the casket. But here, according to plaintiff, she "had not walked in the attic after [d]efendant cut a hole in the walkway and had no way of knowing that [d]efendant had done so."

The problem with plaintiff's distinction is that the outcome in *Draughon* did not depend on the *Draughon* plaintiff's earlier descent of the church steps. We clearly indicated that the descent was an additional—not essential—basis for our decision:

> *Because the condition of the top step would be open and obvious to a reasonable person*, [the] *defendant had no duty to warn* [the] *plaintiff*. Similarly, because [the] plaintiff, after his previous descent of the steps, did not heed the risk obviously presented by the distinct appearance of the top step, and because he carried the casket while walking sideways without looking at the steps, his own negligence contributed to his fall.

Id. at 487 (emphasis added).

The first sentence of the above quotation demonstrates that our holding in *Draughon* rested on the open and obvious condition of the top step. Although this Court pointed to the plaintiff's earlier descent of the steps as further support for our contributory negligence determination, *id.*, we did not hold that a plaintiff must have prior knowledge of an open and obvious risk for the defense of contributory negligence to apply. Indeed, such a holding would have been at odds with our precedents. *See*, *e.g.*, *Benton v. United Bank Bldg. Co.*, 223 N.C. 809 (1944) (applying the "open and obvious" principle without reference to whether the plaintiff had previously visited the store where she fell).

Plaintiff also tries to distinguish this case from *Draughon* by denying that the scuttle hole presented an open and obvious risk. She observes that the attic had only a single light bulb and one window. Plaintiff further asserts that the scuttle hole "was filled in with a piece of batt insulation in the attic, which was flush with the walkway, making it indiscernible." At a minimum, plaintiff contends, whether the scuttle hole presented an open and obvious risk was a question for the jury, not the trial court.

This argument fails for two reasons. First, plaintiff's assertion that the batt insulation effectively camouflaged the scuttle hole appears to be a fresh allegation. She did not argue the batt insulation issue to the trial court or the Court of Appeals, and we find nothing in the record that supports her contention. "[T]he law does not permit parties to swap horses between courts in order to get a better mount in the Supreme Court." *Weil v. Herring*, 207 N.C. 6, 10 (1934).

Second, plaintiff's claim that poor lighting and the batt insulation made the scuttle hole hard to see is contradicted by plaintiff's own testimony. During her deposition, plaintiff admitted under oath that she would have seen the scuttle hole had she looked: "If I had [looked

toward the scuttle hole], I would have seen insulation and I would not have stepped in it." Likewise, plaintiff expressly denied that the hole was hidden or that anything blocked it from view. The summary judgment standard requires us to examine the evidence in the light most favorable to plaintiff; it does not oblige us to ignore the parts of plaintiff's testimony that torpedo her argument.

Despite her admission that the scuttle hole was plainly visible, plaintiff argues that she acted reasonably under the circumstances in stepping backwards in the attic without checking behind her. According to plaintiff, defendant never told her that the scuttle hole's installation had involved the removal of a section from the attic's flooring. She further contends that, even if she had known about the missing section, defendant's promise to repair the master bathroom's ceiling left her with no reason to suppose that the attic's flooring remained dangerous. Plaintiff directs our attention to her testimony that she had visited the attic perhaps twice before defendant installed the scuttle hole. Her familiarity with the attic's original condition, she maintains, left her without any reason to believe that a gap existed in the flooring.

Consistent with *Coleman v. Colonial Store, Inc.*, we reject plaintiff's contention that she acted reasonably by stepping backwards in the attic without looking. The customer in *Coleman* tripped over a metal screen as he turned to his right immediately after exiting the supermarket. 259 N.C. at 242. Shaped like a right triangle, the metal screen was fastened to the wall of the store and was "about four and a half or five feet high, about eight inches wide at the top, and about thirty-four inches wide at the bottom." *Id.* Although the screen was plainly visible through the glass of the exit door, "[t]here was nothing there to call [the customer's] attention to the metal screen." *Id.* The customer had visited the store previously but "in leaving had turned to his left" and "[i]n so doing . . . had not noticed the screen." *Id.* The customer admitted that he was not looking where he was going at the time of his fall. *Id.*

In affirming the trial court's order dismissing the customer's negligence lawsuit against the supermarket, this Court remarked that "[t]he metal screen at the exit door was obvious to any ordinarily intelligent person using his eyes in an ordinary manner." *Id.* We concluded that the customer's "evidence plainly show[ed] [that] he failed to exercise ordinary care for his own safety." *Id.* at 243.

Like the customer in *Coleman*, plaintiff did not look where she was stepping and was injured by an open and obvious condition. If anything, plaintiff had more reasons than the *Coleman* customer to watch where

she was going. Storefronts are not usually perilous environments, but plaintiff knew that she could fall through the ceiling if she stepped off the plywood and onto any area covered by insulation. Moreover, just as the *Coleman* customer's previous familiarity with the store did not excuse him from looking where he was going, plaintiff's prior visits to the attic did not relieve her of the obligation to watch her step.

Plaintiff argues that precedents from the Court of Appeals support her position. We find those cases materially distinguishable. For example, plaintiff points to *Duval v. OM Hospitality, LLC*, 186 N.C. App. 390 (2007). There, a woman and her husband had to make their way down an unlit stairwell to exit a motel. 186 N.C. App. at 391. The stairwell was unlit "because a light timer which controlled the light . . . had been deactivated." *Id.* As the couple descended the stairs, the woman tripped and fell, injuring herself. *Id.* She later testified that the stairwell "was so dark that [she] could not see the steps." *Id.* The woman sued the motel, but the trial court granted summary judgment in favor of the motel on contributory negligence grounds. *Id.* at 392. The Court of Appeals reversed, opining that

> a jury could also find that [the woman] acted reasonably in using the stairwell since she was not aware of another way out and because she used proper care in descending the dark stairs, carefully and slowly, holding the railing, and having her husband ahead of her feeling for the steps, but fell nonetheless.

Id. at 396.

It seems obvious to us that *Duval* is not on point. The woman in *Duval* moved forward cautiously but could not see where she was going through no fault of her own. Here, even if we assume she was moving slowly, plaintiff did not see the scuttle hole because she stepped backwards without looking.

Viewed in the light most favorable to plaintiff, the evidence shows that she failed to exercise reasonable care for her own safety in the attic. By her own admission, plaintiff understood that the attic was dangerous and could have avoided falling by looking before she stepped backwards. The trial court correctly determined that plaintiff was contributorily negligent, and the Court of Appeals erred in vacating the trial court's order granting summary judgment for defendant on plaintiff's negligence claim.

IV. Plaintiff's Claim for Gross Negligence

[2] "Contributory negligence is not a bar to a plaintiff's recovery when the defendant's gross negligence . . . is a proximate cause of the plaintiff's injuries." *Yancey v. Lea*, 354 N.C. 48, 51 (2001). Thus, although it defeats her negligence claim, plaintiff's contributory negligence does not prevent her from pursuing her claim against defendant for gross negligence. Like the trial court and the Court of Appeals, we proceed to the merits of plaintiff's gross negligence claim.

This Court has sometimes found it difficult to distinguish between negligence and gross negligence in practice. *See Hinson v. Dawson*, 244 N.C. 23, 27–28 (1956) ("When an injury is caused by negligence, any attempt to differentiate variations from slight to gross is fraught with maximum difficulty."). Nonetheless, "the difference between ordinary negligence and gross negligence is substantial." *Yancey*, 354 N.C. at 53. Whereas ordinary negligence involves inadvertence or carelessness, we have used the term gross negligence "in the sense of wanton conduct." *Id.* (quoting *Hinson*, 244 N.C. at 28). "An act is wanton when it is done of wicked purpose, or when done needlessly, manifesting a reckless indifference to the rights of others." *Foster v. Hyman*, 197 N.C. 189, 191 (1929).

Plaintiff argues that "defendant willfully violated the building code and consciously disregarded plaintiff's safety." According to plaintiff, defendant created a dangerous condition by leaving the scuttle hole open in the attic and not alerting plaintiff of the peril.

As plaintiff acknowledges, the Court of Appeals has opined that a Building Code violation without more does not qualify as gross negligence. *Bashford v. N.C. Licensing Bd. for Gen. Contractors*, 107 N.C. App. 462, 467 (1992). We agree that such a violation does not automatically constitute gross negligence because it is not necessarily the product of a bad purpose or reckless indifference to the rights of others. Consequently, even if we assume that defendant violated the Building Code by closing the scuttle hole on the master bathroom side, this fact alone does not establish that summary judgment for defendant was improper. The question is whether there is evidence that defendant acted with a bad purpose or with reckless indifference to plaintiff's rights.

Construed in the light most favorable to plaintiff, the evidence yields the following details. Defendant installed the scuttle hole to comply with the county inspector's interpretation of the Building Code. Plaintiff did not know that defendant had cut a section out of the attic's flooring

as part of the installation. Defendant subsequently closed the hole on the master bathroom side in response to the Cullens' unhappiness over the ceiling's appearance. Defendant did not clearly communicate its actions to plaintiff, who believed that the scuttle hole was entirely gone. The scuttle hole on the attic side was filled with insulation that plaintiff would have seen had she looked before stepping backwards.

On these facts, a jury could conclude that defendant violated the Building Code by closing the scuttle hole entrance in the master bathroom. Jurors could also find that defendant created a risk to plaintiff by failing to explain that the scuttle hole remained open in the attic.

Yet these facts do not demonstrate that defendant acted for some bad purpose, nor do they reflect a reckless indifference to the rights of others. Rather, they show that defendant made a thoroughly unwise—and unsuccessful—attempt to balance the competing priorities of customer satisfaction and Building Code compliance. Moreover, while plaintiff might have escaped injury if defendant had clearly informed her of the missing section in the attic's flooring, the scuttle hole presented essentially the same risk—the risk of falling through the ceiling—as the other parts of the attic that were covered with insulation instead of plywood. The insulation covering the scuttle hole was plainly visible and served as a warning not to step there. Defendant did not evince reckless indifference in assuming that plaintiff would heed that warning.

Plaintiff cannot show that defendant's conduct went beyond mere carelessness and rose to the level of wantonness. Defendant was therefore entitled to summary judgment as a matter of law on plaintiff's gross negligence claim.

V. Conclusion

For the reasons set out above, the trial court properly granted defendant's motion for summary judgment on plaintiff's claims of negligence and gross negligence. Accordingly, we reverse the decision of the Court of Appeals and reinstate the trial court's summary judgment order.

REVERSED.

DEPARTMENT OF TRANSPORTATION
v.
BLOOMSBURY ESTATES, LLC,
BLOOMSBURY ESTATES CONDOMINIUM HOMEOWNERS' ASSOCIATION, INC.

No. 250PA21-2

Filed 23 August 2024

Eminent Domain—condemnation—rights asserted by owner and developer—corollary suits pending—all pleaded issues regarding taking resolved—summary judgment proper

In a condemnation matter, where the property's owner (a condominium association) and a developer (to which the association had granted certain development rights with a set expiration date) asserted rights in the property at the time of the taking by the Department of Transportation (for a temporary construction easement) and, therefore, were both parties to the eminent domain action, the trial court did not err by granting summary judgment to and distributing settlement funds in favor of the developer even though the parties' corollary actions were not yet finalized. All of the issues pleaded in the taking action and argued at the hearing held pursuant to N.C.G.S. § 136-108 had been resolved, including the total amount of just compensation (which the parties settled via consent judgment) and issues related to the parties' relative interests in the taken property. Further, the trial court had discretion under section 136-117 to determine the apportionment of compensation between the parties, including that the developer was entitled to compensation for the loss of development rights, which was in accord with the assessment of both parties' appraisers.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 281 N.C. App. 660 (2022), reversing in part and affirming in part the order and final judgment entered on 3 March 2021 by Judge Vinston M. Rozier Jr. in Superior Court, Wake County and remanding the case. Heard in the Supreme Court on 31 October 2023.

No brief for plaintiff-appellee Department of Transportation.

Thomas, Ferguson & Beskind, LLP, by Jay H. Ferguson for defendant-appellant Bloomsbury Estates, LLC.

Law Firm Carolinas, by T. Keith Black and Harmony W. Taylor; and Rossabi Law Partners, by Gavin J. Reardon, for defendant-appellee Bloomsbury Estates Condominium Homeowners Association, Inc.

RIGGS, Justice.

This case asks us to examine the scope of issues that must be resolved within an eminent domain action under N.C.G.S. §§ 136-103 to -121.1 when the subject property is part of a condominium association. A complicating factor in this case is that the property subject to the taking was owned by a condominium association and the condominium declaration granted development rights for a portion of the property to defendant-appellant, Bloomsbury Estates, LLC (the Developer). Therefore, both the Developer and the Bloomsbury Estates Condominium Homeowners Association, Inc. (the Association) were parties to the eminent domain action and had rights to the property at the time of the taking.

Outside of this eminent domain action (the Taking Action), however, the Developer and the Association initiated separate litigation regarding the validity of the development rights and the interests of the property at the time of the taking. By litigating the development rights separately—that is, to some extent, initiating litigation of the interests in the land outside of the eminent domain action and, more specifically, outside of the hearing pursuant to N.C.G.S. § 136-108—the Developer and the Association created three proceedings with interconnected issues and now ask this Court to determine whether the Taking Action can be resolved prior to the resolution of the other claims in the separately-filed actions. The Developer argues the other claims can be litigated separately and the trial court appropriately granted the Developer's motion for summary judgment, distributing the bulk of the compensation from the taking to the Developer. In contrast, the Association contends that issues in the other cases affect the valuation of the property on the date of the taking and therefore must be decided before the compensation can be distributed.

We hold that the trial court did not err in granting summary judgment prior to resolution of the parties' issues in other cases because those issues were not pleaded in the Taking Action on appeal here. Summary judgment is proper when all pleaded issues affecting the rights of the property as of the date of the taking are resolved prior to final judgment. *See Century Commc'n, Inc. v. Hous. Auth.*, 313 N.C. 143, 145 (1985) ("Summary judgment is appropriate only if the pleadings

and other materials before the trial judge show that there is no genuine issue of material fact and that any party is entitled to a judgment as a matter of law."). Section 136-108 of the General Statutes establishes that, in a hearing under this statutory provision, "the judge . . . shall . . . hear and determine any and all issues raised by the pleadings other than the issue of damages, including, but not limited to, if controverted, questions of necessary and proper parties, title to the land, interest taken, and area taken." N.C.G.S. § 136-108 (2023).

Here, the parties settled via consent judgment the total amount of damages (just compensation), so there can be no dispute of material fact as to that matter. To the extent there was a dispute over how the just compensation should be distributed amongst the parties the trial court adopted the Association's appraisal on relative distribution and the Developer disclaims any dispute over that on appeal. Thus, the matter was ripe for resolution on a motion for summary judgment.

At the hearing for determination of issues other than damages (the N.C.G.S. § 136-108 hearing) the trial court resolved controverted questions of title to the land and interest taken that were raised in the action's pleadings. *See generally id*. Specifically, although the eminent domain statutory scheme is comprehensive and generally designed to avoid piecemeal litigation, the validity of the amendment at issue in this case was determined in a separate action and the parties were estopped then from relitigating that matter at the N.C.G.S. § 136-108 hearing.

Along a similar vein, we are generally hesitant to stay or interrupt all condemnation proceedings until later-instituted parallel proceedings conclude. *See Watters v. Parrish*, 252 N.C. 787, 791 (1960) (recognizing that a trial court's decision to hold one lawsuit in abeyance pending the outcome of another case will not be disturbed absent an abuse of discretion). Here, where the legal question of the parties' relative interests in the taken property had already been settled, staying the Taking Action for final resolution of all other litigation serves no purpose. For the reasons articulated below, we thus reverse the Court of Appeals' decision.

I. Factual & Procedural Background

A. Factual Background

The Bloomsbury Estates Condominium Development is situated on a tract of land in downtown Raleigh, adjacent to Raleigh Union Station. Development of the property began in 2006 when the Developer received approval from the City of Raleigh Planning Commission and City Council to build two phases of condominium buildings on the

property. Phase I consisted of a building with fifty-six condominiums and Phase II consisted of an additional building with an additional fifty-four condominiums and amenities to serve both buildings, including a proposed pool and fitness center. The Developer built the Phase I building and sold the fifty-six condominiums in the Phase I building before the Department of Transportation (DOT) initiated the Taking Action on 27 July 2015. In the Taking Action, the DOT permanently took approximately one-third of the Phase II land for a railroad right of way and temporarily took an additional quarter acre for a construction easement to expand the Raleigh Union Station. The land the DOT took coincided with the planned location of the Phase II building, preventing the construction of the Phase II building until the temporary easement ended on 13 September 2017, and affecting the cost of construction for the Phase II building.

After Phase I was completed but before the Taking Action was commenced, the Developer recorded a Declaration of Condominium (Declaration) for the property pursuant to the North Carolina Condominium Act, N.C.G.S. § 47C-2-101 (2023), which legally established the Association on 13 July 2009. The Declaration transferred ownership of the property to the Association but, in this case, gave the Developer control over the Association and reserved the Developer's right "[t]o complete, within five years of the date of recordation of this Declaration of Condominium, any and all improvements indicated on the plats and plans up to a maximum of 140 Units." The Developer recorded multiple amendments to the Declaration, ultimately recording the Fifth Amendment on 8 March 2013. The Fifth Amendment, provided for, *inter alia*, transferring control of the Association from the Developer to the unit owners and extending the Developer's right to complete Phase II until 13 July 2017. The Fifth Amendment stated that the amendment was agreed to by the Developer and at least sixty-seven percent of the unit owners; the Fifth Amendment was recorded on 8 March 2013.

On 27 July 2015, when the DOT initiated the taking, the Developer had not begun construction of the Phase II building and the taking prevented the construction of the Phase II building until after the DOT returned the property. At the time of the taking, the DOT anticipated keeping the temporary construction easement beyond 13 July 2017, the date when the Developer's rights to develop Phase II expired under the Fifth Amendment. The DOT ultimately terminated the temporary easement and returned control of the land to the Developer and the Association on 13 September 2017. When the DOT returned the property, the Developer's right to construct Phase II under the Fifth Amendment had expired.

The DOT initiated the Taking Action by filing a declaration of taking with an estimate of the just compensation for the taking and deposited the sum of $779,050 with the clerk of court as required by N.C.G.S. § 136-103. The DOT's filings referenced the Declaration and all five amendments as liens and encumbrances applicable to the property. The Developer and the Association jointly filed a responsive pleading arguing that the amount was grossly insufficient. This joint responsive pleading did not indicate any dispute over the validity of the Fifth Amendment or how the compensation would be apportioned between the parties.

After mediation in June of 2017, the DOT, the Developer, and the Association entered a consent judgment establishing that $3,950,000 was just compensation for the entire taking. The consent judgment did not establish how the just compensation would be divided between the Developer and the Association. Once the DOT deposited the full sum with the clerk of court, the DOT's involvement in the litigation ended.

During the pendency of the Taking Action, the Developer and the Association each filed a complaint against the other party regarding rights to the property. In the first of the related lawsuits the Developer filed a complaint against the Association seeking, *inter alia*, equitable reformation of the Fifth Amendment to allow the Developer additional time to develop Phase II of the property (Developer's Action). The Association responded to this claim asserting, among other things, that "the time limit expired within which development rights shall have been exercised pursuant to the Declaration and North Carolina law, and the time limit cannot be extended as a matter of North Carolina Law." The Association filed a separate complaint against the Developer shortly thereafter alleging twelve causes of action including, *inter alia*, a request for declaratory judgment to determine the Developer's rights to develop Phase II (Association's Action).

In the Developer's Action, the Developer and the Association litigated the validity of the Fifth Amendment in a hearing held on 28 August 2017. The trial court in that action granted partial summary judgment in favor of the Developer by finding the one-year statute of limitations in N.C.G.S. § 47C-2-117(b) barred the Association from challenging the validity of the Fifth Amendment. The trial court concluded the Fifth Amendment was valid and the "parties [were] bound by the rights and obligations contained therein." Because the Fifth Amendment was valid, the Developer held the right to construct the Phase II building. In other words, at the time the DOT took control of the property, the Developer held valid rights even though those rights had expired by the time of the return of the property under the temporary easement.

Subsequently, the Developer filed a motion for a N.C.G.S. § 136-108 hearing in the Taking Action. In that motion, the Developer contended the parties were bound by the trial court's ruling in the Developer's Action, and the Fifth Amendment controlled distribution of the compensation. The trial court in the Taking Action held a hearing in April 2018 and entered an order concluding that the Association was precluded from relitigating the validity of the Fifth Amendment. Determining that estoppel principles required that the ruling in the Developer's Action bound the court in the Taking Action, the trial court held that the Fifth Amendment was valid and that, as of the time of the taking, the Developer held a valid right to develop Phase II. Subsequently, on 13 November 2019, the Association moved to stay the distribution of the funds pending resolution of the other claims, which would allow the Association the right to appeal the validity of the Fifth Amendment. Additionally, the Association requested consolidation of the claims. The trial court denied the motion to stay the matter on 31 December 2019.

After the N.C.G.S. § 136-108 hearing in April of 2018, the Developer and the Association commissioned appraisals to provide opinions on the appropriate apportionment of the settlement. After the appraisals were complete, the Developer moved for summary judgment on 13 July 2020, requesting distribution of the taking compensation according to its appraisal. The Association, referencing the interplay between the claims, again asked the trial court to stay the action and to consolidate the claims. The Association argued that if, on appeal in the Developer's Action, the Fifth Amendment was found to be invalid, the conclusions of the appraisers would be invalid. The Developer argued that the appraisers agreed—albeit, premised upon the validity of the Fifth Amendment—that the majority of the value of the property taken resided in the development rights. If the Fifth Amendment was not valid, the appraisers for the Association reported that the compensation for the taking should be paid entirely to the Association. After a hearing on 22 July 2020, the trial court granted the motion for summary judgment in favor of the Developer pursuant to the valuation of property rights provided by the Association's appraiser, not the valuation set by the Developer's appraiser.[1] The trial court also consolidated all three actions. The Association filed a motion to amend the summary judgment order and requested the trial court's reconsideration. After a hearing on this motion, the trial court amended the order by decoupling

1. Again, the Developer does not contest on appeal the use of the Association's appraisal.

the Taking Action from the other two actions but otherwise left the order untouched.

The trial court in the Taking Action ultimately entered an order and final judgment concluding that the loss to the Developer from the taking, based upon the Association's appraisal, was $3,350,000 and the remainder of the compensation should be assigned to the Association. The trial court found that under N.C.G.S. § 47C-1-107, the Developer must be fully compensated for the loss of the development rights first and any remaining funds should be distributed to the Association. *See* N.C.G.S. § 47C-1-107 (2023). After adjusting the settlement amount based on prejudgment interest, attorneys' fees, and property taxes, the trial court ordered that $2,929,225 be distributed to the Developer and $54,410 to the Association. The settlement funds were distributed to the parties pursuant to this order.

B. Procedural Background

On appeal, a unanimous panel of the Court of Appeals held that the Developer was not entitled to summary judgment and distribution of settlement funds. *Dep't of Transp. v. Bloomsbury Ests., LLC*, 281 N.C. App. 660, 669 (2022). The Court of Appeals held that the issues presented in the Developer's Action and the Association's Action represented material facts affecting the apportionment of the settlement funds between the Developer and the Association in the Taking Action. *Id.* at 667–68. Additionally, the Court of Appeals held that because the valuation involves the opinion of appraisers, a jury should determine the credibility of each appraiser. *Id.* at 668. The Court of Appeals affirmed the trial court's order regarding the consolidation of the actions but reversed the trial court's summary judgment order and remanded for further proceedings. The Developer filed a petition for discretionary review, and we allowed it.

II. Analysis

The key issue in this case is whether the trial court appropriately resolved, under its authority pursuant to N.C.G.S. §§ 136-108 and -117, the interests in the taken property and the allocation of the just compensation settled in the consent judgment, such that summary judgment and distribution of just compensation was proper. The Developer argues that the validity of the Fifth Amendment was the only issue that affected the rights to the property on the date of the taking and, therefore, summary judgment and the distribution of compensation was appropriate before the resolution of the other claims. The Developer argues, that to the extent that the Association contends that any issues

in the other actions affect the value of the property on the date of the taking, the Association had a duty to present those issues at the N.C.G.S. § 136-108 hearing. The Association provides multiple reasons that the other actions must be resolved before the compensation is distributed. However, at the core of its arguments is the correct but ultimately ancillary argument that the Developer should not be allowed to "double dip" by recouping essentially all of the just compensation for the loss of its development rights and then also seek to equitably reform the Fifth Amendment to restore and extend its development rights after the taking. Recognizing the inequity in the Developer's position, we nonetheless hold, after consideration of the record and the other claims in the matter at hand, that the trial court properly granted summary judgment in favor of the Developer after resolving all issues presented for resolution at the N.C.G.S. § 136-108 hearing, and we trust a later trial court to weigh the Developer's future development rights in equity.

Fundamental to the "right to take private property for public use" is the requirement to pay "fair compensation for the property." *Town of Morganton v. Hutton & Bourbonnais Co.*, 251 N.C. 531, 533 (1960). When the public entity only takes a portion of the property, "just compensation consists of the difference between the fair market value of the entire tract immediately before the taking . . . and the fair market value of the land remaining immediately after the taking." *Dep't of Transp. v. M.M. Fowler, Inc.*, 361 N.C. 1, 5 (2006). In a similar vein, when the property taken has been approved for development, the value of those development rights affects the value of the taken property. *See Town of Midland v. Wayne*, 368 N.C. 55, 66 (2015) (recognizing that approved development rights are "an important feature of the condemned land" affecting the measure of damages).

Typically a judge or jury determines the value of the property in an eminent domain action. N.C.G.S. § 136-112 (2023). In this case, the value of the property was agreed upon in a consent judgment. The controversy at hand centers on the validity of the Fifth Amendment—an issue answering the question of which party held the development rights to the property when the DOT instituted the Taking Action—outside of this action. Importantly, while the Developer's Action is an action collateral to the Taking Action, the legal question in that matter was resolved prior to the N.C.G.S. § 136-108 hearing.

Principles of res judicata preclude "a second suit based on the same cause of action between the same parties." *State ex rel. Tucker v. Frinzi*, 344 N.C. 411, 413 (1996) (cleaned up). The resolution of the Fifth Amendment's validity in the Developer's Action led the trial court

in this matter to hold that validity of the Fifth Amendment could not be relitigated in this action. However, the trial court in the Developer's Action has not yet decided whether the Fifth Amendment can be equitably reformed to allow the Developer to develop the property after the taking was justly compensated and when the temporary easement ended. The resolution of the equitable reformation issue could affect which party held the development rights when the condemned land was returned to the parties. Instead, the trial court in the Taking Action—assuming no equitable reformation—held that the Developer lost development rights due to the taking and distributed compensation for the loss of those rights to the Developer. Plainly, to the extent the Developer wishes to press the undecided equitable reformation issue in a collateral action, the fact that the Developer has already been fully compensated for the loss of the development rights in the Taking Action would be a relevant consideration in equity. *See Surratt v. Chas. E. Lambeth Ins. Agency*, 244 N.C. 121, 131 (1956) (recognizing that when there are inconsistent rights or remedies of which a party may avail himself, a choice of one is held to be an election not to pursue the other).

Because the trial court resolved all issues related to the interests in the property and the just compensation was settled in a consent judgment, we hold that the trial court properly granted summary judgment in favor of the Developer in the Taking Action.

A. Eminent Domain Actions Generally

"The right to take private property for public use, the power of eminent domain, is one of the prerogatives of a sovereign state. . . . Its exercise, however, is limited by the constitutional requirements of due process and payment of just compensation for property condemned." *State v. Core Banks Club Props., Inc.*, 275 N.C. 328, 334 (1969). Both the U.S. Constitution and the North Carolina Constitution require due process and just compensation when a public entity uses its eminent domain power to take property. U.S. Const. amend. XIV, § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ."); N.C. Const. art. I, § 19 ("[N]o person shall be . . . deprived of his . . . property, but by the law of the land.").

The General Assembly vested in the DOT the power of eminent domain and provided procedures for exercising this power in N.C.G.S. §§ 136-103 to -121.1. *See* N.C.G.S. § 136-19(a) (2023) ("The Department of Transportation is vested with the power to acquire either in the nature of an appropriate easement or in fee simple such rights-of-way and title to such land . . . as it may deem necessary and suitable . . . to enable it to properly prosecute the work, by purchase, donation, or condemnation,

in the manner hereinafter set out."). When the DOT exercises its eminent domain power, it must provide just compensation to the "person owning said property or any compensable interest therein at the time of the filing of the complaint." N.C.G.S. § 136-104 (2023). Just compensation is defined as "the market value of property *at the time of the taking*, unaffected by any subsequent change in the condition of the property." *W. Carolina Power Co. v. Hayes*, 193 N.C. 104, 107 (1927) (cleaned up) (emphasis added).

When a partial tract of land is taken, the measure of damages, or just compensation, "shall be the difference between the fair market value of the entire tract immediately prior to said taking and the fair market value of the remainder immediately after said taking, with consideration being given to any special or general benefits resulting from the utilization of the part taken for highway purposes." N.C.G.S. § 136-112(1) (2023); *see also Barnes v. N.C. State Highway Comm'n*, 250 N.C. 378, 387 (1959) ("In determining the value of land appropriated for public purposes, the same considerations are to be regarded as in a sale of property between private parties. The inquiry in such cases must be, what is the property worth in the market, viewed not merely with reference to the uses to which it is at the time applied, but with reference to the uses to which it is plainly adapted—that is to say, what is it worth from its availability for valuable uses?" (quoting *Carolina-Tennessee Power Co. v. Hiawassee River Power Co.*, 186 N.C. 179, 183–84 (1923)).

In a DOT condemnation action, the General Assembly created a process for resolving questions related to the title of the land taken, interest in the land, proper parties, and all issues other than damages in N.C.G.S. § 136-108. The statute provides for a hearing to "eliminate from the jury trial any question as to what land [the State] is condemning and any question as to its title." *N.C. State Highway Comm'n v. Nuckles*, 271 N.C. 1, 14 (1967). The statute provides the following:

> After the filing of the plat, the judge, upon motion and 10 days' notice by either the Department of Transportation or the owner, shall, either in or out of term, hear and determine any and all issues raised by the pleadings other than the issue of damages, including, but not limited to, if controverted, questions of necessary and proper parties, title to the land, interest taken, and area taken.

N.C.G.S. § 136-108. It is the responsibility of the parties to argue all issues of which they are aware at the N.C.G.S. § 136-108 hearing. *See*

City of Wilson v. Batten Fam., L.L.C., 226 N.C. App. 434, 439 (2013) ("[A]t a minimum, a party must argue all issues of which it is aware, or reasonably should be aware, in a N.C.G.S. § 136-108 hearing.").

After the trial court resolves any issues related to the title of or interests in the property that was taken, then, under N.C.G.S. § 136-117, the trial court may determine how the settlement should be distributed:

> If there are adverse and conflicting claimants to the deposit made into the court by the Department of Transportation or the additional amount determined as just compensation, on which final judgment is entered in said action, the judge may direct the full amount determined to be paid into said court by the Department of Transportation and may retain said cause for determination of who is entitled to said moneys and may by further order in the cause direct to whom the same shall be paid and *may in its discretion order a reference to ascertain the facts on which such determination and order are to be made.*

N.C.G.S. § 136-117 (2023) (emphasis added). Generally, when there are conflicting claims as to how the compensation for the property taken by eminent domain should be apportioned, "a proper method of fixing the value of, or damage to, each interest or estate, is to determine the value of, or damage to, the property as a whole, and then to apportion the same among the several owners according to their respective interests or estates." *Barnes v. N.C. State Highway Comm'n*, 257 N.C. 507, 520 (1962).

With this general framework for an eminent domain action in mind, we now turn to the process employed in this case.

B. Resolution of this Eminent Domain Action

Initially, the Developer and the Association jointly argued that the DOT's estimated compensation, which did not include any value for development rights, was "grossly inadequate." A party's development rights in property, this Court has held, is an interest affected by condemnation of the property, and the right of development enhances the value of the property before the taking. *See Wayne*, 368 N.C. at 56 (holding that owners of an undeveloped portion of a subdivision had vested rights to complete the subdivision and the vested rights enhanced the value of the property before the taking). Although the DOT originally valued the land, including damages caused by the temporary taking, at $779,050, the Developer, the Association, and the DOT agreed after mediation that

the just compensation "for any and all claims for interests and costs; for any and all damages . . . ; and for the past and future use" was $3,950,000.

The Developer and the Association signed the consent judgment agreeing to the total valuation without agreeing between themselves on the apportionment of this compensation. The consent judgment which the Developer and the Association signed indicated that "the title to the property is not in dispute" and is "subject only to such liens and encumbrances as were set forth in Exhibit 'A' of the [c]omplaint and [d]eclaration of [t]aking." Exhibit "A" referenced the Declaration and all five amendments to the Declaration.

After the entry of this consent judgment, but before any N.C.G.S. § 136-108 hearing in the Taking Action, the Developer filed a collateral action seeking a declaratory judgment that the Developer "retains the right to develop Phase II until [13 July 2017], pursuant to the Fifth Amendment," and requesting reformation of the Fifth Amendment "to extend the time for [the Developer] to develop Phase II for a period of time equal to the time that the . . . DOT made it impossible for [the Developer] to do so." The Association filed a separate collateral complaint which alleged, *inter alia*, that "[t]he Fifth Amendment was not approved with unanimous consent of the unit owners." The Association did not notice the N.C.G.S. § 136-108 hearing prior to the resolution of the validity of the Fifth Amendment in the Developer's Action, although it could have. The trial court, in the Developer's action, held the Fifth Amendment was valid, establishing that the Developer held development rights at the time of the taking and those rights expired during the time that the DOT controlled a temporary easement on the property. The Association appealed that ruling to the Court of Appeals but then voluntarily withdrew the appeal on 5 January 2018. *Bloomsbury Ests., LLC*, 281 N.C. App. at 664. The Developer then asked the trial court in this action to adopt that ruling, asserting that the doctrine of collateral estoppel precluded the Association from relitigating the issue. *See generally Whitacre P'ship v. Biosignia, Inc.*, 358 N.C. 1, 14–15 (2004) (acknowledging that issue preclusion estops a party from relitigating an issue in a later action after a final judgment has been entered on the merits in a prior judicial proceeding).

Even though the order finding the Fifth Amendment valid in the Developer's Action was an interlocutory order, the trial court in the Taking Action concluded that the "issue of the validity of the Fifth Amendment was fully litigated in [the Developer's] [A]ction and the [Association] enjoyed a full and fair opportunity to litigate this issue." In a condemnation action, the purpose of the N.C.G.S. § 136-108 hearing

is to eliminate "any question as to what land the [DOT] is condemning and any question as to its title." *Nuckles*, 271 N.C. at 14; *see, e.g.*, *DeHart v. N.C. Dep't. of Transp.*, 195 N.C. App. 417, 421–22 (2009) (resolving in the N.C.G.S. § 136-108 hearing an issue of whether a taking occurred). After the N.C.G.S. § 136-108 hearing, the trial court concluded that the "issue of the validity of the Fifth Amendment was a necessary ruling in [the Developer's Action] and therefore, the Fifth Amendment "is valid, and the parties are bound by the rights and obligations contained therein."[2]

However, neither the Developer nor the Association requested that the trial court address the issue of equitable reformation of the Fifth Amendment at the N.C.G.S. § 136-108 hearing. The Developer argued that such a request would not have been appropriate because any equitable reformation would not affect the value of the property on the date of the taking, thus making any determination of equitable reformation outside the scope of a N.C.G.S. § 136-108 hearing. However, with a temporary construction easement, the total loss due to the taking is affected by the value or condition of the property when it is returned to the owner. If the right to develop the property existed when the DOT took the land and was extinguished before the DOT returned the property, then the damages associated with the taking include the loss of those rights. *See Williams v. State Highway Comm'n*, 252 N.C. 514, 517 (1960) (recognizing that in calculating damages, "all of the capabilities of the property, and all of the uses to which it may be applied, or for which it is adapted, which affect its value in the market are to be considered, and not merely the condition it is in at the time and the use to which it is then applied by the owner" (cleaned up)). While we do recognize that the Developer was fully compensated for the loss of its development rights, we decline the Association's invitation to rule in this case on the equities of equitable reformation—such a determination was outside the scope of the N.C.G.S. § 136-108 hearing, and a trial court will undoubtedly weigh the equities taking into account this decision.

The legislature created this process "to eliminate from the jury trial any question as to what land the [DOT] is condemning," *Dep't of Transp. v. Rowe*, 351 N.C. 172, 175–76 (1999) (quoting *Nuckles*, 271 N.C. at 14), and "title to the land, interest taken, and area taken," N.C.G.S. § 136-108.

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2. The Association appealed this ruling to the Court of Appeals. The Court of Appeals dismissed the appeal as interlocutory since the Association "failed to meet its burden in its principal brief to show why it affects a substantial right or to demonstrate what substantial rights would be jeopardized absent immediate review by this Court." *Dep't of Transp. v. Bloomsbury Ests., LLC*, No. COA18-773, slip op. at 15–16 (N.C. Ct. App. Mar. 5, 2019) (unpublished). That decision was not appealed to this Court.

Principles of res judicata apply to matters that have been fully litigated. *See Gibbs v. Higgins*, 215 N.C. 201, 204–05 (1939) ("The plea of *res* [ ] *judicata* applies, except in special cases, not only to the points upon which the court was required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject in litigation and which the parties, exercising reasonable diligence, might have brought forward at the time and determined respecting it." (cleaned up)).

Because the parties in the Developer's Action litigated the validity of the Fifth Amendment, we conclude the trial court in this Taking Action did not err in concluding that the Fifth Amendment was valid, and the parties were bound by the rights and obligations of the Fifth Amendment.

C. Summary Judgment

At the conclusion of the N.C.G.S. § 136-108 hearing, all issues except how the compensation would be apportioned were resolved. Both parties previously agreed—by consent order—that the total damages for the taking were $3,950,000. The sole remaining issue was the appropriation of the compensation between the parties. In eminent domain proceedings, N.C.G.S. § 136-117 gives the trial court the discretion to "order a reference"—in this case, appraisals— "to ascertain the facts" as to "who is entitled to said moneys." N.C.G.S. § 136-117; *cf. Va. Elec. & Power Co. v. Tillett*, 316 N.C. 73, 77–78 (1986) (highlighting that the Rules of Civil Procedure are applicable in eminent domain proceedings to the extent that the rules do not conflict with procedures identified in the eminent domain statutes).

We review summary judgment de novo. *Forbis v. Neal*, 361 N.C. 519, 524 (2007). Summary judgment is appropriate only when the record shows that "there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." *In re Will of Jones*, 362 N.C. 569, 573 (2008) (quoting *Forbis*, 361 N.C. at 523–24). "An issue is material if the facts alleged would constitute a legal defense, or would affect the result of the action, or if its resolution would prevent the party against whom it is resolved from prevailing in the action." *Koontz v. City of Winston-Salem*, 280 N.C. 513, 518 (1972). "When considering a motion for summary judgment, the trial judge must view the presented evidence in a light most favorable to the nonmoving party." *Dalton v. Camp*, 353 N.C. 647, 651 (2001).

At summary judgment, the appraisers for the Developer and the Association agreed that because the Fifth Amendment was valid,

the Developer should be fully compensated for the development rights, which—according to the Association's appraisal—were worth $3,350,000. The Association's appraisal "determined the loss to the [Developer] as a result of the partial taking, as of the date of the taking was $3,350,000 . . . and thus the remainder of the recovery ($600,000) should be assigned to the Association." At the time of the summary judgment hearing, only $3,055,102 of the compensation remained due to disbursements for attorneys' fees and costs. The Association argued that there were material issues of fact precluding an entry of summary judgment, i.e., whether the Association owned the property and the development rights and the proper allocation of the eminent domain proceeds. The trial court granted summary judgment and apportioned the remaining funds between the parties based upon percentages from the Association's appraisal. Because the Fifth Amendment was found to be valid and because the appraisers agreed—based upon the validity of the Fifth Amendment—that the Developer was entitled to compensation for loss of the development rights, there was no dispute of material facts. Therefore, the trial court did not err in granting summary judgment in favor of the Developer. Further the trial court did not err in exercising its discretion under N.C.G.S. § 136-117 to distribute the funds in a manner that compensated the Developer for the loss of the development right and distributed the residual funds to the Association.

The Court of Appeals held that summary judgment was not proper, and that "a jury should be allowed to determine the credibility of each appraiser and examine their opinions of value." *Bloomsbury Ests., LLC*, 281 N.C. App. at 668. However, the Court of Appeals did not address the fact that the appraisers agreed that the Developer should be compensated for the loss of the development rights. Additionally, the plain language of N.C.G.S. § 136-117 allows the trial court the discretion to order an appraisal that the trial court can use to determine the apportionment of the compensation. *See* N.C.G.S. § 136-117; *see also State Highway Comm'n v. Cape*, 49 N.C. App. 137, 140–41 (1980) (noting in the context of an eminent domain proceeding related to multiple tracts of land that when the total compensation is apportioned between distinct tracts of land, the trial court can apportion the damages among several owners of a single tract according to their respective interests and estates). The reference ordered by the trial court—the appraisals—along with the Developer's concession to use of the Association's appraisal established no dispute that the Developer was entitled to the compensation associated with the loss of development rights. The trial court adopted the Association's appraisal for the value of those rights as allowed by

N.C.G.S. § 136-117. The Court of Appeals erred in concluding that the trial court did not have the authority to do so.

III. Conclusion

In sum, the trial court in the Taking Action appropriately granted summary judgment after resolving all issues pleaded and argued at the N.C.G.S. § 136-108 hearing related to title and the interests taken as of the date of the taking. Accordingly, we reverse the decision of the Court of Appeals.

REVERSED.

NUNG HA AND NHIEM TRAN
v.
NATIONWIDE GENERAL INSURANCE COMPANY

No. 312A19-2

Filed 23 August 2024

Insurance—homeowner's fire insurance—notice of cancellation—statutory requirements—actual notice sufficient

Where plaintiff homeowners had actual notice that their provisional homeowner's fire insurance policy had been cancelled—based, in part, on evidence that plaintiffs received, signed, and cashed a check from defendant insurance company listing the policy number and refunding plaintiffs their excess premium—and, therefore, had a reasonable opportunity to procure other insurance before their house burned down two months later, the Supreme Court found it unnecessary to address the broader question of whether defendant's manner of notice—by mailing a letter of cancellation to plaintiffs that they claimed not to have received—was sufficient to meet the requirements of N.C.G.S. § 58-44-16(f)(10).

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. 581 (2022), affirming a judgment entered on 30 July 2021 by Judge Rebecca W. Holt in Superior Court, Wake County. Heard in the Supreme Court on 16 April 2024.

John M. Kirby for plaintiffs-appellants.

Robinson, Bradshaw & Hinson, P.A., by Stephen D. Feldman, Travis S. Hinman, and Garrett A. Steadman, for defendant-appellee.

Young Moore and Henderson, P.A., by Angela Farag Craddock and Walter E. Brock, Jr., for North Carolina Rate Bureau, amicus curiae.

EARLS, Justice.

In this case, we consider whether Nationwide effectively canceled plaintiffs' fire insurance policy before their house burned down. Almost two months before that tragic fire, Nationwide mailed plaintiffs a letter explaining when and why it was terminating their coverage. The cancellation date came and went. Afterwards, Nationwide sent plaintiffs a check listing their policy number and refunding the excess premium. The company also broke from its regular course of drafting monthly premium payments from plaintiffs' bank account. Plaintiffs contend—and the trial court found—that they never saw the cancellation letter. But they received, signed, and cashed the refund check over a month before the fire.

When Nationwide denied plaintiffs' insurance claim, they sued. Nationwide maintained that it cancelled the policy before the blaze; plaintiffs argued that their coverage remained intact. The Court of Appeals held that Nationwide duly terminated plaintiffs' insurance after giving them the advanced notice required by N.C.G.S. § 58-44-16(f)(10) (2023). We affirm the Court of Appeals, but on slightly different grounds.

Ample evidence shows that plaintiffs had "actual notice" of cancellation. *See Moore v. Adams Elec. Co.*, 264 N.C. 667, 672 (1965). And when the "fact of notice" is clearly shown, the "manner of giving notice" becomes of "secondary importance." *Id.* By equipping plaintiffs with the forewarning, time, and information needed to secure other coverage before their insurance lapsed, Nationwide cancelled their policy in line with subsection 58-44-16(f)(10). We thus modify and affirm the Court of Appeals.

I. Background

A. Plaintiffs Seek Insurance

Plaintiffs Nhiem Tran and Nung Ha married in 1993 while living in Vietnam. Mr. Tran immigrated to the United States in 1996 as an international student at Pacific Christian College. Mrs. Ha soon followed.

Together, the couple have one daughter and three sons. In 2010, plaintiffs moved into a house in Wake Forest, North Carolina.

Plaintiffs began looking for homeowner's insurance in early 2015. They first secured coverage from AAA around March of that year. But after AAA inspected plaintiffs' home, it flagged several hazards, including an unfenced swimming pool and rotting wood. Based on those conditions, AAA canceled plaintiffs' policy. The company sent—and plaintiffs received—a written notice informing them of the cancellation and listing the issues with the property.

In response, plaintiffs sought coverage from Nationwide. On 1 April 2015, Mr. Tran filled out an online insurance application. A Nationwide agent called him that same day to discuss the property and his desired coverage. Mr. Tran arranged for Nationwide to draft monthly premiums from his checking account. He later logged into Nationwide's web portal and signed the policy electronically. Nationwide issued that policy subject to an underwriter's review.

B. Nationwide Cancels Plaintiffs' Policy

A few weeks later, Nationwide dispatched an underwriter to inspect plaintiffs' property. That inspection unearthed many of the same hazards logged by AAA—rotten siding, an unfenced swimming pool, and an unsecured trampoline. The latter two conditions were classified as "gross hazards." Citing those concerns, Nationwide—like AAA—chose to cancel plaintiffs' policy. The company then mailed plaintiffs a notice of cancellation on 22 May 2015 by first-class mail. The letter listed the three hazards prompting the cancellation. It also explained that plaintiffs' policy would end on 6 June 2015 unless they fixed the identified risks.

Plaintiffs did not contact Nationwide, and so the company terminated their policy on 6 June 2015—fifteen days after mailing the cancellation letter. According to plaintiffs, they never received that letter. The trial court so found. But everyone agrees that after Nationwide ended plaintiffs' coverage, it stopped drafting monthly premium payments from their bank account. So while funds were withdrawn at the beginning of April, May, and June, plaintiffs did not pay for insurance in July. Also important, two days after the cancellation date, Nationwide mailed plaintiffs a check refunding the excess premium paid for June. The check prominently listed the policy number. And plaintiffs endorsed and cashed that check on 17 June 2015.

On the evening of 24 July 2015, plaintiffs were at church when their home caught fire. The entire structure burned down, consuming

the family's belongings. When Mr. Tran called Nationwide to report the blaze, he learned that his policy ended on 6 June 2015. Plaintiffs later filed a claim with Nationwide—the company rejected it, contending that plaintiffs' insurance expired before the fire.

C. Procedural History of Plaintiffs' Suit

Plaintiffs sued. They invoked N.C.G.S. § 58-41-15(c) (2023), which allows an insurer to cancel a policy within the first sixty days by "furnishing to the insured at least 15 days prior written notice of and reasons for cancellation." According to plaintiffs, the statute requires actual notice of cancellation. And because they never received Nationwide's cancellation letter, plaintiffs continued, their policy remained in place.

After a bench trial, the trial court entered a judgment dismissing plaintiffs' claims in part and declaring that Nationwide canceled their policy before the fire. Per the court, the company's proof of mailing satisfied the statutory notice requirements. And because Nationwide "timely and properly canceled the [p]olicy," the trial court reasoned, it "did not breach the contract by denying [p]laintiffs' claim."

The Court of Appeals reversed. *See Ha v. Nationwide Gen. Ins. Co.*, 266 N.C. App. 10, 17 (2019). According to the court, "furnish[ing]" notice as required by section 58-41-15 entails more than mere proof of mailing. *Id.* Reasoning that the statute demands "actual delivery to and/or receipt" of a cancellation notice, *id.* at 15, the court reversed and remanded the trial court's judgment, *id.* at 17.

Nationwide appealed to this Court. We unanimously vacated the Court of Appeals decision and remanded to "determine whether Article 41, Article 36 or other statutes govern in this matter." *See Ha v. Nationwide Gen. Ins. Co.*, 375 N.C. 87 (2020). The Court of Appeals returned the case to the trial court to answer that question.

On remand, plaintiffs argued that N.C.G.S. § 58-44-16—a provision called the "standard fire insurance policy"—supplied the governing law. Subsection 58-44-16(f)(10) of that statute covers cancellation. It allows an insurer to end a policy "by giving to the insured a five days' written notice of cancellation." N.C.G.S. § 58-44-16(f)(10) (2023). In plaintiffs' view, that provision requires actual receipt of notice.

But according to the trial court, mailing notice of cancellation satisfies subsection 58-44-16(f)(10). Extending that logic, the court held that Nationwide discharged "its notice obligations under the applicable statutes and under the terms of . . . plaintiffs' homeowners' insurance policy by its proof of mailing a timely cancellation notice." The trial court again entered judgment for Nationwide.

A divided Court of Appeals panel affirmed. *See Ha v. Nationwide Gen. Ins. Co.*, 286 N.C. App. 581 (2022). The majority first held that section 58-44-16 controlled plaintiffs' policy. *Id.* at 583. Turning next to subsection 58-44-16(f)(10), the court concluded that the "plain meaning of the word 'give,' particularly in its present participle form, includes the act of mailing notice of cancellation to the insured." *Id.* at 583–84. The statute does not "require[ ] proof that the cancellation notice was actually received," the majority continued—instead, an insurer's "proof of mailing is sufficient to cancel the policy." *Id.* at 583. Applying that statutory analysis, the court held that Nationwide "properly cancelled the policy under section 58-44-16 by proving that the cancellation notice was mailed to [p]laintiffs." *Id.*

Judge Arrowood dissented. *See id.* at 585 (Arrowood, J., dissenting). Because the word "giving" was ambiguous, he reasoned, precedent required that the statute "be interpreted in favor of the insured." *Id.* at 586–87. He would thus hold that "for an insurance company to effectively cancel a policy under [subsection 58-44-16(f)(10)], they would need to show proof the notice of cancellation was actually received." *Id.* at 585. Plaintiffs appealed to this Court based on the dissent.

II. Analysis

Section 58-44-16 sets standard terms for fire insurance policies. *See Boyd v. Bankers & Shippers Ins. Co.*, 245 N.C. 503, 510–15 (1957) (tracing history and evolution of North Carolina's fire insurance provisions). As part of that statutory scheme, the legislature specified how insurers and insureds alike may cancel insurance coverage. N.C.G.S. § 58-44-16(f)(10) (2023). Insureds may end their policy by "communicat[ing] to the insurer a definite and unconditional request" to cancel. *Baysdon v. Nationwide Mut. Fire Ins. Co.*, 259 N.C. 181, 185 (1963). In that event, the "insurer shall, upon demand and surrender of this policy, refund the excess of paid premium above any short rates for the expired time." N.C.G.S. § 58-44-16(f)(10). Insurance companies may also cancel insurance policies by:

> [G]iving to the insured a five days' written notice of cancellation with or without tender of the excess of paid premium above the pro rata premium for the expired time, which excess, if not tendered, shall be refunded on demand. Notice of cancellation shall state that said excess premium (if not tendered) will be refunded on demand.

Id.

As this Court explained almost a century ago, statutory notice requirements are "manifestly for the protection of the insured." *See Dawson v. Concordia Fire Ins. Co.*, 192 N.C. 312, 316 (1926). They codify principles of "just dealing." *See Urey v. Southern Fire Ins. Co.*, 197 N.C. 385, 388 (1929). And they recognize the basic fairness of apprising consumers of "so important a matter as the cancellation of [their] insurance policy." *Id.* Subsection 58-44-16(f)(10) extends those values to fire insurance by obliging an insurer to give at least five days' written notice "before it terminates its contractual relationship with its insured, depriving him of protection." *See Levinson v. Travelers Indem. Co.*, 258 N.C. 672, 674 (1963). As this Court has recognized, though, the legislature crafted statutory notice requirements with a practical eye. *See Pearson v. Nationwide Mut. Ins. Co.*, 325 N.C. 246, 253 (1989). We have thus anchored notice provisions to their real-world purpose: giving insureds the "information necessary for [their] protection" and assuring a "reasonable opportunity to procure other insurance" before tragedy strikes. *See Levinson*, 258 N.C. at 674; *see also Moore*, 264 N.C. at 672.

In line with those principles, we have embraced a functional view of statutory notice requirements like subsection 58-44-16(f)(10). That approach is grounded in pragmatism and legislative fidelity. *See Harrelson v. State Farm Mut. Auto. Ins. Co.*, 272 N.C. 603, 610 (1968) (interpreting notice statute so as "to effectuate the purpose of the Legislature"). Mindful that the General Assembly designed notice provisions to give insureds a meaningful chance to avoid coverage lapses, our cases have elevated that purpose over procedural technicalities. *See Moore*, 264 N.C. at 672. We have thus explained that "the manner in which notice is given is of secondary importance—it is the *fact* of notice" that matters. *Id.* (emphasis added); *see also Levinson*, 258 N.C. at 674 ("When the notice to the insured conforms to the statute and *gives him information necessary for his protection*, the contractual obligation ends at the time fixed." (emphasis added)); *cf. Travelers Indem. Co. v. Guess*, 255 S.E.2d 55, 56 (Ga. 1979) (explaining that the statutory notice "methods adopted by the General Assembly are intended to assure actual notice of cancellation to an insured and where it is admitted such notice was received, the purpose of the statute has been accomplished").

This case tests our commitment to substance over form. The parties ask us to delimit subsection 58-44-16(f)(10) and decide, as did the Court of Appeals, whether "proof of mailing" qualifies as "giving" written notice. *Cf. Ha*, 286 N.C. App. at 583–84. But we settle the dispute on narrower grounds. Everyone agrees that actual notice of cancellation

satisfies subsection 58-44-16(f)(10). In general terms, a person has actual notice when the information "given directly to" him imparts clear knowledge of a fact or condition with legal significance. *See Actual Notice*, Black's Law Dictionary (11th ed. 2019); *see also Horton v. Home Ins. Co.*, 122 N.C. 498, 500 (1898) (insureds lacked notice because they "had no knowledge or information" of a property sale). And here, abundant evidence shows that plaintiffs had actual notice of cancellation well before the fire. Because Nationwide gave plaintiffs the timely forewarning required by subsection 58-44-16(f)(10), it properly canceled their policy.

Our holding, however, is specific to this record and the actual notice it divulges. We decline to gratuitously opine on whether depositing notice in the mail counts as "giving" written notice under subsection 58-44-16(f)(10). That restraint coheres with principles of judicial economy. It also tracks our cautious approach to evidence-intensive insurance disputes.[1] And most importantly, it affirms our longstanding recognition that "it is the *fact* of notice that is important." *Moore*, 264 N.C. at 672 (emphasis added).

Our precedent bears those principles out, illustrating our practical approach to statutory notice requirements. Consider our decision in *Moore*. In that case, the plaintiff—a worker for the Adams Electric Company—was injured on the job. *See Moore*, 264 N.C. at 667. After the accident, the plaintiff sought compensation and reimbursement for medical expenses from his employer. *Id.* at 668. The employer, as required by statute, had secured workmen's compensation insurance. *See id.* But the insurer insisted that it cancelled the employer's policy *before* the plaintiff's accident. *Id.* at 669. On that basis, the insurer disclaimed liability. *Id.*

There, as here, the case hinged on whether the insurer cancelled its policy in line with statutory notice requirements. *See id.* at 672. There, as here, the insurer mailed a notice of cancellation to the employer. *Id.* at 669. And there, as here, the employer contended that the cancellation notice "was either not received by" it or "was misplaced in [its] office."

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1. *See, e.g.*, *Harrelson*, 272 N.C. at 611 (deciding case on presented facts and thus deeming it "unnecessary" to examine the scope and application of various insurance statutes); *Abernethy v. Mecklenburg Farmers' Mut. Fire Ins. Co.*, 213 N.C. 23, 27 (1938) (holding that "the evidence clearly shows that the [notice] statute was not complied with" and—after noting potential conflict between statute and insurer's by-laws—explaining that "from the view we take of this case, this question is not necessary to be decided"); *Smith v. Nationwide Mut. Ins. Co.*, 315 N.C. 262, 268 (1985); *Dixie Fire & Cas. Co. v. Esso Standard Oil Co.*, 265 N.C. 121, 130 (1965).

Id. The Industrial Commission found that the insurer never "gave notice of an intention to cancel [its] workmen's compensation policies to [the] employer by registered mail or certified mail, as required by law." *Id.* at 672 (emphasis omitted). For that reason, the Commission deemed the cancellation ineffective and the insurer liable "upon the risk at the time of the injury." *Id.* (emphasis omitted).

This Court found that reasoning myopic and held that the Commission "reached the erroneous conclusion that the policy could only be terminated by registered or certified mail." *Id.* We underscored the goal of the notice requirement: to "assure an employer sufficient opportunity to procure other insurance." *Id.* In line with that purpose, we reasoned that "the fact of notice" is the statutory lodestar—measured against that animating goal, the "manner in which notice is given is of secondary importance." *Id.* By those lights, the Commission impermissibly "paramounted the *manner* of giving notice rather than the *fact* of notice." *Id.* (emphasis added). "If, in fact, [the] [e]mployer had 30 days' notice" of the insurer's "intent to terminate its compensation insurance," we explained, "the fact that notice was given by some means other than registered or certified mail would not prevent cancellation." *Id.* In our view, then, the "Commission should have answered this factual question: Did [the] [e]mployer have 30 days' actual notice of" the insurer's "intent to cancel its insurance policy"? *Id.* at 672–73. Because the insurer's liability hinged on that issue, we remanded for the Commission to "make necessary findings of fact on which it may make an award." *Id.* at 673.

The same logic controls this case. Though plaintiffs deny receiving Nationwide's cancellation letter, other direct datapoints armed them with clear knowledge and advanced warning of their policy's termination. *Cf. Horton*, 122 N.C. at 500. For that reason, plaintiffs had actual notice of cancellation and Nationwide duly ended their insurance before the fire.

We first offer some key context: Before contracting with Nationwide, plaintiffs sought coverage from AAA. But AAA cancelled plaintiffs' policy after an underwriter inspected their home and noted many of the hazards later flagged by Nationwide. AAA mailed, and plaintiffs received, a cancellation letter that itemized the issues with their property. But rather than fix those risks, plaintiffs sought new insurance from a different insurer. So when plaintiffs contracted with Nationwide, they did not do so in a vacuum—they signed that policy aware of, and yet declining to address, the hazards that led another insurance carrier to end their coverage just weeks before. It is significant, then, that Nationwide cancelled plaintiffs' policy for the same risks cited by AAA and known by plaintiffs.

Important, too, Nationwide's cancellation letter was not its last mailing to plaintiffs. Two days after their policy was terminated, Nationwide sent plaintiffs a check refunding the excess premium. Plaintiffs not only received that check, but personally signed and cashed it on 17 June 2015. *See Horton*, 122 N.C. at 501 (explaining that insured did not receive notice and emphasizing that "[n]o part of the unearned premium was ever repaid or tendered to [her]"); *see also White v. Dixie Fire Ins. Co.*, 226 N.C. 119, 124 (1946) (citing insured's receipt of excess premium as a factor relevant to whether insurer provided notice of cancellation). The check clearly listed plaintiffs' policy number. And the amount of the refund equaled the June premium, less the window of coverage until the cancellation date on 6 June 2015. Other state courts have found actual notice based on similar evidence.[2] Here, by the date of the fire on 24 July 2015, 46 days had passed since Nationwide mailed the reimbursement check, and 37 days since plaintiffs cashed it.

Yet another factor coincided with and contextualized that refund check. Recall that plaintiffs allowed Nationwide to draft monthly payments from their bank account. Over the policy's lifespan, Nationwide thrice withdrew that cost—and at regular intervals, too. Each time the company drafted payments, it did so within the first four days of the month: first on April 3rd, next on May 4th, and finally on June 2nd. In July, though, that regular cadence halted—a break from routine that started only *after* plaintiffs deposited the check refunding their June premium and prominently displaying their policy number.

Taken together, the facts show plaintiffs' actual notice of cancellation. We reach that conclusion based on:

- Plaintiffs' preexisting knowledge of specific property hazards;
- AAA's written cancellation of plaintiffs' coverage just weeks before they contracted with Nationwide;

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2. *See, e.g.*, *Carter v. Allstate Indem. Co.*, 592 So. 2d 66, 69–70 (Miss. 1991) (concluding that insured "receive[d] *actual* notice of the cancellation" in part because insurer mailed, and insured cashed, a refund check for the unearned premium that "clearly exhibit[ed] the policy number on its face" and "equaled the amount of the refund which would have been due" after coverage ended); *see also Favati v. Nat'l Prop. Owners Ins. Co.*, 266 S.E.2d 359, 361 (Ga. Ct. App. 1980) (finding that insured had actual notice of cancellation after he received, personally endorsed, and deposited a refund check "bearing information thereon that by reasonable implication informed [insured] the check was a return of premium that the [insurance] policy, by number, had been canceled"); *Conrad v. Universal Fire & Cas. Ins. Co.*, 686 N.E.2d 840, 844 (Ind. 1997) (noting that if premium "refund had been transmitted to the [insureds], it presumably would have put them on notice of cancellation").

- Plaintiffs' receipt, personal endorsement, and cashing of a check emblazoned with their policy number and matching their excess June premium; and
- Nationwide's abrupt cessation of once-regular monthly withdrawals from plaintiffs' bank account.

Continuing our focus on substance over form, we hold that plaintiffs had advanced warning of cancellation and were armed with the "information necessary for [their] protection." *Levinson*, 258 N.C. at 674. Because "the manner in which notice is given is of secondary importance" when clear evidence shows an insured's actual notice, *see Moore*, 264 N.C. at 672, we begin—and end—our analysis with plaintiffs' direct and palpable knowledge of their policy's expiration. It is unnecessary to parse the scope of subsection 58-44-16(f)(10), and we decline the parties' requests to do so.

III. Conclusion

On this discrete record, we hold that Nationwide gave plaintiffs the timely forewarning required by subsection 58-44-16(f)(10) and aligned with the "purpose of the Legislature." *Harrelson*, 272 N.C. at 610. Because Nationwide canceled plaintiffs' coverage well before 24 July 2015, their policy was not in place at the time of the tragic fire. The Court of Appeals correctly affirmed the trial court's judgment for Nationwide, though it did so by construing the statute rather than consulting the evidence. We thus affirm the Court of Appeals but modify its opinion to focus on the "fact of notice" rather than the "manner of giving notice." *Moore*, 264 N.C. at 672.

MODIFIED AND AFFIRMED.

IN RE A.J.

[386 N.C. 409 (2024)]

IN THE MATTER OF A.J., J.C., J.C.

No. 206PA23

Filed 23 August 2024

Child Abuse, Dependency, and Neglect—neglect and dependency —adjudication order—steps for reviewing on appeal—sufficiency of findings and evidence

In a neglect and dependency matter, where the parties agreed on appeal that many of the trial court's adjudicatory findings of fact were based on inadmissible hearsay and should therefore be disregarded, the Supreme Court reiterated the proper steps for reviewing an adjudication order on appeal after disregarding unsupported findings: first, the appellate court must examine whether the remaining findings of fact support the trial court's conclusions of law; then, if those findings do not support the trial court's conclusions, the appellate court must examine whether the record contains sufficient evidence that could support the necessary findings. Here, the trial court's remaining findings did not support its legal conclusions, but the record contained clear, cogent, and convincing evidence that could have supported the necessary findings, which required vacating the adjudication order and remanding the matter to the trial court to enter a new order.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 289 N.C. App. 632 (2023), reversing an order entered on 22 March 2022 by Judge Lee Teague in District Court, Pitt County, and remanding the case. Heard in the Supreme Court on 20 February 2024.

Jon G. Nuckolls for petitioner-appellant Pitt County Department of Social Services; and Matthew D. Wunsche, GAL Appellate Counsel, and Brittany T. McKinney, GAL Staff Attorney, and for respondent-appellant Guardian ad Litem.

Wendy C. Sotolongo, Parent Defender, by Jacky Brammer, Assistant Parent Defender, for respondent-appellee mother.

DIETZ, Justice.

In this juvenile proceeding, the Court of Appeals held that many of the trial court's key findings in its adjudication order were based on inadmissible hearsay. In their briefing to this Court, the parties agree that those findings are improper and must be disregarded.

The issue before this Court is what to do about it. The Court of Appeals held that the trial court's "findings of fact, unsupported by properly admitted evidence, are insufficient to support the trial court's adjudications." *In re A.J.*, 289 N.C. App. 632, 644 (2023). As a result, the Court of Appeals reversed the trial court's order and remanded with instructions to dismiss the juvenile petitions.

As explained below, this holding omits crucial steps in the appellate analysis. First, when an appellate court determines that a finding of fact is not supported by sufficient evidence, the court must disregard that finding and examine whether the remaining findings support the trial court's conclusions of law. *In re A.J.L.H.*, 384 N.C. 45, 52–53 (2023). If the remaining findings support the trial court's conclusions, the appellate court must affirm, notwithstanding the existence of some invalid findings. *Id.*

Second, if the remaining findings do not support the trial court's conclusions, there is yet another step: the reviewing court must examine whether there is sufficient evidence in the record that *could* support the necessary findings. *See In re K.N.*, 373 N.C. 274, 284 (2020). If so, the appropriate disposition is to vacate the trial court's order and remand for entry of a new order. *Id.* This permits the trial court, as fact finder, to decide whether to enter a new order with sufficient findings based on the record or to change the court's conclusions because the court cannot make the necessary findings. *Id.* at 284–85.

Here, the Court of Appeals did not adequately examine whether the remaining findings supported the trial court's conclusions and did not examine whether the evidence in the record could support sufficient findings. Because the remaining findings of fact are insufficient but the record contains clear, cogent, and convincing evidence that *could* support both the neglect and dependency adjudications, we reverse the decision of the Court of Appeals and remand with instructions to vacate the trial court's order and remand the case for further proceedings in the trial court.

Facts and Procedural History

Respondent is the mother of three children, Amanda, Jade, and Juliet.[1] In 2021, the Pitt County Department of Social Services received several reports regarding respondent's family. At the time, respondent's youngest child, Amanda, lived with respondent while the two older children, Jade and Juliet, lived primarily with relatives but frequently spent time with respondent.

All of the reports involved interactions between respondent and her daughter Jade in which respondent acted in a hostile and aggressive manner, such as by smashing in a window of her car when Jade locked herself inside and leaving Jade outside the home in the cold until neighbors took her in. Respondent acknowledged to social workers that she needed to obtain a mental health assessment in light of her erratic, aggressive behavior. Respondent did not do so and later denied the need for any mental health assessment.

DSS ultimately filed petitions alleging that Jade and her two siblings were neglected and that Jade and her sister Juliet were dependent. At the hearing, over respondent's objection, the trial court admitted statements from Jade to the social workers. Jade did not testify at the hearing. The trial court later entered a written order concluding that all three juveniles were neglected and that Jade and Juliet were dependent. Many of the trial court's findings relied on Jade's hearsay statements or other evidence that was the subject of a timely objection by respondent. Respondent appealed.

On appeal, the Court of Appeals determined that the trial court erred by admitting Jade's hearsay statements. *In re A.J.*, 289 N.C. App. at 644. The court then held that the "findings of fact, unsupported by properly admitted evidence, are insufficient to support the trial court's adjudications either that Jade, Juliet, and Amanda were neglected, or that Jade and Juliet were dependent" and that the trial court's order "is reversed and this cause is remanded for dismissal." *Id.*

This Court allowed a joint petition for discretionary review from DSS and the guardian ad litem.

Analysis

This is an appeal from an initial adjudication in a juvenile proceeding. At this stage of the proceeding, the "sole question for the reviewing

1. We use pseudonyms to protect the identities of the juveniles.

court is 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." *In re A.J.L.H.*, 384 N.C. at 53.

When assessing whether a particular finding is supported by clear, cogent, and convincing evidence, the reviewing court must consider any properly preserved challenges to the admission of the supporting evidence. *See In re J.S.*, 377 N.C. 73, 77–78 (2021). For example, the North Carolina Rules of Evidence apply at the adjudication stage of these juvenile proceedings. N.C.G.S. § 7B-804 (2023). Thus, statements that constitute inadmissible hearsay are not clear, cogent, and convincing evidence on which the trial court may rely. *See In re K.J.M.*, 288 N.C. App. 332, 345 (2023); *In re T.M.*, 187 N.C. App. 694, 698 (2007). Similarly, facts that must be established by expert testimony are not clear, cogent, and convincing evidence if offered by lay witnesses or inferred from other non-expert testimony. *Cf. In re K.L.*, 272 N.C. App. 30, 50 (2020). Assuming an evidentiary objection is properly preserved, a party may argue on appeal that any findings supported solely by inadmissible evidence are infirm and cannot support the trial court's conclusions of law.

We have repeatedly articulated what an appellate court must do if it determines that a finding of fact lacks sufficient support in the record: the reviewing court must disregard that finding and examine whether the remaining findings support the trial court's determination. *In re A.J.L.H.*, 384 N.C. at 52. Naturally, if the remaining findings sufficiently support the trial court's conclusion that a juvenile is abused, neglected, or dependent, then the reviewing court must affirm the trial court's order notwithstanding the existence of some unsupported findings. *Id.* at 52–53.

If, however, the appellate court determines that the trial court's remaining findings of fact are not sufficient, then the court must then examine a follow-on question: whether there is sufficient evidence in the record that *could* support the necessary findings. *See In re K.N.*, 373 N.C. at 284. If so, the appellate court must vacate the trial court's order and remand the case to give the trial court the opportunity to make additional findings if it chooses. *Id.* at 284–85. An appellate court may remand for entry of an order dismissing the matter only if the trial court's findings are insufficient *and* the evidentiary record is so lacking that it cannot support any appropriate findings on remand. *See id.*

Here, the Court of Appeals determined that a number of the trial court's findings of fact were not supported by clear, cogent, and convincing evidence because the supporting evidence was inadmissible

under the Rules of Evidence. *In re A.J.*, 289 N.C. App. at 637–40. But the Court of Appeals did not adequately engage in the additional steps of the analysis described above. First, instead of focusing on the remaining *supported* findings, the Court of Appeals repeatedly focused on the impact of the *unsupported* findings. *See id.* at 640 ("The unsupported findings of fact, as discussed above, are insufficient to support an adjudication that Jade was neglected."); *id.* at 644 ("The findings of fact, unsupported by properly admitted evidence, are insufficient to support the trial court's adjudications either that Jade, Juliet, and Amanda were neglected, or that Jade and Juliet were dependent.").

Second, after determining that the findings were insufficient, the Court of Appeals did not examine whether the evidentiary record *could* support additional findings. Instead, the court simply stated that "this cause is remanded for dismissal," without any examination of the full evidentiary record. *Id.*

We therefore begin our analysis by doing what our case law requires and what the Court of Appeals failed to do adequately: disregard any unsupported findings of fact, examine whether the remaining findings are sufficient, and if necessary, examine whether the evidentiary record could support additional findings.

The challenged findings can be divided into four categories. The first involves findings of a June 2021 incident that resulted in a report to DSS. With respect to that incident, the trial court found that respondent got into an altercation with Jade that led Jade to lock herself in the family's car. The court found that respondent took a shovel and broke out the window of the car, hit Jade with a belt buckle in the head and all over her body, choked Jade, and threatened to kill her.

Some of these findings are not supported by clear, cogent, and convincing evidence in the record. Specifically, respondent's use of a shovel, her choking of Jade, and her threat to kill Jade all were based solely on Jade's statements to social workers during their investigation. On appeal, DSS and the guardian ad litem do not dispute that Jade's statements are inadmissible hearsay.[2]

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2. Because, in their filings with this Court, DSS and the guardian ad litem do not contest the Court of Appeals' conclusion that Jade's statements were inadmissible hearsay, we do not consider that question and treat Jade's statements as inadmissible. *See Soc'y for the Hist. Pres. of the Twenty-Sixth N.C. Troops, Inc. v. City of Asheville*, 385 N.C. 744, 751 (2024) (declining to consider a portion of the Court of Appeals' opinion when the appellant abandoned that issue before the Supreme Court); *see also* N.C. R. App. P. 16(a), 28(a).

The remaining portions of the trial court's findings, however, are supported by clear, cogent, and convincing evidence. Respondent admitted to the social workers that she and Jade got into an "altercation" and Jade then locked herself in the car and was on the phone with police. Respondent also admitted to "breaking the window out of the car" while Jade was inside and to hitting Jade with a belt. A social worker testified that she saw a visible mark where respondent hit Jade with the belt. This supports the remaining portions of the trial court's findings.

The second category of findings concern a November 2021 incident in which the trial court found that respondent "choke slammed" Jade and "threw her out of the car." The trial court found that this incident "was reportedly witnessed by a family member over a video call." On appeal, DSS and the guardian ad litem do not dispute that this entire finding is based on inadmissible hearsay statements. We therefore disregard this finding in its entirety.

The third category involves a December 2021 report to DSS. The trial court found that respondent locked Jade outside of her home in cold weather because Jade refused to babysit her younger sister. The court found that neighbors saw Jade outside in the cold and brought her into their home. The court also found that when a law enforcement officer responded to the neighbor's call concerning Jade, the officer had to handcuff respondent to "get her to calm down," social workers observed respondent "cussing and fussing" in the presence of her children, and respondent's "behavior was unstable."

Again, some of these findings are not supported by sufficient evidence. Specifically, the only evidence that respondent actually locked Jade out of the home, as opposed to merely leaving Jade alone outside, is Jade's statements to social workers. DSS and the guardian ad litem do not contest the Court of Appeals' conclusion that these statements are inadmissible hearsay.

But, again, the remaining portions of the trial court's findings are supported by clear, cogent, and convincing evidence. This includes, importantly, the trial court's findings that respondent left Jade alone outside in the cold until neighbors took her in; that social workers observed respondent "cussing," "fussing," and "banging" in the presence of her children; that a law enforcement officer had to handcuff respondent "just to get her to calm down"; and that respondent's behavior during

this incident was so unusual and erratic that it fits the ordinary meaning of "unstable." [3]

The final category of findings concerns respondent's mental and emotional condition. The trial court found that respondent "suffers from mental and psychological illnesses as a result of traumatic experiences throughout her life" and that respondent "has denied mental health diagnosis." The trial court also found that respondent "presented as extremely hostile and aggressive through the hearing of this matter as evidenced by numerous outbursts in the Courtroom and aggressive comments directed toward other participants in this proceeding."[4] The court further found that respondent acknowledged the need to engage in a case plan to address these issues and specifically agreed "to begin mental health services" but did not do so.

Once again, some of these findings are unsupported by the record. Specifically, there is no evidence in the record of any diagnoses of respondent's mental health. To be diagnosed with a mental illness, a person must be evaluated by a trained mental health professional based on accepted criteria established in the profession, such as those in the Diagnostic and Statistical Manual of Mental Disorders (DSM). *See generally* Am. Psychiatric Ass'n, *Diagnostic and Statistical Manual of Mental Disorders: DSM-5* (5th ed. 2013). Finding that a person suffers from a mental illness typically requires expert testimony or admissible evidence of a past diagnosis by a qualified health professional. *See*, *e.g.*, *State v. Lynch*, 340 N.C. 435, 459 (1995).

To be sure, a social worker testified at the hearing that he personally observed respondent's behavioral issues including "anger, resentment, with the family members," and other evidence in the record demonstrated that respondent had anger issues and acted erratically. The trial court also observed similar behavior at the hearing. But there was no expert testimony or documentary evidence that would support a finding that respondent had a diagnosed mental health condition. Thus, all

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3. The term "unstable" also can have a technical meaning in the context of a mental health diagnosis done by medical professionals. *See*, *e.g.*, *Unstable*, Oxford Advanced American Dictionary (2011). As explained in detail below, there is no evidence to support a finding that respondent had any diagnosed mental health issues, and we reject any interpretation of this finding that suggests otherwise.

4. The purpose of an adjudicatory hearing is to determine "the existence or nonexistence of any of the conditions alleged in a petition." N.C.G.S. § 7B-802; *see also In re L.N.H.*, 382 N.C. 536, 543 (2022). Thus, the "inquiry focuses on the status of the child at the time the petition is filed, not the post-petition actions of a party." *Id.*

findings specifically related to respondent's mental health are unsupported by the record.

The remaining findings, however, are supported by the record, including the trial court's finding that respondent exhibited "extremely hostile and aggressive" behavior and refused to follow through with a recommended case plan to address those issues.

Having identified the remaining findings that are supported by clear, cogent, and convincing evidence in the record, we turn to examining whether those findings support the trial court's conclusions of law. *See In re A.J.L.H.*, 384 N.C. at 52. Those conclusions involve two separate adjudications: the trial court adjudicated Jade and her siblings Amanda and Juliet as neglected and adjudicated Jade and her sibling Juliet as dependent.

A neglected juvenile is one whose parent, guardian, custodian, or caretaker "does not provide proper care, supervision, or discipline" or who "creates or allows to be created a living environment that is injurious to the juvenile's welfare." N.C.G.S. § 7B-101(15) (2023). A juvenile may be adjudicated neglected even if not currently residing in the parent's home. When the juvenile does not currently reside with the parent, the trial court must assess whether there is substantial risk of future neglect based on the historical facts of the case. *In re K.J.D.*, 203 N.C. App. 653, 661 (2010).

A dependent juvenile is one whose "parent, guardian, or custodian is unable to provide for the juvenile's care or supervision and lacks an appropriate alternative child care arrangement." N.C.G.S. § 7B-101(9) (2023). Findings that a parent is unable to care for her children and that the parent lacks an alternative child care arrangement support a dependency adjudication. *In re J.J.*, 180 N.C. App. 344, 347 (2006), *aff'd per curiam*, 362 N.C. 172 (2008). The court "must consider the conditions as they exist at the time of the adjudication as well as the risk of harm to the child from return to a parent" and "look at the situation before the court at the time of the hearing when considering whether a juvenile is dependent." *In re F.S.*, 268 N.C. App. 34, 44, 46 (2019) (cleaned up).

Here, the remaining findings support many of the requirements to satisfy these standards. The findings establish a pattern in which respondent put Jade in situations that are *potentially* injurious to her welfare, such as smashing in a car window while Jade was inside the car and allowing Jade to be unsupervised and alone in cold weather until neighbors took her in. The findings also establish that respondent exhibited hostile and aggressive behavior during these incidents and

that respondent initially acknowledged the need to have these issues assessed by a mental health professional but refused to do so and later denied having these issues. Finally, there are unchallenged findings supporting respondent's lack of an alternative child care arrangement.

Still, there are necessary findings that are missing. There are many scenarios where a parent breaking a window out of a car to get at a child locked inside would be reasonable and would not be an injurious living environment. The same is true of allowing a child to stay outside without supervision, even when it is cold outside. Beyond the bare findings describing these events, the trial court did not make findings demonstrating how these incidents established that the children were not receiving proper care, supervision, or discipline, or were living in an injurious environment. Importantly, there is clear, cogent, and convincing evidence in the record that *could* support the necessary findings. But the trial court did not make those findings.

We therefore agree with the Court of Appeals' holding that the trial court's findings of fact were insufficient to support its conclusions of law.[5] But we reject the Court of Appeals' resulting disposition. After determining that the trial court's findings did not support its conclusions, the Court of Appeals stated that "this cause is remanded for dismissal." *Cf. In re A.J.*, 289 N.C. App. at 644. This is error.

As explained above, when an appellate court determines that the trial court's findings of fact are insufficient, the court must examine whether there is sufficient evidence in the record that could support the necessary findings. *See In re K.N.*, 373 N.C. at 284. If so, the appropriate disposition is to vacate the trial court's order and remand for entry of a new order. *Id.* This permits the trial court, as fact finder, to decide whether to enter a new order with sufficient findings based on the record or to change its conclusions of law because the court cannot make the necessary findings. *Id.* at 284–85.

Here, as we have noted, there is clear, cogent, and convincing evidence in the record that could support the necessary findings. We therefore reverse the decision of the Court of Appeals and remand this case

5. Although we agree with this portion of the Court of Appeals' reasoning, we reject the court's categorical statement that the "use of corporal punishment, with no evidence of any resulting marks, bruising, or other injury, does not constitute neglect." *In re A.J.*, 289 N.C. App. at 640–41. Whether a child is neglected is a fact-specific determination that cannot be reduced to this type of categorical statement. There are scenarios where discipline of a child can constitute neglect even when the discipline causes little or no physical injury. *See In re A.J.L.H.*, 384 N.C. at 55.

for further remand to the trial court. On remand, the trial court, in its discretion, may enter a new order on the existing record or conduct any further proceedings that the court deems necessary.

Conclusion

We reverse the decision of the Court of Appeals and remand with instructions to vacate the trial court's order and remand for further proceedings.

REVERSED AND REMANDED.

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

KODY KINSLEY, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES

v.

ACE SPEEDWAY RACING, LTD., AFTER 5 EVENTS, LLC, 1804-1814 GREEN STREET ASSOCIATES LIMITED PARTNERSHIP, JASON TURNER, AND ROBERT TURNER

No. 280PA22

Filed 23 August 2024

Constitutional Law—North Carolina—direct constitutional claims—colorable—selective enforcement of emergency executive order—State's sovereign immunity overcome

In a dispute between the Department of Health and Human Services (DHHS) and a racetrack owner, who publicly criticized and refused to comply with the governor's executive order prohibiting "mass gatherings" during the COVID-19 pandemic, the trial court properly denied the State's motion to dismiss based on sovereign immunity where the counterclaims brought by defendants (the racetrack and its owner) adequately alleged colorable constitutional claims under the Fruits of Their Labor Clause and Equal Protection Clause of the North Carolina Constitution sufficient to pierce the State's sovereign immunity. Specifically, defendants alleged that: the governor singled out defendants by pressuring the local sheriff to arrest the racetrack owner and, when the sheriff refused, ordering DHHS officials to shut down the racetrack as a health hazard; the governor took these actions to punish the racetrack owner rather than to

address an actual health hazard at the racetrack; and DHHS officials did not take similar actions against other large outdoor venues whose owners did not openly criticize the emergency executive order.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 284 N.C. App. 665 (2022), affirming an order entered on 12 January 2021 by Judge John M. Dunlow in Superior Court, Alamance County. Heard in the Supreme Court on 7 November 2023.

Joshua H. Stein, Attorney General, by Ryan Y. Park, Solicitor General, James W. Doggett, Deputy Solicitor General, Nicholas S. Brod, Deputy Solicitor General, James W. Whalen, Solicitor General Fellow, John P. Barkley, Special Deputy Attorney General, and Hyrum J. Hemingway, Assistant Attorney General, for plaintiff-appellant.

Kitchen Law, PLLC, by S.C. Kitchen, for defendants-appellees, After 5 Events, LLC, Jason Turner, and Robert Turner.

Ivy A. Johnson and Kristi L. Graunke for ACLU of North Carolina Legal Foundation, amicus curiae.

Maynard Nexsen PC, by David S. Pokela and John Mabe, for Association of State and Territorial Health Officials, amicus curiae.

Teague Campbell Dennis & Gorham, by James M. Stanley, Jr. and Matthew W. Skidmore, for North Carolina Association of Local Health Directors, amicus curiae.

Institute for Justice, by Joshua Windham; and Stam Law Firm, by Daniel Gibson, for Jay Singleton, D.O. and Singleton Vision Center, P.A., amici curiae.

DIETZ, Justice.

In the early days of the COVID-19 pandemic, Governor Roy Cooper declared a state of emergency and issued an executive order affecting outdoor venues such as stadiums, concert arenas, and racetracks. The executive order permitted these venues to stay open but limited attendance to only twenty-five people, regardless of the venue's size.

Robert Turner, who operated a racetrack in Alamance County known as Ace Speedway, spoke out against these restrictions and told the public that his racetrack would remain open for all attendees. This led to the series of events at issue in this lawsuit.

These events concern matters that are controversial in contemporary politics. The legal issues in this appeal, by contrast, are so time-tested that they border on mundane. In our legal system, we treat the initial allegations in a lawsuit as true when assessing whether the case can move forward at the outset. It is only after the parties have had the opportunity to gather evidence—from each other, and from other parties with knowledge about the case—that courts examine whether those allegations are true.

Here, the claims at issue allege that Governor Cooper took a series of "unusual steps" to single out and shut down Ace Speedway—first by pressuring the local sheriff to arrest Turner and, when the sheriff refused, ordering public health officials to shut down Ace Speedway as a health hazard. The claims also allege that Governor Cooper took these actions not because there was an actual health hazard at the racetrack, but to punish Turner for speaking out, and that health officials did not take similar actions against other large outdoor venues whose owners did not openly criticize the Governor.

We emphasize that these allegations remain unproven. After all, the case has barely begun. Still, as explained below, these allegations assert colorable claims under the North Carolina Constitution for which there is no alternative remedy. As a result, at this stage of the case, the trial court properly denied the State's motion to dismiss. We affirm the decision of the Court of Appeals, which in turn affirmed the trial court's ruling.

Facts and Procedural History

The following statement of facts is taken from the counterclaims asserting constitutional violations. Under the applicable standard of review, we take these unproven allegations as true for purposes of our review. *Deminski v. State Bd. of Educ.*, 377 N.C. 406, 412 (2021).

In early March 2020, Governor Roy Cooper declared a state of emergency in response to the COVID pandemic. On 20 May 2020, the Governor invoked his emergency authority to issue Executive Order 141. That order temporarily prohibited all "mass gatherings." The order defined a mass gathering as "an event or convening that brings together more than ten (10) people indoors or more than twenty-five (25) people outdoors at the same time in a single confined indoor or outdoor space,

such as an auditorium, stadium, arena, or meeting hall." Exec. Order No. 141, 34 N.C. Reg. 2360 (May 20, 2020).

The executive order applied to Ace Speedway, a large outdoor racetrack in Alamance County. Shortly after the Governor announced the executive order, one of Ace Speedway's owners, Robert Turner, publicly announced that that racetrack would remain open and "have people in the stands."

Turner explained that "unless they can barricade the road, I'm going to do it. The racing community wants to race. They're sick and tired of the politics. People are not scared of something that ain't killing nobody. It may kill .03 percent, but we deal with more than that every day, and I'm not buying it no more."

As Turner indicated, Ace Speedway hosted its first race of the season on 23 May 2020, shortly after the executive order took effect. That event exceeded the 25-person attendance limit at the racetrack.

Ace Speedway had a second race scheduled for the following week. After learning that the speedway did not comply with the executive order, the Governor reached out to Alamance County Sheriff Terry Johnson. The Governor asked the Sheriff to meet with Ace Speedway and convince the speedway to postpone the upcoming race. As requested, Sheriff Johnson met with Ace Speedway. Nevertheless, the speedway hosted its second race as planned. Following that race, Sheriff Johnson announced that he would not take any further steps to enforce the executive order, citing concerns with the order's constitutionality.

On 5 June 2020, the Governor sent a letter to the Alamance County Commissioners and to Sheriff Johnson explaining that the races at Ace Speedway violated the executive order and were criminal acts subject to enforcement by local law enforcement officers. The letter warned that if Sheriff Johnson refused to "do his duty" and enforce the executive order, the Governor would take further action.

The letter did not stop Ace Speedway from hosting its third race of the season in early June. Following that third race, the Secretary of the North Carolina Department of Health and Human Services issued an abatement order that required Ace Speedway to close its operations as an "imminent hazard" to public health. The abatement order required Ace Speedway to notify the public that the upcoming races and events at the facility were canceled and confirm in writing to DHHS that the public had been notified of the racetrack's closure.

Other large venues across the State also permitted more than 25 people to attend their events in violation of the emergency order, but DHHS only issued an abatement order against Ace Speedway. DHHS did not take similar enforcement action against other venues that had not spoken out against Governor Cooper's policies.

Ace Speedway refused to comply with the abatement order. Just days later, DHHS filed a lawsuit. The complaint named Ace Speedway and its owners and operators as defendants.[1] It sought a declaratory judgment that Ace Speedway violated the abatement order and that the State was entitled to an injunction forcing it to comply.

After a hearing, the trial court issued a preliminary injunction prohibiting Ace Speedway from conducting races and other events at its facilities until it complied with the terms of the abatement order.

As the lawsuit progressed, Ace Speedway and its operators answered the complaint and asserted counterclaims against the State for violation of their constitutional right to earn a living and to be free from selective enforcement of the law.

Later in the year, as the lawsuit continued, the Governor replaced Executive Order 141 with a new executive order that loosened restrictions on mass gatherings. DHHS concluded that this extinguished the existing abatement order. DHHS therefore voluntarily dismissed its claims against Ace Speedway. The State also moved to dismiss the counterclaims on the ground that those claims were barred by sovereign immunity.

The trial court denied the motion to dismiss and the State appealed. The Court of Appeals affirmed the trial court's order denying the motion. This Court allowed the State's petition for discretionary review of that decision.

Analysis

I. Standard of Review

We begin our analysis with the appropriate standard of review. The State appealed the trial court's denial of a motion to dismiss based on sovereign immunity. Ordinarily, a court's analysis of sovereign immunity focuses not on the merits of the plaintiff's claim, but on whether the State has "consented or waived its immunity" to being sued. *Est. of Graham v. Lambert*, 385 N.C. 644, 651 (2024).

1. For ease of reading, we will refer to the defendants collectively as "Ace Speedway."

But here, the analysis is different because of the nature of the claims. Ace Speedway brought two claims for violations of rights in the North Carolina Constitution. These constitutional claims are known as "*Corum* claims." *See Corum v. Univ. of N.C.*, 330 N.C. 761 (1992). This Court created *Corum* claims because of the time-honored principle that where there is a right, there is a remedy. *Washington v. Cline*, 385 N.C. 824, 825 (2024). "To ensure that every right does indeed have a remedy in our court system, *Corum* offers a common law cause of action when existing relief does not sufficiently redress a violation of a particular constitutional right." *Askew v. City of Kinston*, 902 S.E.2d 722, 728 (2024) (cleaned up).

Importantly, the State cannot assert sovereign immunity as a defense to a valid *Corum* claim. As we explained in *Corum*, when there is "a clash between these constitutional rights and sovereign immunity, the constitutional rights must prevail." *Corum*, 330 N.C. at 786. Thus, sovereign immunity "cannot stand as a barrier" to a *Corum* claim. *Id.* at 785.

But it is not enough for a claimant to simply *assert* that a claim is valid under *Corum*. We have acknowledged that, to pierce the State's sovereign immunity at the outset, the complaint must "sufficiently allege" a *Corum* claim. *Deminski*, 377 N.C. at 407.

In *Deminski*, we outlined three criteria necessary to sufficiently allege a *Corum* claim. First, the complaint must allege that a state actor violated the claimant's state constitutional rights. *Id.* at 413. Second, "the claim must be colorable," meaning that the claim "must present facts sufficient to support an alleged violation of a right protected by the State Constitution." *Id.* Third, there must be no other "adequate state remedy" for this alleged constitutional violation. *Id.* If a claimant satisfies these three criteria, sovereign immunity "does not bar the claim" and the trial court must deny a motion to dismiss based on sovereign immunity. *Id.* at 407.

Much of our recent *Corum* jurisprudence has focused extensively on whether there was an adequate alternative remedy. *See, e.g.*, *Askew*, 902 S.E.2d at 733; *Washington*, 385 N.C. at 825. Here, though, the State does not dispute that Ace Speedway has no adequate alternative remedy because there is no other forum in which it could seek relief for these constitutional violations. We agree. Likewise, the State does not dispute that the complaint alleges state actors violated the state constitution. Again, we agree.

Thus, the first and third criteria of the test we set out in *Deminski* are satisfied. The State's arguments (and, as a result, this entire appeal)

focuses solely on the second criteria—whether Ace Speedway asserted a "colorable claim" under the state constitution.

As we made clear in *Deminski*, at the motion to dismiss stage, whether a claim is "colorable" focuses entirely on the allegations in the complaint. *Deminski*, 377 N.C. at 412. Those allegations are "treated as true" and the Court examines whether the allegations, if proven, constitute a violation of a right protected by the North Carolina Constitution. *Id.* We therefore examine each of Ace Speedway's constitutional claims and assess whether the allegations assert colorable constitutional claims.

II. Fruits of Their Labor Clause

We begin with Ace Speedway's claim that the State deprived the speedway and its owners of their inalienable right to earn a living guaranteed by the provision of Article I, Section 1 of the North Carolina Constitution known as the "Fruits of Their Labor Clause."

Article I, Section 1 provides as follows: "We hold it to be self-evident that all persons are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, the enjoyment of the fruits of their own labor, and the pursuit of happiness." N.C. Const. art. I, § 1.

This language, added in our state's 1868 constitution, "borrowed certain phraseology from the Declaration of Independence." *State v. Ballance*, 229 N.C. 764, 768 (1949). But the framers also added something new, described in *Ballance* as an "interpolation"—the people's inalienable right to "the enjoyment of the fruits of their own labor." *Id.*

We explained in *Ballance* that this added constitutional right protects people "engaging in any legitimate business, occupation, or trade." *Id.* at 770. It bars state action burdening these activities unless "the promotion or protection of the public health, morals, order, or safety, or the general welfare makes it reasonably necessary." *Id.*

Thus, to survive constitutional scrutiny under this provision, the challenged state action "must be reasonably necessary to promote the accomplishment of a public good, or to prevent the infliction of a public harm." *Id.* This test involves a "twofold" inquiry: "(1) is there a proper governmental purpose for the statute, and (2) are the means chosen to effect that purpose reasonable?" *Poor Richard's, Inc. v. Stone*, 322 N.C. 61, 64 (1988).

The first step in this inquiry requires the reviewing court to identify the State's actual purpose for the constraint on private business activity.

Initially, the State may simply assert that purpose, without the need to "come forward with evidence" proving that it is, indeed, the true purpose. *Id.* at 66. But the plaintiff may rebut that assertion with evidence demonstrating that the State's asserted purpose is not the true one, and instead the State is pursuing a different, unstated purpose. *Id.*

For example, in *Roller v. Allen*, the State defended licensing requirements for ceramic tile installers by asserting that they were necessary to combat consumer fraud by unqualified workers. 245 N.C. 516, 521–23 (1957). After reviewing the evidence, this Court rejected that assertion, holding that the statute's "main and controlling purpose" was "not health, not safety, not morals, not welfare, but a tight control of tile contracting in perpetuity by those already in the business." *Id.* at 525. Simply put, courts assess Fruits of Their Labor Clause claims based on the *actual* purpose of the state action, and that may not always be the purpose initially put forward by the State.

Once the actual purpose of the challenged state action is identified, the reviewing court must then assess whether that purpose is a "proper governmental purpose." *Poor Richard's*, 322 N.C. at 64. Proper purposes are those that "promote the accomplishment of a public good, or to prevent the infliction of a public harm." *Ballance*, 229 N.C. at 770. It is, of course, impossible to enumerate *every* public good or public harm. But our case law offers guidance on how to determine if a purpose is broad enough that it addresses public welfare generally, rather than private interests. *Id.* at 770–71.

In *Ballance*, for example, this Court rejected the notion that it was a public good to reduce "fire risk incident to the practice of photography on account of combustible materials employed." *Id.* at 771. That purpose was too narrow to serve the public welfare generally. It addressed only "the interests of a particular class rather than the good of society as a whole." *Id.* at 772.

Put another way, reducing fire risks for *all* members of the public is a proper governmental purpose. And, if a particular business activity poses a heightened risk of fire hazards, regulating that specific activity may be a reasonable means of advancing the broader purpose, even if it only impacts a subset of the public. *See id.* But a proper governmental purpose must address the "public interest." Protecting the public from fire hazards is in the public interest. Protecting only *photography businesses* from fire hazards, with no concern for anyone else, is merely a regulation of "a private business unaffected in a legal sense with any public interest." *Id.* at 770.

If the reviewing court determines that the challenged state action serves a proper governmental purpose, the inquiry then reaches the second stage: "are the means chosen to effect that purpose reasonable?" *Poor Richard's*, 322 N.C. at 64. This is a fact-intensive analysis. "The means used must be measured by balancing the public good likely to result from their utilization against the burdens resulting to the businesses being regulated." *Id.* at 66.

This requires assessing two fact-specific questions—first, how effective is the state action at achieving the desired public purpose and, second, how burdensome is that state action to the targeted businesses. The analysis then becomes "a question of degree"—given all the options available to the state to advance the governmental purpose, was it reasonable for the state to choose this approach, with its corresponding benefits and burdens? *Id.*

Having laid out the appropriate test for a Fruits of Their Labor Clause claim, we now turn to whether the Court of Appeals erred when it held that Ace Speedway sufficiently alleged a colorable claim under that provision. At this point, we circle back to the standard of review described above. We treat the allegations in the complaint as true and examine whether, if those allegations are proven, Ace Speedway would prevail under the two-step inquiry for a Fruits of Their Labor Clause claim. *See Deminski*, 377 N.C. at 412.

We begin with the first step of the test. The State contends that there "can be little question that the order seeks to achieve 'a proper governmental purpose' " because "protecting North Carolinians from a novel virus—a virus that would eventually kill over one million Americans" is a proper governmental purpose.

But this ignores the central allegation in Ace Speedway's claim—that the purpose of the abatement order was not to protect public health, but to retaliate against Ace Speedway for criticizing the Governor. Ace Speedway alleges that it was "singled out by the Governor for enforcement" because it spoke out against the Governor's emergency order, and that other businesses violating the emergency order were not subjected to similar enforcement action by the State. This allegation, if true, would establish that the State did not pursue a proper governmental purpose because its purpose was not to protect the public interest, but to punish a private business for standing up to the government.

At the motion to dismiss stage, we must accept Ace Speedway's allegation as true. *Deminski*, 377 N.C. at 412. Accordingly, Ace Speedway

sufficiently alleged that the State's actions did not serve a proper governmental purpose.

We next turn to the second step of the test. Even if the State had a proper governmental purpose, we must assess whether the means chosen to achieve that purpose were reasonable. The State argues that the abatement order was reasonably necessary to protect the public health because "large mass gatherings at places like racetracks presented an elevated risk for spreading COVID-19." The State further argues that the need to use the abatement order to shut down Ace Speedway stemmed from "the best scientific and medical knowledge available at the time" to prevent the spread of COVID-19.

But again, the State ignores the allegations in this constitutional claim. Ace Speedway alleges that other racetracks and similar businesses violated the same emergency order, yet none of those speedways faced similar enforcement action. *See Poor Richard's*, 322 N.C. at 66. Even if we accept the State's asserted purpose for the abatement order—protecting the public by stopping the spread of COVID-19—this would mean that the State sought to achieve this governmental purpose by issuing an abatement order shutting down a single business while choosing to ignore many others presenting identical risks to the public. This is a particularly ineffective means of achieving the asserted governmental interest, while simultaneously imposing a tremendous burden on Ace Speedway. In other words, balancing the benefits and the burdens of the State's approach, the State's decision to target Ace Speedway but ignore other businesses posing identical risks is not reasonable.

Again, these are merely allegations. But, at this stage, we must accept those allegations as true. *Deminski*, 377 N.C. at 412. Doing so, we conclude that, even assuming the State had a proper governmental purpose, Ace Speedway sufficiently alleged that the means chosen by the State to achieve that purpose were unreasonable under the circumstances.

In sum, Ace Speedway has sufficiently alleged that the challenged state action fails both steps in the two-step analysis for a Fruit of Their Labor Clause claim. Accordingly, Ace Speedway asserted a colorable constitutional claim that pierces the State's sovereign immunity. The Court of Appeals properly affirmed the trial court's denial of the State's motion to dismiss this claim based on sovereign immunity.

III. Equal Protection Clause

We next turn to Ace Speedway's claim that the abatement order was a form of unconstitutional selective enforcement in violation

of the Equal Protection Clause in Article I, Section 19 of the North Carolina Constitution.

Ordinarily, the use of "some selectivity" when the government enforces the law is appropriate and not a violation of equal protection. *State v. Lawson*, 310 N.C. 632, 643 (1984). To establish that the State's selective enforcement violated the Equal Protection Clause, the claimant must show that the enforcement "was motivated by a discriminatory purpose and had a discriminatory effect." *State v. Garner*, 340 N.C. 573, 588 (1995). The "discriminatory purpose" prong requires a showing that the government consciously and deliberately based the enforcement on an "unjustifiable standard" or "arbitrary classification" such as race, religion, or the exercise of the claimant's constitutional rights. *State v. Ward*, 354 N.C. 231, 244 (2001). The "discriminatory effect" prong requires a showing that the claimant has been singled out and treated differently "when compared to persons similarly situated." *Maines v. City of Greensboro*, 300 N.C. 126, 132 (1980). Satisfying this two-part test is necessary to overcome the presumption that public officials act in good faith when choosing how to enforce the law. *Id.*

As we repeatedly explained above, we assess whether Ace Speedway sufficiently alleged a colorable selective enforcement claim at this early stage of the proceeding by accepting the allegations as true and examining whether those allegations, if proven, satisfy the two-part test articulated in our case law. *See Deminski*, 377 N.C. at 412.

Ace Speedway satisfies this standard. The central allegations of this selective enforcement claim are that Robert Turner exercised his First Amendment rights by openly criticizing Governor Cooper's emergency order. In response to that protected First Amendment activity, according to the allegations, Ace Speedway was "singled out by the Governor for enforcement."

Ace Speedway alleges that the Governor "took the unusual step of having a letter sent to the Sheriff of Alamance County directing him to take action" against the speedway and its operators. When the Sheriff refused, the State targeted the speedway with the abatement order. This was done, according to Ace Speedway's allegations, because of Robert Turner's public statements criticizing the Governor. Other, similarly situated racetracks did not face enforcement action even though the State knew that they, too, were violating the emergency order.

These allegations, if proven, would establish that the State acted with the discriminatory purpose of retaliating against Robert Turner's valid exercise of his First Amendment rights, and that the enforcement

had the discriminatory effect of harming Ace Speedway while other, similarly situated businesses faced no consequences for the same violations of the emergency order. *See Garner*, 340 N.C. at 588. Thus, Ace Speedway asserted a colorable selective enforcement claim that pierces the State's sovereign immunity. The Court of Appeals properly affirmed the trial court's denial of the State's motion to dismiss this claim as well.

IV. Least Intrusive Remedy Criteria

At the close of its new brief to this Court, the State also argues that, even if Ace Speedway asserted colorable constitutional claims, those claims "fail for an independent, alternative reason as well: Money damages are not the least-intrusive remedy for the constitutional violations."

This argument is not appropriate at this stage of the proceeding. In *Corum*, we held that, when adjudicating these constitutional claims, "the judiciary must recognize two critical limitations." *Corum*, 33 N.C. 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.*

These two "critical limitations" arise at separate stages of a *Corum* action. As explained above, the first of these critical limitations—the adequate remedy prong—is incorporated into the test for alleging a valid *Corum* claim. *Deminski*, 377 N.C. at 407. It is effectively "an element" of the constitutional claim. *Askew*, 902 S.E.2d at 733. As a result, the analysis of whether the claimant has an adequate, alternative remedy can occur when a *Corum* claim is first asserted. *Id.* If there is an alternative remedy, the *Corum* claim is infirm and must be dismissed.

By contrast, the second critical limitation—that the *Corum* court must choose "the least intrusive remedy available and necessary to right the wrong"—arises *after* the claimant proves a constitutional violation. *Corum*, 330 N.C. at 784. *Corum* permits the judiciary to "exercise its inherent constitutional power to fashion a common law remedy for a violation of a particular constitutional right." *Id.* That remedy "will depend upon the facts of the case developed at trial. It will be a matter for the trial judge to craft the necessary relief." *Id.*

Thus, the second limitation identified in *Corum* is intended as a restraint on the scope of relief available to a successful *Corum* claimant. *Corum* ensures that claimants can obtain "remedies that are meaningful,

even if not necessarily complete or the relief they want." *Washington*, 385 N.C. at 830. Thus, even in cases where the claimant seeks money damages, the trial court, at the conclusion of the case, may need "to fashion a common law remedy less intrusive than money damages." *Corum*, 330 N.C. at 785. What remedy is both least-intrusive and sufficient to provide meaningful relief is a question that can be answered only after fact issues are resolved and the claim is proven.

Accordingly, we reject the State's argument that Ace Speedway's claims fail because the claims do not seek the least-intrusive remedy. That argument is not ripe for review. As we have repeated throughout this opinion, Ace Speedway's allegations remain unproven. The case has barely begun. The only question reviewable at this early stage of the case is whether Ace Speedway has sufficiently alleged a valid *Corum* claim, thus piercing the State's sovereign immunity and permitting it to bring the State into court to litigate the matter.

The trial court correctly concluded that the claims are valid and therefore the State's motion to dismiss must be denied. The Court of Appeals, in turn, properly affirmed that ruling.

Conclusion

We affirm the decision of the Court of Appeals.

AFFIRMED.

STATE OF NORTH CAROLINA
v.
ROBIN APPLEWHITE

No. 39A22

Filed 23 August 2024

1. Indictment and Information—sufficiency of indictments—human trafficking—multiple counts per victim—unit of prosecution

Each of four indictments charging defendant with multiple counts of human trafficking per victim over specified periods of time were sufficient to put defendant on notice of each offense because they contained the necessary elements of trafficking pursuant to N.C.G.S. § 14-43.11. Although defendant argued that he could be convicted of only one count per victim, the plain language of the statute makes clear that human trafficking is not one continuous offense, that a separate charge may be attached to each violation regardless of whether the same victim is involved, and that the offense is committed when a defendant "obtains" a victim—one of the essential elements of the offense—by any one of the alternative means listed in the statute.

2. Sentencing—prior record level—prior federal conviction—substantial similarity to N.C. offense—any error harmless

Any error by the trial court in calculating defendant's prior record level (to which he had not stipulated) without first comparing defendant's prior federal firearms conviction to any state offense was harmless because the record contained sufficient information demonstrating that the federal offense was substantially similar to the North Carolina offense of possession of a firearm by a felon.

Justice RIGGS concurring in part and dissenting in part.

Justice EARLS 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, 281 N.C. App. 66 (2021), finding no error in judgments entered on 5 March 2019 by Judge Thomas H. Lock in Superior Court, Cumberland County. On 4 May 2022, the

Supreme Court allowed defendant's petition for discretionary review of additional issues. Heard in the Supreme Court on 15 February 2024.

Joshua H. Stein, Attorney General, by A. Mercedes Restucha-Klem, Assistant Attorney General, for the State.

Michael E. Casterline for defendant-appellant.

BARRINGER, Justice.

In this case, we are tasked with determining whether the Court of Appeals erred in affirming the trial court's judgments following a jury's verdict finding defendant guilty of twelve counts of human trafficking, eleven counts of promoting prostitution, four counts of conspiracy to promote prostitution, and attaining habitual felon status. For the following reasons, we affirm the decision of the Court of Appeals.

I. Background

Between December 2012 and March 2015, defendant met several women, including A.C., H.M., A.B., and M.F.[1] Defendant supplied the women with heroin, to which they quickly became addicted. Defendant used heroin to force the women to engage in prostitution arranged by defendant and his wife via online advertisements on Backpage, a website used to solicit prostitution customers. The women used the money they received to pay defendant for heroin as well as their basic needs. They paid defendant far more than what the heroin was worth. Defendant withheld from the women drugs, food, sleep, and any means of communication. He also provided the women housing in exchange for payment but would occasionally lock them in his basement or a hotel room. Defendant transported the women throughout North Carolina, and across state lines to Virginia, South Carolina, and Florida to engage in prostitution.

Defendant was indicted and convicted of five counts of trafficking A.C. between December 2012 and January 2013. Defendant used drugs to entice A.C. to lease a house that defendant would use for prostitution and storing drugs. Ultimately, defendant convinced A.C. to engage in prostitution. Defendant and his wife posted A.C.'s advertisement on Backpage at least 197 times in three cities. Defendant scheduled A.C. to engage in at least ten appointments per night.

1. The parties agree to the use of pseudonyms to protect the women's identities.

Defendant was indicted and convicted of two counts of trafficking H.M. between January 2014 and March 2014. Defendant met H.M. when he began supplying her heroin, which H.M. smoked daily. Eventually, defendant convinced H.M. to prostitute for him via online advertisements. Defendant agreed to support H.M. in exchange for prostituting. Defendant drove H.M. to Greensboro, Raleigh, and South Carolina while she was under the influence of heroin. In addition, defendant would lock H.M. in her hotel room or his basement without food or drugs.

Defendant was indicted and convicted of three counts of trafficking A.B. between January 2014 and April 2015. Defendant first met A.B. when he approached her outside a hotel and gave her pills, after which they engaged in sexual acts. A.B. traveled with defendant to his home where defendant offered A.B. what she thought was cocaine but was in fact heroin. At first, defendant provided A.B. with heroin without asking for anything in return. Ultimately, defendant forced A.B. to engage in acts of prostitution in exchange for drugs and housing. Defendant advertised A.B. online and drove A.B. to Charlotte and Raleigh to engage in prostitution.

Defendant was indicted and convicted of two counts of trafficking M.F. between March 2014 and April 2015. Before meeting defendant, M.F. used crack cocaine, but she began using heroin after she met defendant. Defendant treated M.F. like a girlfriend, but he still had her engage in prostitution. Advertisements for M.F. were posted on Backpage over 219 times.

Beginning on 18 February 2019, defendant represented himself pro se at trial. M.F. died before trial, but A.C., H.M., and A.B., among others, testified to their working arrangements with defendant. The jury returned a unanimous verdict finding defendant guilty of the above-listed charges. The jury found defendant not guilty of charges related to two other victims. Defendant was calculated as a prior record level five offender based on fourteen previous record points. Defendant did not stipulate in writing to the State's calculation of his prior record points. Defendant was sentenced to 2880 to 3744 months to be served consecutively, totaling 240 to 312 years in prison. The trial court also required defendant to register as a sex offender.

Defendant appealed to the Court of Appeals. The Court of Appeals issued a divided opinion finding no error by the trial court. *State v. Applewhite*, 281 N.C. App. 66, 81 (2021). Judge Arrowood concurred in part and dissented in part. In his dissent, he argued that human trafficking is a continuing offense because the statute criminalizing human

trafficking does not define the unit of prosecution. *Id.* (Arrowood, J., concurring in part and dissenting in part). Having committed a continuing offense, defendant could only be convicted of a single, continuing count of human trafficking per victim. *Id.* Therefore, the dissenting judge would remand defendant's case to the trial court to vacate all but one count of human trafficking per victim. *Id.* at 82.

II. Standard of Review

This Court reviews questions of statutory interpretation de novo. *High Point Bank & Trust Co. v. Highmark Props., LLC*, 368 N.C. 301, 304 (2015). This Court reviews a challenge to the sufficiency of an indictment de novo. *State v. Oldroyd*, 380 N.C. 613, 617 (2022).

This Court exercises de novo review over "questions of law concerning the trial court's alleged nonconformance with statutory requirements." *State v. Flow*, 384 N.C. 528, 546 (2023) (extraneity omitted). This Court will not vacate a judgment by the trial court unless the defendant can show such error prejudiced him. *Id.* at 549.

III. Analysis

Defendant filed a notice of appeal based on a dissent at the Court of Appeals. Defendant also filed a petition for discretionary review of additional issues with this Court, which was allowed. On appeal, defendant argues first that he may only be convicted of a single count of human trafficking per victim. Second, defendant argues that the trial court erred when it failed to compare the elements of defendant's earlier federal firearms conviction to a North Carolina offense. For the following reasons, we affirm the decision of the Court of Appeals that found no error in the trial court's judgments.

A. Defendant may be convicted of multiple counts of human trafficking per victim.

1. Unit of Prosecution

[1] At issue in this case is the unit of prosecution under N.C.G.S. § 14-43.11 (2021). Section 14-43.11[2] states, in pertinent part:

> (a) A person commits the offense of human trafficking when that person (i) knowingly or in reckless disregard of the consequences of the action recruits,

2. N.C.G.S. § 14-43.11 was amended effective 1 December 2023 to apply to offenses committed on or after that date. As the offenses occurred before 1 December 2023, this Court will analyze the statute as effective in 2022.

> entices, harbors, transports, provides, or obtains by any means another person with the intent that the other person be held in involuntary servitude or sexual servitude or (ii) willfully or in reckless disregard of the consequences of the action causes a minor to be held in involuntary servitude or sexual servitude.
>
> . . . .
>
> (c) Each violation of this section constitutes a separate offense and shall not merge with any other offense. Evidence of failure to deliver benefits or perform services standing alone shall not be sufficient to authorize a conviction under this section.
>
> . . . .

"In resolving issues of statutory construction, we look first to the language of the statute itself." *Raleigh Hous. Auth. v. Winston*, 376 N.C. 790, 795 (2021) (quoting *Walker v. Bd. of Trs. of the N.C. Loc. Gov'tal Emps.' Ret. Sys.*, 348 N.C. 63, 65 (1998)). "When the [language] in the statute is unambiguous, the [language] 'should be understood in accordance with its plain meaning.' " *Id.* (quoting *Fid. Bank v. N.C. Dep't of Revenue*, 370 N.C. 10, 20 (2017)).

Here, the statutory language is clear and unambiguous. Subsection (a) of N.C.G.S. § 14-43.11 states that "[a] person commits the offense of human trafficking when that person" (1) "knowingly or in reckless disregard of the consequences of the action"; (2) "recruits, entices, harbors, transports, provides or obtains by any means [the victim]"; (3) "with the intent that [the victim] be held in . . . sexual servitude." N.C.G.S. § 14-43.11(a). The second element of section 14-43.11 is satisfied each time a defendant engages in any of the actions listed in subsection (a), "*or*" any other conduct that constitutes "obtain[ing]" the victim for the illicit purposes described in the statute. *Id.* (emphasis added).

Furthermore, subsection (c) of the human trafficking statute specifically states that "[e]ach violation of this section constitutes a separate offense and shall not merge with any other offense." *Id.* § 14-43.11(c). The plain language of subsection (c) clarifies that human trafficking is not a continuing offense. The language specifies that violations are *separate* offenses. The explicit language in the statute that each violation is a separate offense demonstrates that each distinct act of recruiting, enticing, harboring, transporting, providing or obtaining a victim can be separately prosecuted. In order to give meaning to every

word of the statute, the statute can only be read to reference multiple criminal acts.

Moreover, the statute explicitly states that violations shall not merge with other offenses. This anti-merger clause demonstrates that: (1) a single defendant can commit the offense of human trafficking through multiple acts with the same victim; (2) each separate violation "of this section" may be prosecuted; and (3) the several violations shall not merge with each other. *Id.* § 14-43.11(c). Thus, a defendant may be charged separately for each time the defendant violates the human trafficking statute, regardless of whether each violation involves the same victim. *See State v. Perry*, 316 N.C. 87, 104 (1986) ("[D]efendant may be convicted and punished separately for trafficking in heroin by possessing 28 grams or more of heroin, trafficking in heroin by manufacturing 28 grams or more of heroin, and trafficking in heroin by transporting 28 grams or more of heroin even when the contraband material in each separate offense is the same heroin."); *see also State v. Pipkins*, 337 N.C. 431, 434 (1994) (citing *Perry*, 316 N.C. at 102–04). If the legislature clearly intends to define each act as a separate offense and each act has distinct elements, then multiple charges do not violate double jeopardy. *See Blockburger v. United States*, 284 U.S. 299, 303–04 (1932).

The dissent disagrees. It argues that because the legislature included trafficking language in other statutes, the anti-merger provisions only apply to those statutes. But the plain language of N.C.G.S. § 14-43.11 demonstrates legislative intent—that the anti-merger provision applies equally to the human trafficking statute. When "the language of a statute expresses the legislative intent in clear and unambiguous terms, the words employed must be taken as the final expression of the meaning intended unaffected by its legislative history." *Lunsford v. Mills*, 367 N.C. 618, 626 (2014) (quoting *Piedmont Canteen Serv., Inc. v. Johnson*, 256 N.C. 155, 161 (1962)).

As further illustrated by the statute's catch-all language, "or obtain [ ] by any means," the list, "recruits, entices, harbors, transports, [or] provides," identifies different factual bases, or means, for satisfying the second element of the offense of human trafficking.[3] *See Mathis v. United States*, 579 U.S. 500, 514–17 (2016) (discussing the difference between elements of an offense and means for committing an offense); *see also Richardson v. United States*, 526 U.S. 813, 817 (1999) ("[A] federal jury need not always decide unanimously which of several possible sets of

3. This language is identical in the versions of N.C.G.S. § 14-43.11 which apply to all offenses alleged in this case.

underlying brute facts make up a particular element, say, which of several possible means the defendant used to commit an element of the crime."); *King v. United States*, 965 F.3d 60, 66 (1st Cir. 2020) ("Means . . . are the different ways that a single element of a crime may be committed; and unlike elements, the government need not prove a particular means to obtain a conviction (any of the listed means will do).")."[I]f a statutory list is drafted to offer 'illustrative examples,' then it includes only a crime's means of commission." *Mathis*, 579 U.S. at 519. Moreover, a state's indictment listing the alternative means with a disjunctive "or" shows courts that "each alternative is only a possible means of commission, not an element that the prosecutor must prove to a jury beyond a reasonable doubt." *Id.*; *accord State v. Moir*, 369 N.C. 370, 381 n.8 (2016) (recognizing that a statute may "specif[y] several alternative *means* of committing a crime . . . instead of setting out alternative offenses made up of differing *elements*").

Here, the language of the statute provides different means to satisfy the second element of the crime of human trafficking. The statute lists numerous actions followed by the language "or obtains by any means," demonstrating that the prior listed terms are "means" to satisfy that element of the statute. To "obtain" means "[t]o bring into one's own possession; to procure." *Obtain*, Black's Law Dictionary (12th ed. 2024); *see Obtain*, Garner's Dictionary of Legal Usage (3d ed. 2011) ("[O]btain is a formal word for *get*."). The language of the statute leaves open the door for the prosecutor to prove not just one of the listed means but rather any other means by which the defendant "obtain[ed]" the victim. *See United States v. Cooper*, No. 21-CR-10184-NMG, 2024 U.S. Dist. LEXIS 6621, at *1 (D. Mass. Jan. 12, 2024) (stating that the language in 18 U.S.C. § 1591(a)(1), which criminalizes sex trafficking and closely mirrors the language of N.C.G.S. § 14-43.11(a), "constitute[s] means, not elements").

To determine whether the legislature intended for multiple words to constitute distinct offenses, the Supreme Court of the United States has looked to whether the "statutory alternatives carry different punishments." *Mathis*, 579 U.S. at 518. Regardless of how the defendant controls or "obtains" another individual, each violation of this statute constitutes a single offense because this statute does not distinguish the punishment based on the various means provided. *See id.* (citing *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000)) ("If statutory alternatives carry different punishments, then under *Apprendi* they must be elements."). "The legislature remains free under the Double Jeopardy Clause to define crimes and fix punishments; but once the legislature has acted courts may not impose more than one punishment for the

same offense and prosecutors ordinarily may not attempt to secure that punishment in more than one trial." *Brown v. Ohio*, 432 U.S. 161, 165 (1977). In the instant case, a defendant who violated subsection (a) during the time of the offenses charged was "guilty of a Class F felony if the victim of the offense is an adult." N.C.G.S. § 14-43.11(c) (2016).[4] Accordingly, this statute does not distinguish the punishment based on the various means provided.

The evil sought to be prevented by the legislature is the trafficking of persons for the purpose of engaging in prostitution. *See* N.C.G.S. § 14-43.11. "Trafficking" can occur in numerous ways, all of which revolve around whether the defendant did so "with the intent that the [victim] be held in involuntary servitude or sexual servitude." *Id.* § 14-43.11(a). Thus, a defendant may be convicted of multiple counts of human trafficking per victim.

"The elementary rule is that every reasonable [statutory] construction must be resorted to, in order to save a statute from unconstitutionality." *Hooper v. California*, 155 U.S. 648, 657 (1895); *accord Skilling v. United States*, 561 U.S. 358, 406 (2010) ("[I]f this general class of offenses can be made constitutionally definite by a reasonable construction of the statute, this Court is under a duty to give the statute that construction." (quoting *United States v. Harriss*, 347 U.S. 612, 618 (1954))). This interpretation of N.C.G.S. § 14-43.11 is reasonable—that defendant has violated the human trafficking statute each instance he employs one of the means contemplated by statute.

Our dissenting colleagues disagree. The dissent alleges that defendant is facing multiple punishments for the same conduct, in violation of the Double Jeopardy Clause.[5] Where, as here, the State chooses to utilize the statutorily provided short form indictment, "[e]xamination of the facts underlying each charge [ ] more accurately illustrates whether defendant has been placed in double jeopardy." *State v. Rambert*, 341 N.C. 173, 176 (1995). Examination of the facts here clearly indicates

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4. Effective December 2017, the penalty for violating N.C.G.S. § 14-43.11 was increased to a Class C felony.

5. While defendant focused his argument on the sufficiency of the indictment, he briefly mentioned double jeopardy. Since the parties did not fully develop a double jeopardy argument, attempting to resolve a potential double jeopardy issue without complete briefing is improper. *See* N.C. R. App. P. 28.

Moreover, the dissent concedes this issue is non-jurisdictional. As aptly noted by the dissent, non-jurisdictional issues can be resolved by a defendant filing a bill of particulars or a motion to dismiss. Defendant did neither here.

that defendant employed a variety of means to traffic multiple women throughout the time periods specified in the indictments. Thus, we cannot conclude that defendant has been punished more than once for the same conduct.

Furthermore, the dissent creates ambiguity and substitutes its will when, as demonstrated by the plain language of the statute, legislative intent is clear. The dissent concludes that "recruits," "entices," and "obtains" are synonymous words. However, the very definitions used in the dissent belie that conclusion. For example, the dissent defines "recruit" as "enrolling," and "entice" as "luring or inducing." Clearly these words mean different things. It is not synonymous that students enroll in school every year, and that schools are luring their students every year.

2. Sufficiency of Indictment

The indictment was sufficient to put defendant on notice because it contained the necessary elements of the offense.[6] Section 15A-924 of the North Carolina General Statutes codifies the requirements for an indictment.

> [I]t is not the function of an indictment to bind the hands of the State with technical rules of pleading; rather, its purposes are to identify clearly the crime being charged, thereby putting the accused on reasonable notice to defend against it and prepare for trial, and to protect the accused from being jeopardized by the State more than once for the same crime.

State v. Creason, 313 N.C. 122, 130 (1985) (alteration in original) (quoting *State v. Sturdivant*, 304 N.C. 293, 311 (1981)); *see In re J.U.*, 384 N.C. 618, 624 (2023) ("It is generally held that the language in a statutorily prescribed form of criminal pleading is sufficient if the act or omission is clearly set forth so that a person of common understanding may know what is intended."). "Generally, the purpose of an indictment is to put the defendant on notice of the crime being charged and to protect the defendant from double jeopardy." *State v. Newborn*, 384 N.C. 656, 659 (2023) (citing *Sturdivant*, 304 N.C. at 311). As noted above, an indictment's "purpose[ ] [is] to identify clearly the crime being charged,

6. In this case, the State chose to utilize the statutorily provided short-form language containing the necessary elements of the offense. We note, however, that in cases where short-form language for a charged offense is not utilized, an indictment is sufficient when it "alleges facts supporting the essential elements of the offense to be charged." *State v. Newborn*, 384 N.C. 656, 659 (2023).

thereby putting the accused on reasonable notice to defend against it and prepare for trial." *Sturdivant*, 304 N.C. at 311. "[A]n indictment couched in the language of the statute is generally sufficient to charge the statutory offense." *State v. Palmer*, 293 N.C. 633, 638 (1977); *State v. Singleton*, 386 N.C. 183, 213–14 (2024).

In this case, the indictments tracked the language of the statute but included variations for the names of the victims and the date ranges of the alleged violations. The indictments used identical language, which stated:

> [B]etween and including [date range] . . . defendant . . . unlawfully, willfully and feloniously did knowingly or in reckless disregard of the consequences of the action, did recruit, entice, harbor, transport, provide or obtain by any means another person, [victim's name,] with the intent that the other person, [victim's name], be held in sexual servitude. This act was in violation of North Carolina General Statutes Section 14-43.11(a).[7]

Each indictment as written requires the State to satisfy three elements as to the date range alleged and the specific victim identified therein: (1) defendant "knowingly or in reckless disregard of the consequences"; (2) "did recruit, entice, harbor, transport, provide or obtain by any means [the victim]"; (3) "with the intent that [the victim] be held in sexual servitude." Put simply, the State must prove: (1) defendant's mental state surrounding his conduct; (2) defendant's actual conduct of obtaining the victim; and (3) defendant's intent when he obtained the victim.

This Court has stated that:

> The general rule is well settled that an indictment or information must not charge a party disjunctively or alternatively in such manner as to leave it uncertain what is relied on as the accusation against him. . . . [W]here a statute specifies several means or ways in which an offense may be committed in the

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7. This Court has previously rejected the argument that "short-form indictments [which] bear the same language and same time frame . . . lack specific details to link them to specific acts and incidents; thus, the court cannot be sure that jurors unanimously agreed that the State has proved each element that supports the crime charged in the indictment." *State v. Lawrence*, 360 N.C. 368, 373 (2006).

> alternative, it is bad pleading to allege such means or ways in the alternative. But where terms laid in the alternative are synonymous, the indictment is good; and where a statute in defining an offense, uses the word 'or' . . . in explanation of what precedes, making it signify the same thing, the indictment may follow the words of the statute. An indictment is not vitiated by an alternative statement in matter which may be rejected as surplusage. *State v. Jones*, 242 N.C. 563, 565 (1955) (first alteration in original).

Here, the State did not charge defendant "disjunctively or alternatively." *Id.* It is necessary to distinguish between alternative means for violating the statute and alternative means to satisfy an element. The indictments do not charge defendant in the alternative because the statute does not provide for alternative offenses. Rather, as discussed above, the statute provides a list of alternative means for satisfying one element of the offense—that defendant obtained, "got," or controlled the victim in some way. Because the language of the indictment tracks the pertinent statutory language and merely provides alternative means for how defendant obtained the victim in some way, the indictment is sufficient.

Here, none of the indictments rendered the charged offenses uncertain.[8] First, as stated above, the multiple means by which the State may prove an element of the offense are just that—illustrations of alternative ways to control, get, or obtain another person. The statute does not provide for alternative offenses, so defendant was not in doubt as to the charges against him. Thus, the indictment gave defendant sufficient notice of human trafficking charges for which he should prepare a defense.

It should be noted that defendants may not be convicted for *continuous* offenses if the continuous offenses listed in the indictments cover the same date range, as this runs afoul of double jeopardy protections. *State v. Johnson*, 212 N.C. 566, 569–70 (1937). However, as discussed above, the crime penalized by N.C.G.S. § 14-43.11 is not a continuous offense.

The dissent writes that defendant's convictions violate the Double Jeopardy Clause because the indictments do not make certain that

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8. This Court no longer follows our prior hyper-technical indictment jurisprudence. *See In re J.U.*, 384 N.C. at 624; *Singleton*, 386 N.C. at 195.

defendant was not placed in jeopardy for a subsequent prosecution for the same crime. Yet, as discussed above, "examination of the indictments is not always dispositive on the issue of double jeopardy." *Rambert*, 341 N.C. at 176. "For a plea of former jeopardy to be good it must be grounded on the same offense both in law and in fact." *Id.* at 175 (extraneity omitted). "Examination of the facts underlying each charge [ ] more accurately illustrates whether defendant has been placed in double jeopardy." *Id.* at 176. For a defendant's double jeopardy claim to prevail, he must show that he had been convicted of numerous offenses for the same prohibited conduct. Here, each offense requires proof of a fact that the others do not. *Brown*, 432 U.S. at 166. As discussed in the Background and Analysis sections above, the law and evidence both demonstrate that defendant's acts were distinct and do not run afoul of double jeopardy principles. *See Rambert*, 341 N.C. at 175–77.

B. The trial court erred in determining defendant's prior record level; however, this error did not cause any prejudice to defendant.

[2] Also at issue in this case is whether the trial court erred in calculating defendant's prior record level when defendant did not stipulate to his prior convictions, nor did the trial court compare defendant's federal conviction relevant to his sentencing here to any state offense. The trial court erred in failing to state its finding that defendant's federal conviction at issue was substantially similar to a North Carolina offense. However, such error was harmless.

A determination under subsection 15A-1340.14(e), which governs classification of prior convictions from other jurisdictions, "is a question of law involving comparison of the elements of the out-of-state offense to those of the North Carolina offense." *State v. Sanders*, 367 N.C. 716, 720 (2014) (extraneity omitted). Subsection 15A-1340.14(e) and this Court's precedent in *Sanders* require trial courts to compare North Carolina offenses and offenses from foreign jurisdictions in order to classify a prior offense as anything higher than a Class I felony. N.C.G.S. § 15A-1340.14(e) (2023). Subsection 15A-1340.14(e), states that "a conviction occurring in a jurisdiction other than North Carolina is classified as a Class I felony if the jurisdiction in which the offense occurred classifies the offense as a felony." *Id.* However, "[i]f the offender proves by the preponderance of the evidence that an offense classified as a felony in the other jurisdiction is substantially similar to an offense that is a misdemeanor in North Carolina, the conviction is treated as that class of misdemeanor for assigning prior record level points." *Id.* Substantial similarity may be shown through various listed methods,

including "[a]ny other method found by the court to be reliable." *Id.* § 15A-1340.14(f) (2023).

Here, the State classified defendant's prior federal firearms conviction as a Class G felony without furnishing the trial court any evidence to show substantial similarity between the offenses. Additionally, the trial court failed to check the box on the prior record level worksheet indicating that the trial court found the federal conviction was substantially similar to a North Carolina offense. The trial court thus erred in calculating defendant's prior record level because defendant did not stipulate to his prior record level nor did the trial court make a comparison of the elements of the federal offense to any North Carolina offense. Nonetheless, such error was harmless.

While not controlling, in *State v. Riley* the North Carolina Court of Appeals determined that "the federal offense of being a felon in possession of a firearm, 18 U.S.C. § 922(g)(1), is substantially similar to the North Carolina offense of possession of a firearm by a felon, N.C.[G.S.] § 14-415.1(a), a Class G felony." 253 N.C. App. 819, 820, 825 (2017). The Court of Appeals noted the record contained sufficient information for the court to make the analysis on its own despite the State's "fail[ure] to meet its burden of proof at sentencing." *Id.* at 825. In rendering its decision, the Court of Appeals reached "the almost inescapable conclusion that both offenses criminalize essentially the same conduct—the possession of firearms by disqualified felons." *Id.* at 827.

"In order to demonstrate prejudicial statutory error in accordance with N.C.G.S. § 15A-1443(a), defendant would have to prove that there was a reasonable possibility that, had the trial [conformed to the statutory requirement], a different outcome would have resulted at his trial." *Flow*, 384 N.C. at 549. Here, although the trial court erred, defendant has failed to show he was prejudiced by the error because his federal firearms conviction is substantially similar to a Class G felony in North Carolina. If the trial court's judgment was vacated and the matter remanded for resentencing, defendant's sentence would not change. Thus, no prejudicial error occurred at defendant's sentencing.

IV. Conclusion

Accordingly, we find no prejudicial error and affirm the decision of the Court of Appeals.

AFFIRMED.

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

Justice RIGGS concurring in part and dissenting in part.

Human trafficking is an egregious crime, and that fact does not give this Court the right to interpret criminal laws in a way that violates the Double Jeopardy Clause of the United States Constitution. Mr. Applewhite will spend the rest of his natural life incarcerated even under the constitutional interpretation of the statute put forth in this dissent. Our obligation is to ensure that ambiguous statutes, such as the one at bar here, are interpreted consistent with the Constitution, no matter how odious the crime.

Generally, the Court considers statutory language that is "equally susceptible to multiple interpretations" to be ambiguous. *Winkler v. N.C. State Bd. of Plumbing, Heating, & Fire Sprinkler Contractors*, 374 N.C. 726, 730 (2020). The language in the human trafficking statute, N.C.G.S. § 14-43.11 (2021), is open to multiple reasonable interpretations and therefore, is ambiguous, contrary to the majority's assertion. Significantly, the statutory language can be reasonably interpreted to punish the same conduct twice, violating the Double Jeopardy Clause. Further, the indictments in this case are insufficient to make certain that Mr. Applewhite is not placed in jeopardy in a subsequent prosecution for the same crime.

When a statute is ambiguous, the Court interprets the statute by considering "the language of the statute, the spirit of the statute, and what it seeks to accomplish." *State v. Barnett*, 369 N.C. 298, 304 (2016) (quoting *State ex rel. Utils. Comm'n v. Pub. Staff*, 309 N.C. 195, 210 (1983)). When we interpret statutes, it is fundamental that we interpret the statute consistently with the Constitution. *See In re Banks*, 295 N.C. 236, 239 (1978) ("A well recognized rule in this State is that, where a statute is susceptible to two interpretations—one constitutional and one unconstitutional—the Court should adopt the interpretation resulting in a finding of constitutionality."). Still, statutory construction does not demand that this Court give words the most strained meaning in order to avoid a constitutional problem; "words are given their fair meaning in accord with the manifest intent of the [legislature]." *State v. Jones*, 358 N.C. 473, 478 (2004) (quoting *United States v. Brown*, 333 U.S. 18, 25–26 (1948)) (recognizing statutory construction should not override common sense and evident statutory purpose by giving statutory language the narrowest meaning). The Court must construe statutes "mindful of the criminal conduct that the legislature intends to prohibit," *State v. Rankin*, 371 N.C. 885, 889 (2018), which in this statute is the entrapment of vulnerable victims in a state of involuntary sexual servitude.

I agree with the majority that some of the activities identified in the statute could represent multiple offenses against a single victim—but only if the charges are based upon distinct acts and the indictment gives "notice sufficient to prepare a defense and to protect against double jeopardy." *State v. Lancaster*, 385 N.C. 459, 462 (2023) (quoting *In re J.U.*, 384 N.C. 518, 623 (2023)). However, on the facts of this case, I would hold that the indictments are only sufficient to support one count of human trafficking per victim within the dates provided in the indictment. For this reason, I respectfully dissent from the majority's reading of the statute and its application here. I concur with the majority's holding that Mr. Applewhite was not prejudiced by the trial court's error in failing to compare the elements of his federal firearm conviction to the elements of a similar North Carolina offense.

I. Analysis

A. N.C.G.S. § 14-43.11 is Ambiguous.

Subsection (a) of the statute does not clearly state whether the six activities—"recruits, entices, harbors, transports, provides, or obtains by any other means"—represent separate offenses or alternative means of committing the same offense of human trafficking. N.C.G.S. § 14-43.11(a). The language can be reasonably interpreted as identifying six separate offenses for human trafficking in the same way that the drug trafficking statute, N.C.G.S. § 90-95(a)(1) (2023), establishes that sale and delivery, possession, and manufacturing of drugs represents three separate offenses under the statute. *See State v. Creason*, 313 N.C. 122, 129 (1985) (recognizing that sale and delivery, possession, and manufacturing represent three separate offenses under N.C.G.S. § 90-95(a)(1)); *State v. Aiken*, 286 N.C. 202, 206 (1974) (explaining that the sale of controlled substances is a separate offense from possession because a defendant can sell a substance which he does not possess and possess a substance that he does not sell). In contrast, the activities listed in the human trafficking statute can also be read to only represent alternative means of committing a single offense of human trafficking in the same way that N.C.G.S. § 14-202.1 establishes different means of committing the crime of taking indecent liberties with a child. *See* N.C.G.S. § 14-202.1 (2023); *State v. Hartness*, 326 N.C. 561, 564–65 (1990) (explaining "any immoral, improper, or indecent liberties" represent different means falling within the ambit of N.C.G.S. § 14-202.1). The majority adopts the latter view, reading the enumerated activities in the human trafficking statute as alternate means of committing human trafficking but also reads subsection (c) to allow each activity to represent a separate offense against a single victim. But the fact that the majority reads

the statute in a manner where the activities are both alternate means of committing the offense of human trafficking and separate offenses only reinforces the ambiguity of the statute.

I agree with the majority that the statute provides for multiple charges related to a single victim so long as each charge is based upon a distinct act. However, the majority glosses over the meaning of "distinct act" without analyzing whether the synonymous nature of the enumerated means of holding a victim in involuntary or sexual servitude could lead to multiple charges based upon the same conduct (or indeed, represents a distinct act). In doing so, the Court is interpreting the statute in a way that creates multiple punishments for the same distinct act in violation of double jeopardy protection. *See State v. Irick*, 291 N.C. 480, 502 (1977) ("[D]ouble jeopardy is designed to protect an accused from double punishment as well as double trials for the same offense.").

While several of the six activities identified in the statute represent distinct acts of human trafficking, some do not represent distinct acts. "Harbor" and "transport" represent two distinct means of holding a victim in servitude, and "provide" represents a means "[t]o furnish [or] supply" a victim for servitude. *Provide*, The American Heritage College Dictionary (3d ed. 1997). However, "recruits," "entices," and "obtains" are synonymous words related to bringing a victim into servitude. "Recruit" is defined as "enroll[ing] (someone) as a member or worker in an organization," *Recruit*, New Oxford American Dictionary (3d ed. 2010), while "entice" means "lur[ing] or induc[ing]; esp[ecially], to wrongfully solicit (a person) to do something," *Entice*, Black's Law Dictionary (12th ed. 2024). "Obtain," as the majority notes, means "bring[ing] into one's own possession; [ ] procur[ing], esp[ecially] through effort." *Obtain*, Black's Law Dictionary (12th ed. 2024).[1] The majority's flippant analogy that enrolling students in school is different from luring a student into school fails to consider the definitions of the words in the statutory context. *See West Virginia v. EPA*, 142 S. Ct. 2587, 2607 (2022) ("It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." (quoting *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989))). This is not a statute about school enrollment. It is a criminal statute about actions executed with the intent to hold victims "in involuntary servitude or sexual servitude." N.C.G.S. § 14-43.11(a).

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1. The fact that the statute states "obtains by any other means" does not dictate that the verbs listed prior to that are legally understood as means of committing the same offense rather than separate offenses—"by any other means" simply describes and expands the verb "obtain."

In the context of human trafficking, recruiting, enticing, and obtaining are all means of bringing a victim into involuntary or sexual servitude. In this case, the State alleged that Mr. Applewhite offered the victims free heroin to get them addicted and then forced them to engage in prostitution to pay him for the heroin. Based on the State's evidence, providing heroin to the victims to lure them into the trafficking ring serves equally to "recruit[ ]," or "entice[ ]" them into the illegal program or to "obtain[ ]" them. In the context of this statute, there is no legally significant definitional daylight between the plain usage of the statute's three problematic verbs that would make "enroll[ing] (someone) as a member or worker in an organization," *Recruit*, New Oxford American Dictionary (3d ed. 2010), "lur[ing] or induc[ing] . . . esp[ecially], to wrongfully solicit (a person) to do something," *Entice*, Black's Law Dictionary (12th ed. 2024), and "bring[ing] into one's own possession; [ ] procur[ing], esp[ecially] through effort," *Obtain*, Black's Law Dictionary (12th ed. 2024), so distinct that it is reasonable to consider them three separate offenses.[2] The "by any other means" language supports this interpretation by expanding the statute to ensure that any means used to bring a victim into involuntary or sexual servitude can serve as the basis for a human trafficking charge so long as it is based upon a distinct act.

B. The Majority's Statutory Construction of N.C.G.S. § 14-43.11 Allows for Multiple Punishments for the Same Conduct.

In construing an ambiguous criminal statute, the legislative intent controls the interpretation. *Jones*, 358 N.C. at 478. All parts of the statute dealing with the same subject are to be construed together, and every part shall be given effect if it can be done by fair and reasonable interpretation. *State v. Tew*, 326 N.C. 732, 739 (1990). In construing ambiguous criminal statutes, the Court applies the rule of lenity, which requires that the statute be strictly construed against the State. *See State v. Hinton*, 361 N.C. 207, 211–12 (2007) (recognizing that the rule of lenity applies to construe ambiguous criminal statutes); *United States v. Santos*, 553 U.S. 507, 514 (2008) ("The rule of lenity requires ambiguous criminal laws to be interpreted in favor of the defendant subjected to them."). Any doubt as to punishment "will be resolved against turning

2. This is not to say that a defendant may not be charged with recruiting the same victim multiple times. As the State suggested during oral argument, if a victim leaves the involuntary servitude but then is recruited back into servitude by a defendant, then the defendant could be charged with multiple counts against the same victim, but more specificity would be required by the State to establish each charge. Oral Argument at 32:15, *State v. Applewhite*, No. 39A22 (N.C. Aug. 23, 2024), https://www.youtube.com/watch?v=SaTrwzNAwSo.

a single transaction into multiple offenses." *State v. Conley*, 374 N.C. 209, 213 (2020) (quoting *State v. Smith*, 323 N.C. 439, 442 (1988)).

By comparison to other statutes intending to deal with far-reaching criminal enterprises, in creating the human trafficking statute, the legislature obviously sought to criminalize the insidious operation of human trafficking by casting a wide net to ensnare all aspects of a human trafficking operation and hold all who engage in any aspect responsible for such role, similar to the way Congress sought to address complex racketeering schemes. *See, e.g.*, 18 U.S.C. § 1959(a) (enumerating the wide range of crimes that can be committed for the purpose of joining a racketeering enterprise to include murder, kidnapping, maiming, assault, or a threat to commit a crime of violence). While we must construe the statute "mindful of the criminal conduct the legislature intends to prohibit," *Rankin*, 371 N.C. at 889, the Court may not increase the penalty the statute "places on an individual when the [l]egislature has not clearly stated such an intention," *Conley*, 374 N.C. at 212 (quoting *State v. Garris*, 191 N.C. App. 276, 284 (2008)).

The constitutional guarantee against double jeopardy protects a defendant from multiple punishments for the same distinct conduct. *See State v. Sparks*, 362 N.C. 181, 186 (2008) (recognizing that the constitutional prohibition against double jeopardy protects three distinct abuses including multiple punishments for the same offense). In the context of multiple violations of a single statute, the Supreme Court of the United States has acknowledged that when the legislature "has the will, that is, of defining what it desires to make the unit of prosecution" it can do so, but when the legislature "leaves to the [j]udiciary the task of imputing . . . an undeclared will, the ambiguity should be resolved in favor of lenity." *Bell v. United States*, 349 U.S. 81, 83 (1955) (holding that under the Mann Act, a defendant who transported two women on the same trip and in a single vehicle could only be charged with a single offense and not be subjected to cumulative punishment). Any ambiguity as to the unit of prosecution—that is the particular course of conduct defined by statutes as a distinct offense— should be resolved in favor of the defendant under the rule of lenity. *Id.*; *see also Sanabria v. United States*, 437 U.S. 54, 69–70 (1978) (describing an "allowable unit of prosecution" as the particular course of conduct defined by statute as a distinct offense). This Court applied this principle in the context of a North Carolina statute criminalizing obscene literature and exhibitions. *Smith*, 323 N.C. 439. In *Smith*, this Court concluded that the applicable statute "exhibits no clear expression of legislative intent to punish separately and cumulatively for each and every obscene item disseminated, regardless of the

number of transactions involved." *Id.* at 442 (cleaned up). The Court held that "until the General Assembly unambiguously declares a contrary intent, we should assume that a single sale . . . does not spawn multiple indictments." *Id.* at 444 (cleaned up).

Similarly, here, the legislature fails to unambiguously define the unit of prosecution for human trafficking and this Court must resolve any ambiguity as to the unit of prosecution in favor of lenity. While subsection (c) makes clear that a defendant may face multiple charges for a single victim by employing the language that "[e]ach violation of this section constitutes a separate offense," N.C.G.S. § 14-43.11(c), this language does not demonstrate legislative intent to allow multiple charges based upon the same conduct. This ambiguity on the unit of prosecution should be resolved in favor of lenity. *See Hinton*, 361 N.C. at 211 (recognizing the "rule of lenity" requires courts to construe ambiguity in a criminal statute in favor of the defendant); *Smith*, 323 N.C. at 442–44 (acknowledging that courts must construe ambiguity regarding the allowable unit of prosecution against the State and in favor of lenity).

When the legislature uses duplicative terms, this Court has looked at the conduct the legislature seeks to prevent to determine if the terms represent separate offenses. *See Creason*, 313 N.C. at 129 (holding that in the context of drug trafficking, "sell or deliver" is one offense that criminalizes placing drugs into the stream of commerce); *State v. Jones*, 242 N.C. 563, 565–66 (1955) (recognizing that the terms "build" or "install" as used in a health board ordinance are synonymous because the gist of the offense is failure to get a permit). Looking at the conduct the legislature intends to prevent, the synonymous terms "recruit," "entice," and "obtain" can, in the context of human trafficking, represent the same conduct of bringing a victim into involuntary or sexual servitude. *See State v. Rambert*, 341 N.C. 173, 176 (1995) (recognizing that an examination of the facts underlying each charge may be necessary to show that the defendant was not charged with the same offense for the same act but was charged with distinct acts and therefore, was not placed in double jeopardy).

Additionally, the plain language of the anti-merger language in subsection (c) does not demonstrate legislative intent to allow multiple charges based upon the same conduct. Indeed, the majority's interpretation of the anti-merger language gives it the same meaning as the prior clause in this subsection—"each violation of this section constitutes a separate offense." The majority's interpretation renders the anti-merger clause superfluous, completely redundant to the first clause in the subsection. *See Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 387 (2012)

("[T]he canon against surplusage is strongest when an interpretation would render superfluous another part of the same statutory scheme.").

Importantly, the majority's interpretation undermines the legislative intent. The legislative history demonstrates that the anti-merger language operates to keep the crime of human trafficking from merging with offenses under other statutes, including kidnapping under N.C.G.S. § 14-39, involuntary servitude under N.C.G.S. § 14-43.12, and sexual servitude under N.C.G.S. § 14-43.13. *See* N.C.G.S. §§ 14-39, -43.12, -43.13 (2023). The 2006 legislation in which the General Assembly established the crime of human trafficking also created the separate offenses of involuntary servitude and sexual servitude. An Act to Protect North Carolina's Children/Sex Offender Law Changes, S.L. 2006-247, § 20(b), 2006 N.C. Sess. Laws 1065, 1084. Those two statutes include the same anti-merger language as in the statute at issue in this case—"[e]ach violation of this section constitutes a separate offense and shall not merge with any other offense." *Id.* Additionally, in that same legislative session, the legislature added language to the kidnapping statute that made confining a person for the purpose of human trafficking a crime under the kidnapping statute. *Id.* § 20(c). Thus, to interpret subsection (c) consistent with the legislative intent and to avoid rendering the last clause superfluous, I would hold that the anti-merger language in the human trafficking statute in subsection (c) ensures that the offense of human trafficking does not merge with the offenses of kidnapping, involuntary servitude, and sexual servitude. *See* N.C.G.S. § 14-43.11(c).

In sum, the plain language of the human trafficking statute, N.C.G.S. § 14-43.11, can support multiple reasonable interpretations. Therefore, to interpret the statute in a manner that does not violate the prohibition against double jeopardy but also effectuates the will of the legislature, I would hold that the three means of "recruit[ing]," "entic[ing]," and "obtain[ing] by any means" can only represent multiple offenses of bringing a victim into involuntary or sexual servitude if the indictment meets the particularity standards articulated in the section below.

C. The Indictments Were Insufficient to Avoid Double Jeopardy in a Subsequent Prosecution.

Even though the statute allows nonduplicative separate offenses against a single victim, the indictments in this case do not make certain that in a subsequent prosecution, Mr. Applewhite will not be charged with the same crime. *See State v. Gardner*, 315 N.C. 444, 454 (1986) ("[W]hen a person is acquitted of or convicted and sentenced for an offense, the prosecution is prohibited from subsequently . . . indicting,

convicting, or sentencing him a second time for that offense . . . ."). The purpose of an indictment, as the majority recognizes, is 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."[3] *Creason*, 313 N.C. at 130 (quoting *State v. Sturdivant*, 304 N.C. 293, 311 (1981)); *accord State v. Singleton*, 900 S.E.2d 802, 821 (N.C. 2024) ("An indictment might fail to satisfy constitutional purposes by failing to provide 'notice sufficient to prepare a defense and to protect against double jeopardy' " (quoting *Lancaster*, 385 N.C. at 462)). But the prosecutor must charge the multiple offenses in a manner as to eliminate any doubt as to the nature of the offenses to which the defendant must answer and to protect against double jeopardy. *See State v. Freeman*, 314 N.C. 432, 435 (1985) (acknowledging the "long held view" of this Court that one of the purposes of an indictment is putting the defendant "in a position to plead prior jeopardy if he is again brought to trial for the same offense").

An indictment cannot be sufficient if it does not make certain a prosecutor cannot bring a charge for the same conduct in a subsequent prosecution. *See State v. Greer*, 238 N.C. 325, 327 (1953) (recognizing that a valid indictment must "protect the accused from being twice put in jeopardy for the same offense"). Double jeopardy protects against a second prosecution for the same offense following an acquittal, a second prosecution for the same offense following a conviction, and multiple punishments for the same offense. *State v. Thompson*, 349 N.C. 483, 495 (1998). In this case, if Mr. Applewhite faced subsequent prosecution for human trafficking for these victims during the same time frames alleged in the indictments, there would be no way to know if he was facing a second prosecution for the same offense.

Here, the State indicted Mr. Applewhite for multiple counts of human trafficking against each victim simply replicating the statutory language. The indictments do not differentiate the multiple charges

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3. Because the indictment alleged a crime, the defect in the indictment is not jurisdictional. Under Rule 10(a)(1) of the Rules of Appellate Procedure, the question of whether a criminal charge is sufficient in law is automatically preserved for review. N.C. R. App. P. 10(a)(1). Because Mr. Applewhite is alleging a constitutional error, we use the test found in N.C.G.S. § 15A-1443(b) to determine whether the error was prejudicial. N.C.G.S. § 15A-1443(b) ("A violation of the defendant's rights under the Constitution of the United States is prejudicial unless the appellate court finds that it was harmless beyond a reasonable doubt. The burden is upon the State to demonstrate, beyond a reasonable doubt, that the error was harmless.").

on the basis of the date the offense occurred or on the basis of the means Mr. Applewhite used—i.e., "recruit[ing], entic[ing], harbor[ing], transport[ing], provid[ing], or obtain[ing] by any other means." *See* N.C.G.S. § 14-43.11(a). For example, Mr. Applewhite was acquitted of two charges of human trafficking against J.O. Neither the indictments nor the jury verdicts indicate the conduct that was the basis of the charges for which he was acquitted. Therefore, a prosecutor cannot bring subsequent charges against Mr. Applewhite for the human trafficking of J.O. during the same date range. Any subsequent charges of human trafficking within the date range would present a risk of a second prosecution for the same offense for which he was already acquitted. *See State v. Oldroyd*, 380 N.C. 613, 620 (2022) (concluding that an indictment must convey "the exactitude necessary to place [the defendant] on notice of the event or transaction against which he was expected to defend, to protect [the] defendant from being placed in jeopardy twice for the same crime").

Also, Mr. Applewhite was convicted of three counts of human trafficking as to the victim A.B., and all the charges have the same date range. Neither the indictments nor the jury verdicts specify the means that Mr. Applewhite used to commit the offense for which he was convicted. To explain, imagine a prosecutor decided to indict Mr. Applewhite again for human trafficking of A.B. during the same date range—there is no way to know if the new charge represents a duplicative means, the same means, or a different means of the offense for which the jury has already convicted him. Therefore, a new indictment within the same date range, even if the new indictment specifies the means and the date, could put him in jeopardy for an offense for which he was already convicted.

To be sure, in this case, the State presented evidence of the crimes this defendant committed against each victim. However, neither the indictments nor the jury verdict clarified the distinct acts that served as the basis for each means charged and each conviction. During the charge conference, even the trial court asked the prosecutor how to distinguish the charges so that the jury could differentiate between the charges it was considering. However, the prosecutor did not provide any means of identifying the conduct that was the basis of each charge, and even now, the majority does not, because it cannot, delineate in the facts the conduct that served as the basis for each charge in this case.

Therefore, the indictments, in this case, are insufficient to make certain that in subsequent prosecutions, Mr. Applewhite is not placed in jeopardy again for the same crime. The insufficiency in the indictments

is not, however, jurisdictional in nature because the indictments allege the crime of human trafficking. *See Singleton*, 900 S.E.2d at 805 (holding that an indictment raises jurisdictional concerns only when it wholly fails to charge a crime against the laws or people of this state).[4] In order to resolve these types of non-jurisdictional defects in an indictment, a defendant can request a bill of particulars or file a motion to dismiss under N.C.G.S. § 15A-952(b)(6)(c). *See* N.C.G.S. § 15A-952(b)(6)(c) (2023).

II. Conclusion

In sum, I would hold that a defendant can be charged with multiple counts of human trafficking against a single victim so long as each count is based upon a distinct act. However, the indictment must allege the multiple offenses in a manner that provides the defendant with notice and protection against double jeopardy.

In this case, the indictments do not shed light on the specific conduct the State alleged to support multiple counts of human trafficking against each victim. Therefore, I would hold the indictments here are only sufficient to support a single count of human trafficking against each victim. For these reasons, I respectfully dissent.

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

4. The fact that the inadequacies in the indictment are not jurisdictional by no means suggests that those inadequacies cannot rise to a constitutional level, particularly given the majority's interpretation of the statute. All this means is that we do not suggest that the entirety of Mr. Applewhite's convictions should be overturned because of the indictments.

STATE OF NORTH CAROLINA
v.
TRAVIS LAMONT DAVENPORT

No. 155PA22

Filed 23 August 2024

1. Robbery—with a dangerous weapon—taking of property—sufficiency of evidence

In a prosecution for murder and robbery, the State presented sufficient evidence to survive defendant's motion to dismiss the charge of robbery with a dangerous weapon, including that: the victim's wallet had contained a large sum of money the day before his murder and he had not planned to deposit the money until the next day; the victim's money, wallet, and cell phone were missing from his house where he was killed; the victim's body exhibited defensive wounds from a knife that was presumed to be the murder weapon, which supported the theory that his life was endangered or threatened; witness testimony and cell phone records linked defendant temporally and spatially with the crime; and defendant gave an extrajudicial confession to a fellow inmate that he killed the victim so that he could steal $10,000 from him. Although some of the evidence was circumstantial and the victim's items were never recovered, all of the evidence considered as a whole and in the light most favorable to the State established each element of the offense and that defendant was the perpetrator.

2. Evidence—murder and robbery trial—defendant's prior incarceration, gang affiliation, and tattoos—plain error analysis—prejudice prong not met

In defendant's prosecution for first-degree murder and robbery with a dangerous weapon, there was no plain error in the admission of evidence regarding defendant's prior incarceration, gang affiliation, and tattoos because, even if the evidence had been excluded, the jury probably would not have reached a different result in light of other evidence consisting of witness statements placing defendant at the scene of the crime and defendant's extrajudicial confession to another inmate that defendant killed the victim for money.

3. Evidence—hearsay—phone call between murder victim and niece—code name used for defendant—excited utterance exception

In defendant's prosecution for first-degree murder and robbery with a dangerous weapon, evidence that the victim called his niece the night before he was murdered and quickly said "Dianne to the house" before hanging up, which they both knew was a code name for defendant, was not improperly admitted because, although the statement was hearsay, it fell within the excited utterance exception since it was made in circumstances indicating that the victim was startled by the defendant's intention to come to his home (the phone call was hurried and brief, and the victim and defendant had experienced recent conflict in their relationship).

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous, unpublished decision of the Court of Appeals, No. COA20-628 (N.C. Ct. App. May 3, 2022), reversing an order entered on 3 May 2019 by Judge Cy A. Grant in Superior Court, Martin County, denying defendant's motion to dismiss the charge of robbery with a dangerous weapon, and concluding that defendant is entitled to a new trial for first-degree murder. Heard in the Supreme Court on 17 April 2024.

Joshua H. Stein, Attorney General, by Teresa M. Postell, Special Deputy Attorney General, for the State-appellant.

Kellie Mannette for defendant-appellee.

EARLS, Justice.

This case presents three issues arising from the trial of Travis Davenport for the robbery and murder of Mike Griffin. The first issue is whether the State presented substantial evidence of each essential element of robbery with a dangerous weapon and of Davenport's identity as the perpetrator of that crime. The next issue is whether the admission of evidence related to Davenport's prior incarceration, gang affiliation, and tattoos rises to the level of plain error. The final issue is whether the statement "Dianne to the house" is admissible under the excited utterance exception to the hearsay rule. We reverse the decision of the Court of Appeals on all three issues and hold that: (1) the State presented substantial evidence of each essential element of robbery with a dangerous weapon and of Davenport's identity as the perpetrator of that crime; (2) the trial court's admission of evidence related to Davenport's prior incarceration, his gang affiliation, and his tattoos was not plain error; and (3) the statement "Dianne to the house" is admissible pursuant to the excited utterance exception to the hearsay rule.

I. Procedural History

On 3 May 2019, Travis Davenport was convicted of robbery with a dangerous weapon and first-degree murder under theories of premeditation and deliberation and felony murder. Davenport also stipulated to being a level IV felony offender with eleven prior record points. The trial court sentenced Davenport to life in prison for the first-degree murder conviction and 97 to 129 months for the robbery with a dangerous weapon conviction.

On appeal, Davenport argued that the trial court erred in denying his motion to dismiss the charge of robbery with a dangerous weapon. *State v. Davenport*, No. COA20-628, slip op. at 8 (N.C. Ct. App. May 3, 2022) (unpublished). Davenport also claimed he was entitled to a new trial on the charge of first-degree murder because the trial court erred in allowing inadmissible character evidence of Davenport's prior incarceration, gang affiliation, and tattoos under Rule 404(b) of the North Carolina Rules of Evidence. *Id*. at 13.

The Court of Appeals held that Davenport's motion to dismiss the robbery charge should have been granted because the State had not presented substantial evidence of each essential element of the crime. *Id*. at 10–11. On the admissibility of Rule 404(b) evidence pertaining to Davenport's prior incarceration, gang involvement, and tattoos, the court determined that admission of that evidence amounted to plain error. *Id*. at 22. Based on this, the court awarded Davenport a new trial for the first-degree murder charge. *Id*. Lastly, the court held that the hearsay statement "Dianne to the house" was inadmissible hearsay. *Id*. at 25. However, because it had already awarded Davenport a new trial pursuant to improperly admitted 404(b) evidence, the court declined to reach the question of whether admission of the hearsay statement was prejudicial. *Id*. The State petitioned for discretionary review, which this Court allowed on 1 March 2023.

II. Background

After being released from prison in 2015, Travis Davenport moved to Rocky Mount, North Carolina, to live with his brother, Timothy, and his sister-in-law, Sylvia. Davenport's mother lived in Williamston, North Carolina, and Davenport often visited her there. The victim, Mike Griffin, also lived in Williamston. Griffin sold cocaine and had previously been in prison. Davenport and Griffin dated in the 1990s, and they rekindled their relationship in November 2015.

Griffin had diabetes and received dialysis treatments several days a week. These treatments were always early in the morning. On treatment

days, Griffin would wake up and shower between 4:30 a.m. and 4:45 a.m., check his blood sugar and eat breakfast around 5:00 a.m., and leave around 5:30 a.m. Craig Daniels, a local magistrate, routinely provided Griffin with transportation to his dialysis appointments around 5:30 a.m.

Griffin had a close relationship with both of his nieces. His niece, Marion Griffin Knight, sometimes drove him to medical appointments, and his other niece, Somers Griffin, lived two blocks away from Griffin and spoke to him daily. Griffin introduced Davenport to his two nieces in November and December of 2015. At that time, Somers believed that Griffin and Davenport had a "good relationship."

That relationship changed later in December 2015 when Griffin and Davenport got into an argument, which led to a physical altercation. According to Somers, Davenport "put[ ] hands on" Griffin, and Griffin responded by "pull[ing] out a blade." Somers later called Davenport to discuss the incident. During that call, Davenport called Griffin a "mother fucker." Referring to himself, Davenport stated that he was not "the same Travis he used to be," identified himself as "Blood," and stated it was "against his gang religion" for someone to pull a weapon on him. In addition, Davenport stated, "If I had my banger I would've did that mother fucker dirty" and stated, "If that mother fucker pull out a blade on me again I will do that mother fucker dirty." At trial, Somers explained that she understood "banger" to mean "gun" and the term "do him dirty" to mean "kill him."

A. The Day Before Griffin's Murder

On 18 January 2016, Davenport had a disagreement with his brother, and he was asked to leave his brother's home. Davenport left and went to his mother's home in Williamston. That same day, Griffin went to Somers's home to give her ten dollars to play the lottery. During that visit, Somers noticed Griffin's wallet was so full of money that the "wallet couldn't fold" closed. When Somers asked Griffin why he had so much cash, he said he was going to load it on his card the next day.

That same evening, after 9:00 p.m., Griffin called Somers hurriedly stating, "Dianne to the house" after which they simply hung up. At trial, Somers testified that "Dianne" was a code name for Davenport. At 10:06 p.m., Griffin called William Edwards, a cab driver, to give his "friend" a ride home. Griffin often relied on Edwards to take him to medical appointments and the grocery store. At trial, Edwards testified that he did not recognize Griffin's friend but described him as a Black man with facial tattoos who was wearing a "nice jogging suit, white, trimmed in red, with a hood." Edwards dropped Griffin's friend off near

Davenport's mother's home. Witness testimony later established that Griffin had given a white track suit to Davenport as a gift.

B. The Day of Griffin's Murder

At 12:09 a.m. on 19 January 2016, Davenport called Griffin. The two subsequently exchanged at least eight phone calls, with the last call between them occurring at 12:39 a.m. Despite phone records showing these calls occurred, Davenport told police he had no contact with Griffin for "about a month" prior to Griffin's death.

Edwards received calls from an unknown number at 12:43 a.m. and at 12:50 a.m. At 1:03 a.m., Edwards returned these calls to what was later identified as Davenport's phone number, and a man answered asking to be driven back to Griffin's home. At pick up, Edwards saw Griffin's friend in the "white jogging suit with red trimming." In the car, the friend told Edwards that "he had just got out of prison" after serving "like thirteen years." Edwards dropped the man off at Griffin's home, and Griffin let the man in. Before departing, Edwards saw Griffin gesturing with his hands through the glass door and presumed Griffin and his friend were arguing.[1]

At 5:08 a.m., Griffin's glucometer was used. But at 5:20 a.m., when Magistrate Daniels arrived to drive Griffin to his dialysis appointment, a Black man, unfamiliar to Magistrate Daniels, waved him away and stated that he "didn't need a ride." Because it was unusual for Griffin to miss a dialysis appointment, a concerned employee from the dialysis center asked the police to conduct a wellbeing check. During this check, officers knocked on Griffin's doors and windows. After receiving no response, officers talked to Griffin's neighbors and called the fire department to determine if EMS had picked anyone up from Griffin's home. At approximately 9:30 a.m., the police kicked in Griffin's front door and found Griffin dead in his living room. The medical examiner estimated that Griffin had been dead for two to three hours before the police found him.

Upon entering the home, police found Griffin's love seat pushed up against the front wall of the house with a "reddish staining." There was also a reddish stain under the love seat, on the wall above the love

1. Edwards originally told police officers that Griffin and the man in the white track suit appeared to be arguing when he first picked the man up from Griffin's home at around 10:00 p.m., but Edwards later testified that the two appeared to be arguing when he later dropped the man in the white track suit off at Griffin's house. This inconsistency in Edwards's testimony is for the jury to consider. *See State v. Benson*, 331 N.C. 537, 544 (1992).

seat, and near the top corner of the front door. Reddish stains were also found in the kitchen, specifically on the kitchen faucet and countertop. The stain on the faucet contained "some type of print in the reddish material." The bag Griffin took to his dialysis appointments was found packed and on the kitchen table. Bags containing a white powdery substance were also found throughout the home. However, Griffin's phone and wallet were not found.

Griffin's body had approximately eight stab wounds to his face and neck and other superficial incised wounds, including defensive wounds, on his face, hands, chest, and abdomen. Griffin ultimately died from a stab wound that cut through his cheek and severed his left common carotid artery. The medical examiner testified that with such a wound, Griffin would have died within "several seconds or minutes." Police found a knife soaking in the kitchen sink, but the medical examiner was unable to determine whether that knife was the murder weapon. However, medical testimony established that the blade used against Griffin was likely two-and-a-quarter to five-and-a-half inches long.

On 25 January 2016, Davenport was arrested. Neither Griffin's cell phone nor his wallet was found on Davenport's person or at Davenport's mother's or brother's home. The white jogging suit was also never recovered. Upon questioning by police, Davenport reported that he was at his mother's home throughout the night of 18 January 2016. His mother and sister confirmed that he was there when they went to bed around midnight and that he was there when they woke up, sometime between 6:45 a.m. and 8:30 a.m.

Following his arrest, Davenport was incarcerated with another inmate, Jeffrey Harrison, who offered to testify as a witness for the State. At trial, Harrison acknowledged that he had a criminal record, had difficulty recalling details, and had initially sought to cooperate with law enforcement in order to be transferred to a prison closer to his family. Harrison testified that Davenport confessed to killing Griffin "to steal . . . $10,000" from him. Harrison also testified that Davenport had caught Griffin cheating on him and that while Davenport "wished he hadn't killed Mike," Davenport was also "glad he did it."

III. Sufficiency of the Evidence for Davenport's Robbery with a Dangerous Weapon Charge

[1] At trial, Davenport filed a motion to dismiss the charge of robbery with a dangerous weapon, which the trial court denied. The Court of Appeals reversed the trial court's order on this issue. *Davenport*, slip op. at 11. Now, on appeal with this Court, the State argues that the Court of

Appeals erred in reaching this conclusion because rather than review evidence favorable to the State "as a whole," *see State v. Thomas*, 296 N.C. 236, 244–45 (1978), the court reviewed the evidence of robbery with a dangerous weapon "in isolation," *see Davenport*, slip op. at 10–11. This was improper under our precedent. *See Thomas*, 296 N.C. at 244–45. Thus, we reverse the decision of the Court of Appeals and hold that the State presented substantial evidence of each essential element of robbery with a dangerous weapon, *see* N.C.G.S. § 14-87(a) (2023), and that Davenport was the perpetrator of that offense. *See State v. Fritsch*, 351 N.C. 373, 378 (2000).

A. Applicable Law

"Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied." *Id.* (quoting *State v. Barnes*, 334 N.C. 67, 75 (1993)). However, "[i]f the evidence is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator of it, the motion should be allowed." *Id.* (quoting *Barnes*, 334 N.C. at 75). "Whether the State presented substantial evidence of each essential element is a question of law," *State v. Phillips*, 365 N.C. 103, 133–34 (2011), and "[w]e review questions of law de novo," *State v. Khan*, 366 N.C. 448, 453 (2013).

When reviewing sufficiency of the evidence challenges, this Court is required to "view the evidence in the light most favorable to the State [and] give[ ] the State the benefit of all reasonable inferences." *Fritsch*, 351 N.C. at 378–79 (citing *State v. Benson*, 331 N.C. 537, 544 (1992)). Accordingly, "contradictions and discrepancies [in the evidence] do not warrant dismissal of the case"; instead, "they are for the jury to resolve." *Benson*, 331 N.C. at 544 (quoting *State v. Earnhardt*, 307 N.C. 62, 67 (1982)).

The test for sufficiency of the evidence is the same regardless of the type of evidence presented, thus the same test applies "whether the evidence is direct or circumstantial or both." *Fritsch*, 351 N.C. at 379 (quoting *Barnes*, 334 N.C. at 75). In cases involving circumstantial evidence, "the court must consider whether a reasonable inference of defendant's guilt may be drawn from the circumstances." *Id.* (quoting *Barnes*, 334 N.C. at 75). If this standard is met, "then it is for the jury to decide whether the facts *taken singly or in combination*, satisfy it beyond a reasonable doubt that the defendant is actually guilty." *Id.* (cleaned up).

B. Robbery with a Dangerous Weapon

Pursuant to N.C.G.S. § 14-87(a), robbery with a dangerous weapon has three elements: "(1) the unlawful taking or an attempt to take personal property from the person or in the presence of another (2) by use or threatened use of a firearm or other dangerous weapon (3) whereby the life of a person is endangered or threatened." *State v. Hartman*, 344 N.C. 445, 473 (1996) (quoting *State v. Olson*, 330 N.C. 557, 566 (1992)). Moreover, the commission of a robbery "does not depend upon whether the threat or use of violence precedes or follows the taking of the victims' property." *State v. Barden*, 356 N.C. 316, 352 (2002) (quoting *State v. Green*, 321 N.C. 594, 605 (1988)). And "[w]here there is a continuous transaction, the temporal order of the threat or use of a dangerous weapon and the takings is immaterial." *Id.* (quoting *Green*, 321 N.C. at 605). Furthermore, if "the theft and the force are aspects of a single transaction, it is immaterial whether the intention to commit the theft was formed before or after force was used upon the victims." *Id.* (quoting *Green*, 321 N.C. at 605).

At the motion to dismiss stage, recovery of the stolen item is not required to support that a taking occurred. *State v. Palmer*, 334 N.C. 104, 112–13 (1993). In *Palmer*, the indictment charged that the defendant took cash and a gun from the deceased victim, but the defendant argued that there was no evidence to support the robbery. *Id.* Regarding the stolen money, this Court found it sufficient that there was evidence supporting that the victim "always had money," that her purse had been emptied, and that no money was found following a search of the apartment. *Id.* This Court also determined that the defendant's extrajudicial confession to a detective, in which he stated that "after he had shot [the victim], he carried the pistol from the apartment," was sufficient to support "the jury's finding that [the defendant] took the pistol during the course of the robbery." *Id.* at 112.

To be sure, there are special rules surrounding extrajudicial confessions. Namely that, "an extrajudicial confession, standing alone, is not sufficient to sustain a conviction of a crime." *State v. Cox*, 367 N.C. 147, 151 (2013) (quoting *State v. Parker*, 315 N.C. 222, 229 (1985)). In cases where the State relies on a defendant's extrajudicial confession, the doctrine of *corpus delicti* applies, and this inquiry must be completed before consideration of whether the State presented enough evidence to survive a motion to dismiss. *Id.* Under this doctrine, the State must provide "corroborative evidence, independent of the defendant's confession, tending to show that (a) the injury or harm constituting the crime occurred and (b) this injury or harm was done in a criminal manner." *Id.*

But this evidence does not need to "tend to show that the defendant was the guilty party." *Id.* at 152 (cleaned up).

The *corpus delicti* doctrine is grounded in three policy justifications aimed at protecting criminal defendants. *Id.* at 151. First, the rule is intended "to protect against those shocking situations" in which a defendant has confessed to murder but the alleged victim later turns up alive after the defendant has already been convicted or worse, executed. *Id.* (cleaned up). Second, the rule ensures that "confessions that are erroneously reported or construed, involuntarily made, mistaken as to law or fact, or falsely volunteered" by a person with a mental impairment or illness "cannot be used to falsely convict a defendant." *Id.* (cleaned up). Lastly, the rule exists to encourage and "promote good law enforcement practices by requiring thorough investigations of alleged crimes to ensure that justice is achieved and the innocent are vindicated." *Id.* (cleaned up). In essence, this rule is concerned with the trustworthiness of the accused's confession. *See Parker*, 315 N.C. at 237–38.

In *Parker*, this Court expanded the type of corroborating evidence sufficient to show that a confession is "trustworth[y]" under the *corpus delicti* doctrine in noncapital cases. *Id.* at 235. In doing so, this Court explained that "if the accused's confession is supported by substantial independent evidence tending to establish its trustworthiness, including facts that tend to show the defendant had the opportunity to commit the crime," "it is no longer necessary that there be independent proof tending to establish the *corpus delicti* of the crime charged." *Id.* at 236. However, in cases where "independent proof of loss or injury is lacking, there must be strong corroboration of essential facts and circumstances embraced in the defendant's confession." *Id.* (emphases omitted). This helps ensure the trustworthiness of a confession and "protect[s] against convictions for crimes that have not in fact occurred." *Id.*

C. Application to Davenport's Case

1. First Element of Robbery with a Dangerous Weapon

Based on *Palmer*, the State argues that in this case, there was substantial evidence to support the robbery charge because there was evidence Griffin's wallet was full of money and neither the money nor Griffin's cell phone were found during the police officers' search of Griffin's home. This case is similar to *Palmer* because while Griffin's wallet and cell phone were never found at the scene of Griffin's murder, the evidence shows that Griffin's wallet contained a large sum of money the day before the murder and that he did not plan to load that money onto his card until the following day. *See Palmer*, 334 N.C.

at 112–13. There is also evidence that Griffin had possession of his cell phone until the morning of the robbery and murder. Thus, recovery of Griffin's cell phone, wallet, and the money in that wallet were not required to show the first element of robbery with a dangerous weapon, *see id.*, that an "unlawful taking or an attempt to take personal property" occurred "from the person or in the presence of another," *Hartman*, 344 N.C. at 473 (quoting *Olson*, 330 N.C. at 566). We hold that the State presented substantial evidence of the first element of robbery with a dangerous weapon and that when this evidence is viewed in the light most favorable to the State and taken "as a whole," *see Thomas*, 296 N.C. at 245, with the evidence discussed below, there is substantial evidence that Davenport was the perpetrator of that offense. *See Fritsch*, 351 N.C. at 378.

2. Second and Third Elements of Robbery with a Dangerous Weapon

There is also substantial evidence to support elements two and three of the crime of robbery with a dangerous weapon: that there was "use or threatened use of a firearm or other dangerous weapon" and that "the life of a person is endangered or threatened." *See Hartman*, 344 N.C. at 473 (quoting *Olson*, 330 N.C. at 566). This evidence is based on the manner in which Griffin was killed, the fact that a knife was found soaking in the sink, and the fact that there were reddish stains on the kitchen counter and faucet. Moreover, because there is evidence showing that Griffin was killed, this supports that his life was endangered or threatened. *See id.* When this evidence is taken together with Davenport's confession, in the light most favorable to the State, *Fritsch*, 351 N.C. at 378, and "as a whole," *Thomas*, 296 N.C. at 245, there is substantial evidence to support elements two and three of robbery with a dangerous weapon. Accordingly, we hold the State met its burden to present substantial evidence of each element of the charged crime.

Additionally, pursuant to *Parker*, the State contends that Davenport's confession to Harrison is supported by substantial independent evidence tending to establish its trustworthiness, including facts that tend to show Davenport had the opportunity to commit the crime. *See Parker*, 315 N.C. at 236. Indeed, the State emphasizes that even in cases where proof of loss is lacking, if there is a "strong corroboration of essential facts and circumstances" embraced in the defendant's confession, this Court will deem that confession to be trustworthy. *See id.* (emphases omitted).

Here, evidence that Davenport had the opportunity to commit the robbery is supported by witness testimony and the cell phone records

of three different people: Griffin, Davenport, and Edwards. In *Cox*, the crime at issue was possession of a firearm by a felon under N.C.G.S. § 14-415.1. 367 N.C. at 150. Applying the standard in *Parker*, this Court reviewed the evidence to determine whether there were facts "link[ing] defendant temporally and spatially to the firearm." *Id.* at 153.

Here, there is testimony from Edwards and Somers which temporally and spatially link Davenport to the crime scene. Specifically, Somers testified that after 9:00 p.m. the night before the robbery and murder, Griffin called her and said, "Dianne to the house." Because Somers also testified that "Dianne" was code for Davenport, this testimony links Davenport to the scene of the robbery and murder, Griffin's home.

Additionally, Edwards testified that he picked up one of Griffin's friends—a Black man matching Davenport's description with facial tattoos in a white jogging suit with red trim and a hood—from Griffin's home after 10:00 p.m. that same night. This evidence together with the calls Edwards received from Davenport's phone number at 12:43 a.m. and 12:50 a.m., requesting to be taken back to Griffin's home that night, also links Davenport to the scene of the crime. Indeed, perhaps the strongest evidence linking Davenport both spatially and temporally to the crime is Edwards's testimony that the man he picked up and took to Griffin's home sometime after 1:00 a.m. was wearing a "white jogging suit with red trimming" and told Edwards that he had recently been released from prison after serving a thirteen-year sentence. In addition, Edwards testified that after he dropped the man off at Griffin's home, Griffin let the man in. This evidence links Davenport to the robbery and murder and shows that he had the opportunity to commit the charged crime. *See Cox*, 367 N.C. at 153.

Lastly, Davenport's confession to Harrison provided that Davenport was in a sexual relationship with Griffin so that he could steal from him. Specifically, Davenport confessed to Harrison that he stole $10,000 from Griffin. Somers's testimony that on 18 January 2016 Griffin's wallet was so full of money that it would not close, corroborates Davenport's confession to Harrison that he killed Griffin to steal $10,000 from him. Accordingly, Davenport's confession strongly corroborates an essential fact and circumstance of the charged crime. *See Cox*, 367 N.C. at 153; *Parker*, 315 N.C. at 236. Based on this evidence, the State presented substantial evidence showing that Davenport was the perpetrator of the crime charged. *See Fritsch*, 351 N.C. at 378.

Under our precedent "evidence favorable to the State [must] be considered as a whole in order to determine its sufficiency." *Thomas*,

296 N.C. at 244–45. "This is especially necessary in a case, such as ours, when the proof offered is circumstantial, for rarely will one bit of such evidence be sufficient, in itself, to point to a defendant's guilt." *Id.* at 245. In applying this analysis, we reverse the Court of Appeals' holding and hold that when the evidence in this case is "considered as a whole," *id.* at 245, and taken "in the light most favorable to the State" a "reasonable inference[ ]" can be drawn that Davenport committed the crime he was charged with, *see Fritsch*, 351 N.C. at 378–79; *see also id.* at 379 (stating that in cases involving circumstantial evidence "the court must consider whether a reasonable inference of defendant's guilt may be drawn from the circumstances" (quoting *Barnes*, 334 N.C. at 75)). Stated another way, the trial court properly denied Davenport's motion to dismiss the charge of robbery with a dangerous weapon because the State provided substantial evidence of all three elements of the crime charged and that Davenport was the perpetrator of such offense. *See id.* at 378.

IV. Plain Error Review

[2] This Court "has elected to review unpreserved issues for plain error when they involve . . . rulings on the admissibility of evidence." *State v. Gregory*, 342 N.C. 580, 584 (1996). To establish plain error,

> a defendant must demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty. Moreover, because plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously affects the fairness, integrity or public reputation of judicial proceedings.

State v. Lawrence, 365 N.C. 506, 518 (2012) (cleaned up). Ultimately, the question a reviewing court must answer is whether without the improperly admitted evidence, the jury probably would have reached a different result. *State v. Reber*, No. 138A23, slip op. at 11 (N.C. May 23, 2024).

The issues subject to plain error review in this case relate to the admission of evidence regarding Davenport's prior incarceration, his gang affiliation, and his tattoos. While Davenport filed a motion in limine objecting to the admission of evidence regarding his prior incarceration, he failed to object each time this evidence was offered. Additionally, Davenport did not object when evidence of his gang affiliation and tattoos was presented. Davenport's failure to continuously object to the admission of these three types of evidence means none of

these issues were properly preserved for appeal. *See State v. Brown*, 327 N.C. 1, 17 (1990).

We hold that the evidence at issue in this case does not meet the prejudice prong of the plain error standard and decline to reach whether evidence of Davenport's prior incarceration, gang affiliation, or tattoos was improperly admitted pursuant to Rule 404(b). Under the second prong of our plain error standard, Davenport must show he suffered prejudice. *See Reber*, slip op. at 11. This is done by showing that without the admission of the evidence in question, the jury probably would have reached a different result. *Id*. The properly admitted evidence in this case tended to show that Davenport and Griffin exchanged several calls leading up to Griffin's robbery and murder, and that someone matching Davenport's description was picked up from Griffin's home the night before Griffin's murder and driven back to Griffin's home after 1:00 a.m. the morning of Griffin's murder. Somers also testified that Griffin called her the night before his murder and said, "Dianne to the house." Thus, this evidence placed Davenport at the scene of the crime the night before and the morning of Griffin's murder. In addition, Harrison testified that Davenport confessed to him that he had killed Griffin "to steal . . . $10,000" from him, and that he both "wished he hadn't killed Mike" and was also "glad" that he did. Accordingly, we cannot say that if the evidence of Davenport's prior incarceration, tattoos, and gang affiliation had been excluded the jury probably would have reached a different result. We reverse the Court of Appeals' holding and hold that the evidence of Davenport's prior incarceration, gang affiliation, and tattoos does not rise to the level of plain error because admission of this evidence was not prejudicial.

V. Hearsay

[3] At issue is Griffin's statement "Dianne to the house." " 'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C.G.S. § 8C-1, Rule 801(c) (2023). Under Rule 802, hearsay is not admissible unless an exception applies. N.C.G.S. § 8C-1, Rule 802 (2023). In Davenport's case, Somers testified that Griffin called her on the evening of 18 January 2016, after 9:00 p.m. and said, "Dianne to the house." While Davenport objected to this statement, the trial court overruled that objection. Somers also testified that Dianne was a code name for Davenport.

Because the statement "Dianne to the house" was offered to prove that Davenport went to Griffin's home the night of Griffin's murder, this

statement is hearsay. *See* N.C.G.S. § 8C-1, Rule 801. However, the Court of Appeals erred in finding that the statement was not admissible under our hearsay rules. Namely because in this case, the excited utterance exception to the hearsay rule applies.

Under Rule 803, an excited utterance is "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." N.C.G.S. § 8C-1, Rule 803(2) (2023). "To qualify as an excited utterance, the statement must relate (1) a sufficiently startling experience suspending reflective thought and (2) a spontaneous reaction, not one resulting from reflection or fabrication." *State v. Nicholson*, 355 N.C. 1, 35 (2002) (cleaned up). We have previously held that testimony about a phone conversation that takes place immediately after a startling event is admissible. *State v. Murillo*, 349 N.C. 573, 587 (1998). Here, Somers described the statement as "hurried" and stated that after Griffin said, "Dianne to the house," she said, "Okay. Bye." Based on the brevity of this statement, it is clear that Griffin called Somers with one urgent purpose: to relay an important piece of information, that Davenport was coming to Griffin's house.

There is evidence that a month before this phone call, Griffin and Davenport experienced conflict in their relationship, which led to a physical altercation involving a knife and subsequent threats by Davenport that if he would have had his gun, he would have killed Griffin at the time of that altercation. The hurried and brief nature of Griffin's phone call to Somers supports that Griffin was startled at learning that Davenport was coming to his home, and this led him to hurriedly call Somers.

Because there is evidence that Griffin and Davenport had experienced some recent conflict in their relationship and the statement Griffin made followed a startling experience and was brief and quick, this statement qualifies as an excited utterance. *See Nicholson*, 355 N.C. at 35. Accordingly, the Court of Appeals erred by concluding "Dianne to the house" was inadmissible hearsay.

VI. Conclusion

We reverse the decision of the Court of Appeals on the three issues before us and hold that: (1) the State presented substantial evidence of each essential element of the charged offense, robbery with a dangerous weapon, and of Davenport's identity as the perpetrator of that offense; (2) admission of evidence of Davenport's prior incarceration, his gang affiliation, and his tattoos does not rise to the level of plain error because admission of this evidence did not prejudice Davenport;

and (3) the statement "Dianne to the house" is admissible under the excited utterance exception to our hearsay rule.

REVERSED.

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

STATE OF NORTH CAROLINA
v.
PHILLIP BRANDON DAW

No. 174PA21

Filed 23 August 2024

1. Appeal and Error—mootness—denial of habeas petition—review of lower appellate court decision—clarification required

The Supreme Court exercised its jurisdiction pursuant to the North Carolina Constitution to review the decision of the Court of Appeals regarding the denial of a habeas corpus petition because, although the case was moot, review was necessary to clarify the scope of the writ of habeas corpus and the public interest exception and to resolve conflicting statements of law between the lower appellate court's opinion and established law.

2. Habeas Corpus—summary denial—final judgment of court of competent jurisdiction—discharge provisions inapplicable

The trial court's summary denial of petitioner's application for a writ of habeas corpus was proper under the plain and definite language of N.C.G.S. § 17-4 because petitioner was detained by virtue of a final judgment of a court of competent criminal jurisdiction. Despite the unambiguous mandate of section 17-4, the Court of Appeals improperly extended its analysis to consider petitioner's argument that the COVID-19 pandemic created conditions making him eligible for discharge under section 17-33(2), and erroneously concluded that section 17-33(2) provided an exception to the general rule contained in section 17-4(2) for parties detained by virtue of criminal process. However, the discharge provisions in section 17-33 apply only to persons detained by virtue of civil process—which does not include criminal convictions—and do not provide an exception to section 17-4 because they only become relevant after

an application to prosecute the writ has been granted and returned and a hearing has been held.

Justice EARLS dissenting.

Justice RIGGS dissenting.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 277 N.C. App. 240 (2021), affirming an order entered 15 June 2020 by Judge Craig Croom in Superior Court, Wake County, summarily denying defendant's application for writ of habeas corpus. Heard in the Supreme Court on 13 February 2024.

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

W. Rob Heroy for defendant-appellee.

Daniel K. Siegel and Ivy Johnson for American Civil Liberties Union of North Carolina Legal Foundation, North Carolina Advocates for Justice, Disability Rights North Carolina, and the Cato Institute, amici curiae.

BERGER, Justice.

Petitioner Phillip Brandon Daw was sentenced to multiple consecutive terms of imprisonment in the fall of 2019. On 15 June 2020, Daw filed a petition for writ of habeas corpus alleging that he was "unlawfully and illegally detained" because the North Carolina Department of Public Safety was "incapable of ensuring that [he would] not be exposed to COVID-19." According to petitioner, his continued confinement violated the Eighth Amendment to the United States Constitution and Article I, Section 27 of the North Carolina Constitution. The trial court denied petitioner's request, and the Court of Appeals affirmed, but we allowed discretionary review to determine whether the decision below altered the plain language of our habeas corpus statutes. We modify and affirm the decision of the Court of Appeals for the reasons set forth herein.

I. Factual and Procedural Background

Petitioner pleaded guilty and was found guilty of multiple counts of obtaining property by false pretenses in September and November 2019.

He was ultimately sentenced to a total prison term of between forty-one and 107 months for these convictions.

On 15 June 2020, petitioner filed an application for writ of habeas corpus in the Superior Court, Wake County, arguing that he was "unlawfully and illegally detained" and that his continued incarceration violated the Eighth Amendment to the United States Constitution and Article I, Section 27 of the North Carolina Constitution. According to petitioner, the potential viral spread of COVID-19 within the correctional institution, combined with petitioner's medical history and condition, rendered his continued confinement cruel and/or unusual. Petitioner's application did not contest the competency of the trial court's criminal jurisdiction. Instead, petitioner relied on a Court of Appeals opinion, *State v. Leach*, 227 N.C. App. 399 (2013), to argue that competent jurisdiction did not compel summary denial of his application for habeas relief.

The trial court denied the application that same day, noting that N.C.G.S. § 17-4(2) requires that "[a] petition for a writ of habeas corpus shall be denied where a person is held pursuant to a valid final judgment in a criminal case entered by a court with proper jurisdiction," and that petitioner's "judgments are valid final judgments entered by a court with proper jurisdiction." Petitioner sought certiorari from the Court of Appeals, and his petition for writ of certiorari was allowed on 9 July 2020.

The Court of Appeals heard oral argument in this matter on 9 February 2021, but petitioner was released from prison six days later under the Department of Public Safety's Extended Limits of Confinement Program. *State v. Daw*, 277 N.C. App. 240, 243 (2021). The Court of Appeals acknowledged that because petitioner had "received the relief requested in his petition . . . this case is moot," *id.* at 244, but nevertheless held that "the public interest exception to the mootness doctrine applie[d]" and proceeded to the merits of the case, *id.* at 245. The Court of Appeals repudiated the trial court's basis for its decision, holding that the discharge provision in N.C.G.S. § 17-33(2) provided an exception to the plain language of N.C.G.S. § 17-4(2). *Id.* at 260. Nevertheless, the Court of Appeals affirmed the trial court's summary denial on the basis that petitioner's application "did not demonstrate . . . colorable claims for violations of his rights." *Id.* at 269.

This Court allowed the State's petition for discretionary review on 3 March 2023 to determine whether the Court of Appeals erred in holding that subsection 17-33(2) provides an exception to subsection 17-4(2). As this question involves issues of statutory interpretation, we review the decision of the Court of Appeals de novo. *Morris v. Rodeberg*, 385 N.C. 405, 409 (2023).

II. Analysis

A. Mootness

[1] Our State Constitution provides that "[t]he Supreme Court shall have jurisdiction to review upon appeal any decision of the courts below, upon any matter of law or legal inference." N.C. Const. art. IV, § 12. In addition, the General Assembly has provided that this 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." N.C.G.S. § 7A-26 (2023). "While the federal constitution limits the federal 'Judicial Power' to certain 'Cases' and 'Controversies.' U.S. Const. Art. III, § 2, our Constitution, 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 (2021).

"A case is moot when a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy." *Chavez v. McFadden*, 374 N.C. 458, 467 (2020) (cleaned up). While this Court generally "do[es] not decide moot cases," *id.*, resolution of an underlying issue does not deprive this Court of jurisdiction where there remains an unresolved matter of law.

For example, the public interest exception applies where "[e]ven if moot," the case implicates "a question that involves a matter of public interest, is of general importance, and deserves prompt resolution." *N.C. State Bar v. Randolph*, 325 N.C. 699, 701 (1989) (per curiam); *see also Harper v. Hall*, 383 N.C. 89, 113–14 (2022) (denying a party's request "to dismiss their own appeal in order to avoid a ruling by this Court" because "th[e] issue is of great significance to the jurisprudence of our state and is squarely and properly before this Court"), *reh'g allowed*, 384 N.C. 1, *and opinion withdrawn and superseded on other grounds on reh'g*, 384 N.C. 292 (2023).

Here, both parties agree that this case is moot. But petitioner now asks this Court to refrain from invoking the same public interest exception relied upon by the Court of Appeals in reaching this issue. Petitioner contends that "[b]ecause the [p]andemic is over, there is no need for this Court to exercise its discretion to unsettle the Court of Appeals['] decision."

But the mootness doctrine is not a shield which prevents this Court from engaging in meaningful review of decisions from the Court of Appeals that, if left undisturbed, would be contrary to established law.

First, although the Court of Appeals' decision to proceed to the merits may have been influenced by COVID-19, its expansive interpretation of this State's habeas corpus statutes was not limited to the COVID-19 context. Second, because the Court of Appeals chose to issue a published opinion in this matter, its interpretation of these statutes is not limited to this singular case; rather, the decision below has precedential effect and is binding on other Court of Appeals' panels and all trial courts in this State. Finally, because the decision below relied on prior decisions of the Court of Appeals interpreting the habeas corpus statutes, dismissing this case and vacating the decision below would not resolve the tension that exists between the plain language of these statutes and the Court of Appeals' interpretation of the same.[1]

For more than five centuries, the writ of habeas corpus has served an essential function of providing relief for those unlawfully restrained of their liberty. *See generally* Dallin H. Oaks, *Legal History in the High Court—Habeas Corpus*, 64 Mich. L. Rev. 451, 459–61 (1966). The writ predates the founding of this State and has been enshrined in our Constitution from the outset. Its function and the procedures under which it may issue are therefore matters of public interest, of general importance, and of great significance to the jurisprudence of this state. Questions regarding these topics, especially those involving direct conflict between decisions of the Court of Appeals and established law, must be resolved, and we therefore proceed to the merits.

B. Habeas Corpus

1. The Writ's Origin and Development

[2] Our founding fathers understood that "the practice of arbitrary imprisonments, have been, in all ages, the favorite and most formidable instruments of tyranny," and that the writ of habeas corpus was "a remedy for this fatal evil." *The Federalist* No. 84 (Alexander Hamilton). Thus, the writ was enshrined as a fundamental protection of individual liberty against government abuse by the ratification of the United States Constitution. *See* U.S. Const. art. I, § 9, cl. 2 ("The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.").

The Supreme Court of the United States initially recognized the writ's historically limited function such that "[a] perceived error in the judgment

1. While our dissenting colleagues take a different view of the public interest exception in this case, we note an evolving attitude towards mooted decisions of the Court of Appeals. *See Brewer v. Rent-A-Center*, 385 N.C. 853, 853 (2024).

or proceedings, under and by virtue of which the party is imprisoned, constituted no ground for relief," and that "a habeas court could examine only the power and authority of the court to act," i.e., the court's jurisdiction, "not the correctness of its conclusions." *Brown v. Davenport*, 142 S. Ct. 1510, 1521 (2022) (cleaned up). But over time, "federal habeas practice began to take on a very different shape," *id.* at 1521, and "[t]he traditional distinction between jurisdictional defects and mere errors in adjudication no longer restrained federal habeas courts," resulting in "an exploding caseload of habeas petitions from state prisoners," *id.* at 1522, that left the Supreme Court struggling to "devis[e] new rules aimed at separating the meritorious needles from the growing haystack," *id.* at 1523.

But the writ in the federal system, shaped by federal statutes and decisions of the Supreme Court of the United States, is largely irrelevant to our consideration of the writ's function within North Carolina. *See Holmes v. Moore*, 384 N.C. 426, 437 (2023) ("[I]t is the duty of the Supreme Court of North Carolina alone to declare what the law is under our Constitution." (citing *Bayard v. Singleton*, 1 N.C. 5 (1787))). Unlike in the federal system, on the state level "the privilege of the writ of habeas corpus was transmitted into American law principally through tradition and the common law" as "[o]nly three of the twelve original states that had written constitutions in the first decade of our national existence included any mention of the writ." Dallin H. Oaks, *Habeas Corpus in the States: 1776–1865*, 32 U. Chi. L. Rev. 243, 247 (1965). One of those three states was North Carolina, with our 1776 Constitution providing that "every freeman, restrained of his liberty, is entitled to a remedy, to inquire into the lawfulness thereof, and to remove the same, if unlawful; and that such remedy ought not to be denied or delayed." N.C. Const. of 1776, Declaration of Rights § XIII.

North Carolina's constitutional provision was initially enforced through our courts' common law authority, with the first legislative action on the subject arriving in 1836. *See* An Act For the Better Security of Personal Liberty, ch. 55, 1 N.C. Rev. Stat. 314 (1836–37). Like "[v]irtually all American habeas corpus legislation," this Act "had its genesis in the English Habeas Corpus Act of 1679," which made the writ accessible "to persons who were committed or detained for criminal or supposed criminal matters." Oaks, *Habeas Corpus*, 32 U. Chi. L. Rev. at 251–52. North Carolina's 1836 Act generally codified the English Habeas Corpus Act of 1679, prohibiting issuance of the writ to "persons convicted, or in execution by legal process." 1 N.C. Rev. Stat. at 315, § 1.

The 1836 Act also extended the availability of the writ beyond the scope of criminal matters. Specifically, the Act provided:

> When any person shall be imprisoned or otherwise restrained of his liberty, for any other cause than the commission of a criminal offence, unless he shall have been committed in execution upon some legal civil process, or upon some mesne process in a civil action, on which he was liable to be arrested and imprisoned, and on which excessive and unreasonable bail shall not have been required, such person shall be entitled, on application by himself or any person in his behalf, and upon its appearing by affidavit that there is a reasonable ground for the complaint, to the same remedy by writ of habeas corpus . . . .

1 N.C. Rev. Stat. at 317, § 10.

Thus, the 1836 Act followed in the historical footsteps of both the common law and the English Habeas Corpus Act of 1679 by ensuring that "a prisoner [who] was held by a valid warrant or pursuant to the execution or judgment of a proper court . . . could not obtain release by habeas corpus." Oaks, *Habeas Corpus*, 32 U. Chi. L. Rev. at 245. The legislature emphasized this principle again in 1854, mandating that upon habeas review a prisoner who "is condemned by judgment given against him, and held in custody by virtue of an execution issued against him, . . . shall not be let to bail, but shall be presently remanded, where he shall remain until discharged in due course of law." N.C. Rev. Code, ch. 31, § 111 (1854).[2]

2. The Writ Today

In 1868, the people of North Carolina ratified a new Constitution which retained the prior guarantee of the writ and expressly provided that "[t]he privilege of the writ of habeas corpus shall not be suspended." N.C. Const. of 1868, Declaration of Rights § 21; *see also id.* § 18. The legislature also enacted a more comprehensive statutory scheme governing the writ's procedures that remains in force today as Chapter 17 of the General Statutes, with only minor changes made in the intervening years.

Chapter 17 provides that the writ may be prosecuted, or applied for, by "[e]very person imprisoned or restrained of his liberty within this State, for any criminal or supposed criminal matter, or on any pretense whatsoever, *except* in cases specified in G.S. 17-4." N.C.G.S. § 17-3 (2023) (emphasis added). This provision thus sets forth a general

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2. In the habeas context, "remand" is the return of a petitioner to confinement and "discharge" is release from such confinement. *See* N.C.G.S. §§ 17-33 to -34 (2023).

rule and an exception; application of the writ is available to any person restrained of their liberty regardless of whether such restraint resulted from a criminal or civil matter, unless the restraint stems from those instances specified in section 17-4. *See id.*; *see also* 1 N.C. Rev. Stat. at 315, § 1 (permitting application for the writ by any person "committed or . . . detained for any crime . . . other than persons convicted, or in execution by legal process"); 1 N.C. Rev. Stat. at 317, § 10 (providing that the writ is available in noncriminal matters, unless the person was "committed in execution upon some legal civil process").

To determine whether the initial hurdle of allowing an application for the writ of habeas corpus has been met, judges must first look to section 17-4, which provides that:

> Application to prosecute the writ shall be denied in the following cases:
>
> (1) Where the persons are committed or detained by virtue of process issued by a court of the United States, or a judge thereof, in cases where such courts or judges have exclusive jurisdiction under the laws of the United States, or have acquired exclusive jurisdiction by the commencement of suits in such courts.
>
> (2) Where persons are committed or detained by virtue of the final order, judgment or decree of a competent tribunal of civil or criminal jurisdiction, or by virtue of an execution issued upon such final order, judgment or decree.
>
> (3) Where any person has willfully neglected, for the space of two whole sessions after his imprisonment, to apply for the writ to the superior court of the county in which he may be imprisoned, such person shall not have a habeas corpus in vacation time for his enlargement.
>
> (4) Where no probable ground for relief is shown in the application.

N.C.G.S. § 17-4 (2023).

This provision mandates summary denial of an application to prosecute the writ when the applicant is, among other things, imprisoned due to a final judgment or order of a court possessing jurisdiction over the

matter, regardless of whether the matter is criminal or civil in nature. *Id.*; *see also* 1 N.C. Rev. Stat. at 315, 317, §§ 1, 10. When read in conjunction with section 17-3, the law is clear. Every person imprisoned in this State, regardless of whether such imprisonment stems from a criminal or civil matter, may apply for the writ of habeas corpus.

But section 17-4 serves a gatekeeping function and limits further consideration of the writ's issuance. N.C.G.S. § 17-4; *see also* N.C.G.S. § 17-9 (2023) (stating that the writ shall be granted without delay unless the application or documents attached thereto show the individual is "prohibited from prosecuting the writ"). Thus, the writ of habeas corpus is expressly not available in this State to persons "detained by virtue of the final order, judgment or decree of a competent tribunal of civil or criminal jurisdiction." *Ledford v. Emerson*, 143 N.C. 527, 536 (1906); *see also* N.C.G.S. § 17-4(2).

3. The Court of Appeals' Decision

Petitioner here never asserted that his detention was unlawful for a jurisdictional defect, and because he was detained by virtue of the final judgments of a competent court of criminal jurisdiction, the trial court correctly relied on section 17-4 when it summarily denied petitioner's application for the writ of habeas corpus. The Court of Appeals, however, went further; even though inquiry into the availability of habeas relief should have ended with the plain language of section 17-4, it entertained petitioner's argument that the conditions associated with his confinement entitled him to habeas relief. This was error.

When interpreting a statute, "it must be presumed that the means employed by the Legislature to express its will are adequate to the purpose and do express that will correctly." *State v. Barco*, 150 N.C. 792, 796 (1909) (cleaned up). It should go without saying that we may not "interpret what has no need of interpretation and, when the words have a definite and precise meaning, [we cannot] go elsewhere in search of conjecture in order to restrict or extend the meaning." *Id.* (cleaned up).

The Court of Appeals violated these basic tenets of statutory construction by ignoring the plain and definite language of section 17-4. *See also* N.C.G.S. § 17-9. North Carolina's habeas statutes require denial of a habeas application where the applicant is detained by virtue of a final judgment entered by a court of competent jurisdiction, as petitioner was here.[3] By "interpret[ing] what has no need of interpretation" and

3. Our dissenting colleague criticizes us for transforming section 17-4 from a "gatekeeper" into a "gate closer." One wonders at the notion of a gatekeeper that allows entry

"go[ing] elsewhere in search of conjecture in order to restrict" or eliminate the applicability of section 17-4, *Barco*, 150 N.C. at 796 (cleaned up), the Court of Appeals judicially rewrote Chapter 17.

Both petitioner and our dissenting colleague rely on section 17-33 to support their contention that section 17-4 does not mean what it plainly says but instead silently establishes a "general rule" subject to exceptions. The relevant portion of section 17-33 provides that "if it appears on the return to the writ that the party is in custody by virtue of *civil process* from any court legally constituted, . . . such party can be discharged only" in one of six circumstances.[4] N.C.G.S. § 17-33 (2023) (emphasis added). One of these circumstances is "[w]here, though the original imprisonment was lawful, yet by some act, omission or event, which has taken place afterwards, the party has become entitled to be discharged." *Id.* § 17-33(2).

Here, because petitioner was "detained by virtue of the final order, judgment or decree of a competent tribunal of civil or criminal jurisdiction," *id.* § 17-4(2), and therefore was not "in custody by virtue of civil process," *id.* § 17-33, section 17-33 is inapplicable in this matter.[5]

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to all. The role of a gatekeeper, even in the legal context, is to allow passage only for those permitted to enter and to keep out all others—precisely how section 17-4 operates.

4. Petitioner's argument for habeas relief is rooted in subsection 17-33(2). But he has not argued that there is no legal cause for his detention under the first sentence of that subsection. By its plain terms, the remainder of that subsection applies to those in custody by virtue of civil process. Even though our dissenting colleague insists that her dissent is in defense of textualism, she acknowledges that the phrase "civil process" does not apply to criminal defendants and is therefore forced to judicially craft a new argument for petitioner under the first sentence of section 17-33. Her discussion is misleading and particularly irresponsible given the clear and unambiguous language at issue. Rather than focus on the text, a fundamental tenet of textualism, she apparently wants to create a new avenue to post-conviction relief for those barred by the legislature from applying for a writ of habeas corpus. Ignoring the fact that making law is not a proper function of the judiciary, our dissenting colleague's atextual approach is especially egregious as post-conviction review is already independently available through a motion for appropriate relief or federal habeas review.

We also note that our colleague's "exaggerated, hyperbolic dissent," *Walker v. Wake Cty. Sheriff's Dept.*, 385 N.C. 300, 301 (2023) (Dietz, J., concurring), provides ample opportunities to respond in kind, but we decline the invitation to engage in further reductive discourse. It is sufficient to reiterate that because section 17-33 becomes operative only after a writ of habeas corpus has been issued and returned, it is irrelevant to section 17-4's provisions governing *application* for issuance of the writ.

5. The Court of Appeals' interpretation of the phrase "civil process" is simply untenable. Changing the meaning of the phrase "civil process" to include criminal convictions requires us to insert words into a statute, *see In re B.O.A.*, 372 N.C. 372, 380 (2019), otherwise "extend the meaning" of words actually used, *Barco*, 150 N.C. at 796, and presume

However, contrary to these provisions' plain language, the Court of Appeals held, and our dissenting colleague insists, that "§ 17-33(2) provides an exception to the general rule provided by § 17-4(2)." *Daw*, 277 N.C. App. at 260. The Court of Appeals reached this conclusion because subsection 17-4(2)

> appears to require summary denial of a petition where a party is "committed or detained by virtue of the final order, judgment or decree of a competent tribunal of civil or criminal jurisdiction," when remand would be required, while § 17-33 requires discharge rather than remand if, "though the original imprisonment was lawful, yet by some act, omission or event, which has taken place afterwards, the party has become entitled to be discharged[.]" Reading § 17-4 without reference to § 17-33 could lead a court reviewing a habeas petition to *mistakenly conclude* that a party "committed or detained by virtue of the final order, judgment or decree of a competent tribunal of civil or criminal jurisdiction" was "prohibited from prosecuting the writ," resulting in summary denial of the petition without resolving whether because of "some act, omission or event, . . . the party has become entitled to be discharged[.]"

Id. at 259 (cleaned up) (emphasis added).

This reasoning disregards the statutes' plain language and fundamentally misunderstands their operation. When interpreting statutes, "[c]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Conn. Nat. Bank v. Germain*, 503 U.S. 249, 253–54 (1992). In writing for the Supreme Court of the United States, Justice Thomas stated that "[w]hen the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete." *Id.* at 254 (cleaned up). Courts "need not choose between giving effect on the one hand to [one provision] and [effect] on

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that the legislature was incapable of stating the phrase "civil or criminal" when it intended to communicate that meaning. The plain language of Chapter 17 demonstrates precisely the opposite. *See* N.C.G.S. § 17-4(2) (providing that habeas application must be denied when the applicant is "detained by virtue of the final order, judgment or decree of a competent tribunal of *civil* or *criminal* jurisdiction." (emphasis added)); *id.* § 17-34(2) (2023) (same).

the other to [another provision]" unless there is a "positive repugnancy" between the provisions such that they "pose an either-or proposition." *Id.* at 253. Put another way, when confronted with an apparent conflict between two laws "[t]he preferred approach to statutory construction dictates that a reviewing court first determine if the perceived conflict between two laws is real." *Sunshine Dev. v. F.D.I.C.*, 33 F.3d 106, 113 (1st Cir. 1994).

Here, rather than determine if there was a "positive repugnancy" between the statutes such that they "pose[d] an either-or proposition," *Germain*, 503 U.S. at 253, or otherwise analyzing whether "the perceived conflict [wa]s more apparent than real," *Sunshine Dev.*, 33 F.3d at 113, the Court of Appeals stated that section 17-4 "*appears* to conflict" with section 17-33. *Daw*, 277 N.C. App. at 259 (emphasis added). The Court of Appeals made no effort to reconcile this alleged conflict. Instead, based in part on its erroneous determination that section 17-33 applies to parties detained by virtue of criminal process, the Court of Appeals reasoned that it needed to "harmonize the *apparent* conflict between § 17-33(2) and § 17-4(2)" by holding that "§ 17-33(2) provides an exception to the general rule provided by § 17-4(2)." *Id.* at 260 (emphasis added).

Even if section 17-33 applied to persons in custody by virtue of criminal process, which it does not, it would not conflict with section 17-4 because the plain language of these provisions indicates they apply to different classes of applicants and different procedural stages. Subsection 17-4(2) requires summary denial of an *application* where the party is "committed or detained by virtue of the *final order, judgment or decree* of a competent tribunal of civil or criminal jurisdiction, or by virtue of an execution issued upon such final order, judgment or decree." N.C.G.S. § 17-4(2) (emphasis added). In contrast, section 17-33 provides a limited set of circumstances under which a party who, after the application is reviewed and the writ is allowed, *see id.* § 17-9, is "in custody by virtue of civil *process* from any court legally constituted, or issued by any officer in the course of judicial proceedings" and may be discharged. *Id.* § 17-33 (emphasis added).

When interpreting a statute, a court must "give every word of the statute effect, presuming that the legislature carefully chose each word used." *N.C. Dep't of Corr. v. N.C. Med. Bd.*, 363 N.C. 189, 201 (2009). Thus, when the legislature provides that one statute applies to those "detained by virtue of the final order, judgment or decree," N.C.G.S. § 17-4(2), and another statute applies to those "in custody by virtue of

civil process," *id.* § 17-33, we must presume that the legislature carefully chose to differentiate the applicability of these statutes.[6]

This choice comports with the legal reality that a person detained by virtue of civil process is not a person detained by virtue of a final order, judgment or decree. A person may be "detained by virtue of civil process," *id.*, under a variety of circumstances, including during the pendency of certain civil actions. *See id.* § 1-410 (2023) (listing civil cases in which "[t]he defendant may be arrested"). In addition, "[a]n involuntary commitment proceeding . . . is a proceeding of a civil nature," *In re Underwood*, 38 N.C. App. 344, 347 (1978), and this Court has recognized that "recovery from a mental disease after commitment to an institution would seem to be an 'event which has taken place afterwards,' within the meaning of [section] 17-33(2)[.]" *In re Harris*, 241 N.C. 179, 180–81 (1954); *see also* N.C.G.S. § 122C-261 (2023) (providing procedures for "involuntary commitment of the mentally ill").

Because section 17-33's discharge provisions apply only to persons detained by virtue of civil process—not persons detained by virtue of a final order, judgment or decree—and because applications to prosecute the writ of habeas corpus submitted by such persons are not subject to summary denial under subsection 17-4(2), there is no conflict between these provisions. The Court of Appeals therefore erred in holding that "§ 17-33(2) provides an exception to the general rule provided by § 17-4(2)," *Daw*, 277 N.C. App. at 260, because the "general rule" provided by subsection 17-4(2) does not apply to parties covered by section 17-33. No exception is required.

In addition, the operation of Chapter 17 makes it a practical impossibility for section 17-33 to provide an exception to section 17-4. Because section 17-33 is not relevant until after an application to prosecute the writ has been granted, a return has been made, and a hearing has been held, it cannot practically conflict with section 17-4, a statute which specifically operates to prevent certain applicants from prosecuting the writ. *See* N.C.G.S. § 17-3 (barring persons "imprisoned . . . in cases specified in [N.C.]G.S. § 17-4" from prosecuting the writ of habeas corpus); *id.* § 17-9 (requiring the writ to be granted without delay unless the applicant is "by this Chapter, prohibited from prosecuting the writ."). It would

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6. Both petitioner and our dissenting colleague note that the drafters of Chapter 17 were mindful that the statutory scheme may not have been perfect. We doubt that such self-awareness is unique to these drafters, and we decline the dissent's seeming invitation to use drafters' acknowledgment of their own imperfection as a license to ignore or otherwise depart from the plain language in the text of a valid legislative enactment.

be strange indeed for the legislature to place an "exception" twenty-nine sections away from the "general rule," and the plain language of Chapter 17 confirms the legislature did no such thing.

The writ of habeas corpus is a mechanism designed to protect liberty and is a fundamental safeguard against arbitrary detention and abuse of power by the government. But the availability of this remedy is textually limited. Judges and courts are therefore constrained by the explicit language of Chapter 17 in reviewing habeas applications. Failure to abide by these clear requirements subjects judges and courts to charges of unlawfulness and arbitrariness given the unambiguous statutory scheme. Because the Court of Appeals' decision amounted to an exercise of legislative power under the guise of statutory interpretation, we expressly disavow its analysis, especially that portion of the opinion concerning the applicability of section 17-33 and the interpretation of the phrase "civil process."

III. Conclusion

When an applicant for a writ of habeas corpus is "detained by virtue of the final order, judgment or decree of a competent tribunal of civil or criminal jurisdiction," the habeas court *must* summarily deny the application. N.C.G.S. § 17-4(2). Courts may not thereafter consider a petitioner's application in light of the subsequent provisions of Chapter 17 because the remainder of that chapter applies only when the application is allowed.[7]

Here, the trial court summarily denied petitioner's application under subsection 17-4(2) because it determined that petitioner was in custody by virtue of "valid final judgments entered by a court with proper jurisdiction." Such summary denial was proper, and the Court of Appeals erred when it failed to end its inquiry with the plain language set forth in section 17-4. We, therefore, expressly disavow the language in the Court of Appeals opinion, and we modify and affirm.

MODIFIED AND AFFIRMED.

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7. There may be instances where an application does not trigger the mandatory dismissal provisions in section 17-4 but the judge nevertheless later discovers at the hearing the applicant is detained "[b]y virtue of the final judgment or decree of any competent court of civil or criminal jurisdiction[.]" N.C.G.S. § 17-34. In that case, "[i]t is the duty of the court or judge forthwith to remand the party" to the place of their confinement. *Id.*

Justice EARLS dissenting.

Today, the majority closes a door the legislature left open. It converts an isolated subpart of a single habeas statute into an ironclad rule. According to the majority, subsection 17-4(2) extinguishes habeas for anyone imprisoned under a final criminal judgment—no exceptions. *See* N.C.G.S. § 17-4(2) (2023).

But that cannot be right. Neighboring statutes *require* habeas relief when a defendant's "original imprisonment was lawful" but a later "act, omission or event" demands his discharge. N.C.G.S. § 17-33(2) (2023). There is no way to reconcile that language with the majority's newly minted rule. For under the interpretation adopted today, subsection 17-4(2) bars habeas precisely *because* a defendant's "original imprisonment was lawful."

So one of two things is true: Either the majority is wrong, or the legislature did not mean what it said. Between those options, the choice should be easy. Language and logic cut against the majority's wooden interpretation. Read properly, section 17-33 creates a narrow exception to subsection 17-4(2), allowing defendants like Mr. Daw to challenge the "legal cause" for their "continu[ed]" imprisonment, even if that detention flows from a valid criminal judgment. *See* N.C.G.S. § 17-33. Precedent points the same way. Our courts have recognized section 17-33 as a carve out to subsection 17-4(2)—both expressly and implicitly. History fits hand-in-glove with text and caselaw. The General Assembly enacted sections 17-4 and 17-33 as part of the same package, signaling their compatibility. By reading the former to swallow the latter, the majority creates disjuncture where the legislature intended congruence.

The Court of Appeals interpreted section 17-33 in line with statutory text, history, and precedent. The majority, however, discards that principled approach. It plucks subsection 17-4(2) from context, sculpting a categorical rule from cherry-picked language. And it twists the knife, scolding the Court of Appeals for "judicially rewr[iting] Chapter 17." That criticism is, in truth, a confession. For it is the majority that "radically alter[s] the plain language of our habeas corpus statutes." With lip service to legislative fidelity, the Court subverts the legislature's intent. Respectfully, I dissent.

I. Mr. Daw's claim is moot.

The majority's first misstep is deciding this case at all. It is moot—and has been even before the Court of Appeals decided it. North Carolina's "appellate courts do not decide moot cases." *Chavez v. McFadden*, 374

N.C. 458, 467 (2020). Correctly so. 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). A case becomes moot if, "during the course of litigation," the "questions originally in controversy between the parties are no longer at issue" or the "relief sought has been granted." *Pearson v. Martin*, 319 N.C. 449, 451 (1987) (cleaned up); *see also Benvenue Parent-Tchr. Ass'n v. Nash Cnty. Bd. of Educ.*, 275 N.C. 675, 679 (1969) (collecting cases). Both are true here. I thus agree with Justice Riggs' analysis and expand on her central point: In bypassing the usual mootness rules, the majority embarks on an "ill-advised," "ends-driven" crusade to rewrite our habeas statutes.

Mr. Daw filed his habeas petition in June 2020. In it, he sought release from prison based on the worsening COVID-19 pandemic and the state's then-existing policies for managing it. At the time, North Carolina was scrambling to handle the virus. In May 2020, Governor Cooper—like executive officers across the country—declared a state of emergency and ordered measures to limit the virus's spread. *See* Exec. Order No. 116 (Mar. 10, 2020). Other officials acted, too. In April of that year, the Secretary of the Department of Public Safety (DPS) invoked his statutory authority to "allow certain individuals to serve their sentence outside of a DPS prison facility, but under the supervision of community corrections officers and/or special operations officers." *See* Press Release, N.C. Dep't of Pub. Safety, Pandemic Prompts Department of Public Safety to Transition Some Offenders to Supervision in the Community (Apr. 13, 2020), https://www.ncdps.gov/news/press-releases/2020/04/13/pandemic-prompts-department-public-safety-transition-some-offenders.

When the Court of Appeals heard Mr. Daw's case, North Carolina remained under a declaration of emergency. *See* Exec. Order No. 215 (May 14, 2021). But things changed—and fast. Soon after oral argument, the executive branch agreed to the early reentry of thousands of state prisoners. *See* Joint Motion for Stay, *NAACP v. Cooper*, No. 20-CVS-500110 (N.C. Super. Ct. Feb. 25, 2021). Mr. Daw was one of them—he was released just six days after the Court of Appeals heard his case. Things changed inside prisons, too. The state modified and strengthened the very mitigation policies Mr. Daw challenged via habeas. With conditions improved, Governor Cooper lifted the declaration of emergency in August 2022. *See* Exec. Order No. 267 (Aug. 15, 2022).

Mr. Daw and the state agree that this case is moot. So did the Court of Appeals. It conceded that Mr. Daw "ha[d] been released from prison and [was] now serving the remainder of his sentence in the community." *State v. Daw*, 277 N.C. App. 240, 244 (2021). Since Mr. Daw "received the

relief requested in his petition," the controversy was dead. *See id.* But the court below—like the majority today—invoked the public-interest exception to reach the merits. *See id.* at 244–45.

That exception allows courts to decide a technically moot case that "involves a matter of public interest, is of general importance, and deserves prompt resolution." *N.C. State Bar v. Randolph*, 325 N.C. 699, 701 (1989). There is wisdom in that rule. And in proper cases, the public-interest exception serves principles of fairness and judicial economy. But it has limits, as our cases make clear. When abstention offers a more prudent course, we have refused to decide moot cases that raise "matter[s] of significant public interest." *Cape Fear River Watch v. N.C. Env't Mgmt. Comm'n*, 368 N.C. 92, 100 (2015); *see also Benvenue*, 275 N.C. at 680 (declining to "pass upon" important "constitutional questions" raised in appeal but "which have now become abstract questions of law"); *Wikel v. Bd. of Comm'rs*, 120 N.C. 451, 452 (1897) (declining to reach "grave questions of constitutional law" because "the cause of action has been destroyed" and "this Court will not go into a consideration of the abstract question"). Two factors guide when the mootness rule yields to the public-interest exception.[1] First, the exception carries less force in idiosyncratic and fact-specific cases. *See Cape Fear River Watch*, 368 N.C. at 99–100 (withholding public-interest exception in case that involved a narrow subset of coal facilities and raised record-heavy, fact-bound claims). Second, we stay our hand when our decision would not "have any practical impact." *Id.* at 100. In Mr. Daw's case, both factors cut against reaching the merits.

For one, Mr. Daw's case is hyperspecific and fact-bound. He does not seek sweeping relief or unlatch the habeas floodgates. From the start, Mr. Daw has tethered his claim to his specific medical conditions and the specific risks raised by specific prison policies in the face of a specific virus. In the years since his petition, prison policies have changed and COVID-19 has ebbed in magnitude. The facts essential to Mr. Daw's habeas claim have thus evaporated as his appeal has evolved. And since Mr. Daw's petition hinged on his unique medical vulnerabilities to a unique virus, his case has a narrow blast radius.

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1. Our cases have recognized other exceptions to the mootness doctrine, such as when a claim is "capable of repetition, yet evading review." *Chavez v. McFadden*, 374 N.C. 458, 467 (2020). Though the Court of Appeals gestured to alternative bases for reviewing Mr. Daw's case, its substantive analysis dealt exclusively with the public-interest exception. Because other mootness exceptions were not examined below and are, at any rate, not applicable to Mr. Daw's claim, I confine my discussion accordingly.

For more proof on that score, look no further than the Court of Appeals. Despite Mr. Daw's already idiosyncratic claims, the court insisted on even more precision. It affirmed the summary denial of his petition for failing to forecast "admissible evidence individualized to the specific circumstances of [his] case that an 'act, omission or event' had occurred that entitled [him] to be discharged." *Daw*, 277 N.C. App. at 246–47. According to the court, Mr. Daw did not clarify "how [his] medical conditions put him at an elevated risk for serious illness or other medical complications from COVID-19." *Id.* at 264 (emphasis omitted). And without a particularized "evidentiary link between the general information in the application and the specific facts of [his] case," the court held that Mr. Daw did not raise "colorable claims" for habeas relief. *Id.* at 269. In both reasoning and result, the Court of Appeals did not adopt the "expansive interpretation" conjured up by the majority. It required an extra measure of specificity for Mr. Daw's already fact-specific claims. And so the decision below—like Mr. Daw's petition—has little purchase beyond its four corners, thus mitigating the "general importance" of the issues involved. *See Randolph*, 325 N.C. at 701.

Perhaps most strikingly, deciding this dispute will not have "any practical impact." *Cape Fear River Watch*, 368 N.C. at 100. Before the Court of Appeals issued its opinion, the state released Mr. Daw and others like him to serve their sentences at home. Mr. Daw completed his sentence in February 2021—over three years ago. And so the relief sought—discharge from incarceration—is not just past its expiration date, but several years so. Our input "cannot have any practical effect on the existing controversy." *Roberts v. Madison Cnty. Realtors Ass'n*, 344 N.C. 394, 398–99 (1996). Or to be more accurate, it cannot affect the once-existing controversy—Mr. Daw's original dispute "has been settled" and "cease[s] to exist." *See Cochran v. Rowe*, 225 N.C. 645, 646 (1945).

The majority makes clear the real reason for discarding the usual mootness rules: It disagrees with the Court of Appeals and hopes to extirpate its decision, root and branch. Even before touching the merits, the majority excoriates the ruling below as "contrary to established law," in "tension" with statutory language, and in "direct conflict" with entrenched legal precepts. The Court, in other words, starts with the outcome and works backwards from there. That analysis is inverted. It is also an unprincipled assumption of the "law-making role," as Justice Riggs explains. For when a controversy is truly extinguished—as is the case here—we should not gratuitously interject merely "to determine which party should rightly have won in the lower court." *Benvenue*, 275

N.C. at 679. The majority's distaste for habeas does not make this peculiarly dormant case one of public significance. Along with Justice Riggs, I would follow our "usual response" and dismiss the appeal. *See Messer v. Town of Chapel Hill*, 346 N.C. 259, 260 (1997) (per curiam) (quoting *Simeon v. Hardin*, 339 N.C. 358, 370 (1994)).[2]

II. The majority's analysis is textually dishonest, divorced from context, incongruent with precedent, and belied by history.

A. Methodology

The majority is wrong from the ground up. It decides this case by stripping subsection 17-4(2) of context and pronouncing its language unambiguous in isolation. One struggles to classify this divide-and-conquer methodology. It is barely statutory interpretation, as the majority interprets precious little of the relevant statutes. And it is certainly not textualism, as even the strictest textualists concede that "[c]ontext is a primary determinant of meaning." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 167 (2012). Perhaps "textual gerrymandering" is the best name for the majority's approach. For it "manipulat[es] statutory boundaries," packing and cracking the legislature's words to "sustain a preferred interpretation." *See* William N. Eskridge, Jr. & Victoria F. Nourse, *Textual Gerrymandering: The Eclipse of Republican Government in an Era of Statutory Populism*, 96 N.Y.U. L. Rev. 1718, 1732 (2021).[3]

Whatever the label, the majority's methodology simply is not how courts read laws. To determine legislative intent—the guiding star of statutory analysis—we analyze "the statute as a whole, considering the

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2. I adhere to my view that neither precedent nor prudence require us to reflexively abrogate a Court of Appeals opinion—whether by vacating or "unpublishing" it—whenever a case becomes moot. My other writings address this point in more detail. *See Walker v. Wake Cnty. Sheriff's Dep't*, 385 N.C. 300, 303 (2023) (Earls, J., dissenting) (explaining the problems with this Court "unpublishing" a Court of Appeals decision after the parties settled their dispute and asked us to dismiss the appeal); *see id.* at 307 (clarifying why "unpublishing" an opinion means that "for all intents and purposes, the Court effectively vacates the decision below"); *see also Mole v. City of Durham*, 384 N.C. 78, 91 (2023) (Earls, J., dissenting) (examining this Court's recent fondness for "unpublishing" Court of Appeals opinions and highlighting the procedural, administrative, and fairness concerns with that approach).

3. Textualism is, of course, not the only approach to legal interpretation. *See* Stephen Breyer, *Reading the Constitution: Why I Chose Pragmatism, Not Textualism* (2024). I reference textualism because it appears to be the majority's professed approach and yet even by its own methodology, the majority's analysis is deeply flawed. I do not assert that textualism accurately represents what this Court's precedents establish as the principal or sole method of statutory and constitutional interpretation.

chosen words themselves, the spirit of the act, and the objectives the statute seeks to accomplish." *Brown v. Flowe*, 349 N.C. 520, 522 (1998). We first look to a provision's plain language, as the "actual words of the legislature are the clearest manifestation of its intent." *N.C. Dep't of Corr. v. N.C. Med. Bd.*, 363 N.C. 189, 201 (2009). If those words are "clear and unambiguous within the context of the statute, they are to be given their plain and ordinary meanings." *Brown*, 349 N.C. at 522 (citing *Hyler v. GTE Prods. Co.*, 333 N.C. 258, 262 (1993)); *see also Union Carbide Corp. v. Offerman*, 351 N.C. 310, 315 (2000).

But the "plainness or ambiguity of [a] statut[e's] language" cannot "turn solely on dictionary definitions of its component words" viewed in an echo chamber. *Yates v. United States*, 574 U.S. 528, 537 (2015) (cleaned up). As this Court long ago recognized, a "phrase or clause or sentence may vary greatly in color and meaning according to the circumstances of its" invocation. *Watson Indus., Inc. v. Shaw*, 235 N.C. 203, 210 (1952). And so a provision's language draws substance from the "specific context in which [it] is used, and the broader context of the statute as a whole," *Yates*, 574 U.S. at 537 (cleaned up); *see also Deal v. United States*, 508 U.S. 129, 132 (1993) (applying the "fundamental principle of statutory construction (and, indeed, of language itself) that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used"). In practical view, legal instruments "typically contain[ ] many interrelated parts that make up the whole," and so the "entirety of the document . . . provides the context for each of its parts." Scalia & Garner, at 167. Meaning, in other words, is a function of context. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000) ("The meaning—or ambiguity—of certain words or phrases may only become evident when placed in context."). Which is why, to again quote Justice Scalia, "In textual interpretation, context is everything." Antonin Scalia, *A Matter of Interpretation* 37 (1997).

That principle holds special sway for statutes. *Rodgers, McCabe & Co. v. Bell*, 156 N.C. 378, 385 (1911). And for good reason—the General Assembly does not legislate in fragments but on top of and "with reference to" broader legal schemes. *Raeford Lumber Co. v. Rockfish Trading Co.*, 163 N.C. 314, 317 (1913) (cleaned up). Put simply, the legislature's "chosen words" function within "the statute as a whole." *Brown*, 349 N.C. at 522 (cleaned up). To faithfully interpret that language, judges must "consider the entire text, in view of its structure and of the physical and logical relation of its many parts." Scalia & Garner, at 167. Courts ignore statutory context at their own peril. Reading a provision wrenched from its setting is like measuring an iceberg without looking

beneath the surface. In both cases, the incomplete perspective yields a distorted result divorced from both reality and common sense. Even Justice Scalia bemoaned the "failure to follow the whole-text canon" as an all too common "interpretive fault" that dislocates language from its intended meaning. *Id.*

That lesson is not new. As far back as 1628, Sir Edward Coke explained that "it is the most natural and genuine exposition of a statute to construe one part of the statute by another part of the same statute, for that best expresseth the meaning of the makers." 1 Edward Coke, *The First Part of the Institutes of the Laws of England, or, a Commentary upon Littleton* § 728, at 381a (Dublin, College-Green 14th ed. 1791). Over the centuries, context has retained its primacy, requiring jurists to construe "the entire instrument, and not merely . . . disjointed parts of it." *See* Herbert Broom, *A Selection of Legal Maxims* 440 (Joseph Gerald Pease & Herbert Chitty eds., 8th ed. 1911).

This Court has followed that time-honored maxim. In "determining legislative intent," we have explained, "the words and phrases of a statute must be interpreted contextually"—courts do not read segments of a statute in an echo chamber. *See In re J.E.B.*, 376 N.C. 629, 634 (2021) (cleaned up). We have returned to that principle again and again. Our cases, for example, denounce reading statutes "as detached, unrelated sentences." *State v. Fox*, 262 N.C. 193, 195 (1964). We have rejected "rigid interpretation[s] of isolated provisions" unmoored from "the whole of the statutory text." *In re A.P.*, 371 N.C. 14, 18 (2018). And we have gone further, explaining that courts disserve the legislature's intent by scrutinizing "statutory provisions" in a vacuum "rather than analyzing the relevant statutory language in its entirety."[4] *State v. James*, 371 N.C. 77, 92 (2018).

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4. The importance of linguistic context transcends time and subject matter. A glance through our cases makes it difficult to imagine a more firmly entrenched interpretive principle. *See, e.g.*, *Rodgers, McCabe & Co. v. Bell*, 156 N.C. 378, 385 (1911) ("In order to determine the true intent of the Legislature, the particular clauses and phrases should not be studied as detached and isolated expressions, but the whole and every part of the statute must be considered in fixing the meaning of any of its parts. . . . Having reference to this general principle, it is also well understood that a statute should be so construed as to make it harmonize with the existent body of the law, unless the legislative intent is clearly expressed to the contrary, and that each and every clause shall be allowed significance if this can be done by fair and reasonable interpretation." (cleaned up)); *Victory Cab Co. v. City of Charlotte*, 234 N.C. 572, 576 (1951) ("[T]he language of the statute must be read not textually, but contextually, and with reference to the matters dealt with, the objects and purposes sought to be accomplished, and in a sense which harmonizes with the subject matter."); *Puckett v. Sellars*, 235 N.C. 264, 268 (1952) (instructing courts to adopt a "reasonable construction of [statutory] language" that "is consonant with the general purpose

On top of context, other principles guide our statutory analysis. Specificity, for instance, imports meaning. *See State ex rel. Utils. Comm'n v. Lumbee River Elec. Membership Corp.*, 275 N.C. 250, 260 (1969). For that reason, if "two statutes arguably address the same issue, one in specific terms and the other generally, the specific statute controls." *High Rock Lake Partners, LLC v. N.C. DOT*, 366 N.C. 315, 322 (2012). That interpretive tool is "most common[ly]" needed in cases like this one: Where "a general prohibition"—like subsection 17-4(2)—is "contradicted by a specific permission"—like section 17-33. *See* Scalia & Garner, at 183. More basically, when statutes cover the same "matter or subject," this Court construes them together *in pari materia*. *DTH Media Corp. v. Folt*, 374 N.C. 292, 300 (2020) (cleaned up). Our

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and intent of the Act under consideration, is in harmony with the other provisions of the statute, and serves to effectuate the objective of the legislation"); *Piedmont Canteen Serv., Inc. v. Johnson*, 256 N.C. 155, 160 (1962) (explaining that "part of a statute may not be interpreted out of context" but rather "construed as a part of the whole"); *In re Hardy*, 294 N.C. 90, 95–96 (1978) ("Words and phrases of a statute may not be interpreted out of context, but individual expressions must be construed as a part of the composite whole and must be accorded only that meaning which other modifying provisions and the clear intent and purpose of the act will permit." (cleaned up)); *Jolly v. Wright*, 300 N.C. 83, 86 (1980) ("Word and phrases of a statute may not be interpreted out of context; rather, individual expressions must be interpreted as part of a composite whole, in a manner which harmonizes with the other provisions of the statute and which gives effect to the reason and purpose of the statute."); *State v. Jones*, 305 N.C. 520, 531 (1982) ("An ordinance or statute must be considered as a whole, and its language should not be isolated in order to find fault with its descriptive character when the general sense and meaning of the statute can be determined from reading such language in proper context and giving the words ordinary meaning."); *Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 215 (1990) ("A construction which operates to defeat or impair the object of the statute must be avoided if that can reasonably be done without violence to the legislative language. To this end, the words and phrases of a statute must be interpreted contextually, in a manner which harmonizes with the other provisions of the statute and which gives effect to the reason and purpose of the statute." (cleaned up)); *In re D.S.*, 364 N.C. 184, 187 (2010) ("Legislative intent controls the meaning of a statute; and in ascertaining this intent, a court must consider the act as a whole, weighing the language of the statute, its spirit, and that which the statute seeks to accomplish. The statute's words should be given their natural and ordinary meaning unless the context requires them to be construed differently." (cleaned up)); *Rhyne v. K-Mart Corp.*, 358 N.C. 160, 188 (2004) ("[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."); *Dickson v. Rucho*, 366 N.C. 332, 342 (2013) ("We read [a provision] in the context of the entire article in which it appears."); *N.C. Dep't of Transp. v. Mission Battleground Park, DST*, 370 N.C. 477, 483 (2018) (reversing Court of Appeals in part for failing to interpret a subsection "holistically with the rest of the statute"); *Town of Pinebluff v. Moore County*, 374 N.C. 254, 256 (2020) (explaining that statutory subsections "must be read in the context of the rest of the statute, since we assume that the Legislature acted with full knowledge of prior and existing law" (cleaned up)); *In re J.E.B.*, 376 N.C. 629, 634 (2021) (admonishing courts from divvying up a provision's language "to the exclusion of the rest of the statute").

interpretation "must sound a harmonious—not a discordant—note in the general tenor of the law." *Watson Indus.*, 235 N.C. at 210. And we must give "effect, if possible, to all provisions without destroying" their meaning. *DTH Media Corp.*, 374 N.C. at, 300 (cleaned up). Above all, 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).

In discarding those interpretive rules, the majority proves their value. For the statutes that emerge from today's decision are quite different from those the legislature passed. That departure is unjustified.

B. Statutory Text

Start where the majority should have—the language of our habeas statutes viewed in context.[5] When a person files a habeas petition, the court must "grant the writ without delay, unless it appear from the application itself or from the documents annexed" that the applicant is "prohibited from prosecuting the writ." N.C.G.S. § 17-9 (2023). Section 17-4 lists cases in which the "[a]pplication to prosecute the writ shall be denied." N.C.G.S. § 17-4. Most relevant here, subsection 17-4(2) withholds the writ from a petitioner:

> [C]ommitted or detained by virtue of the final order, judgment or decree of a competent tribunal of civil or criminal jurisdiction, or by virtue of an execution issued upon such final order, judgment or decree

N.C.G.S. § 17-4(2).

In effect, the majority begins and ends its analysis with that lone subpart. Intentionally so, as that language—read in a vacuum—yields the majority its preferred result. But subsection 17-4(2) is not the final word on habeas claims; it is but one provision amid a sea of interlocking laws. And its language, placed in the proper setting, takes on a different hue than the majority gives it.

Consider, for instance, section 17-32. When a petitioner "is brought on a writ of habeas corpus" before a "court or judge," that decisionmaker must examine "the cause of the [petitioner's] confinement or restraint." N.C.G.S. § 17-32 (2023). The statute also casts a wide net, embracing habeas petitioners committed "for any criminal or supposed criminal

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5. It is, of course, disappointing that the majority finds it "reductive" to flesh out the basis of a dissent and to offer another perspective on important legal issues. Even so, I believe that our state, its law, and the people we serve merit a full and fair elucidation of the case before us.

matter or not." *Id.*; *cf. In re Bailey*, 203 N.C. 362, 365 (1932), *rev'd on other grounds*, 289 U.S. 412 (1933) (applying contemporary version of section 17-32 to criminal proceeding and interpreting "statutory words" to "preclude the idea that such hearing shall be perfunctory and merely formal"). If "facts are alleged to show that the imprisonment or detention is illegal, or that the party imprisoned is entitled to his discharge," the court must "hear the allegations and proofs on both sides." N.C.G.S. § 17-32. And after taking evidence, it must award the relief to which "justice appertains in delivering, bailing, or remanding" the petitioner. *Id.* The next three provisions track section 17-32's listed remedies, detailing when and why courts must award habeas relief. *See* N.C.G.S. §§ 17-33 (titled: "When party discharged"), -34 (titled: "When party remanded"), -35 (2023) (titled: "When . . . party bailed or remanded").

Key here, section 17-33—the statute cited by Mr. Daw—obliges a court to discharge a habeas petitioner from unlawful imprisonment or its "continuance." N.C.G.S. § 17-33. It opens with a broad command:

> If no legal cause is shown for such imprisonment or restraint, or for the continuance thereof, the court or judge shall discharge the party from the custody or restraint under which he is held.

Id. That language sets no limits—it embraces criminal defendants and civil detainees alike. We know that for three reasons. First, the statute requires discharge from "*such* imprisonment or restraint," *id.* (emphasis added), an adjectival callback to the modes of confinement itemized in section 17-32. *See Such*, *Black's Law Dictionary* 1732 (11th ed. 2019) ("That or those; having just been mentioned"). That matters, in turn, because section 17-32 directs courts to examine the factual and legal basis for a petitioner's "commitment for any criminal or supposed criminal matter or not." N.C.G.S. § 17-32. In light of their textual and spatial nexus, the "imprisonment or restraint" embraced by section 17-33 includes the forms of criminal process reviewable under section 17-32. *See* N.C.G.S. § 17-33.

Section 17-33's second sentence confirms the broad sweep of its first. After requiring discharge if there is no "legal cause" for a petitioner's "imprisonment or restraint," the statute pivots to a specific class of habeas claims:

> But if it appears on the return to the writ that the party is in custody by virtue of civil process from any court legally constituted, or issued by any officer in the course of judicial proceedings before him,

> authorized by law, such party can be discharged only in one of the following cases:

Id. That second sentence starts with the disjunctive "but," making clear its break from the guidance before. *See But*, *The American Heritage College Dictionary* (3d ed. 2000) ("Used to indicate an exception"). In setting specific rules for specific petitioners, though, the legislature kept the general regime that applies to claimants outside that category but within the statute's ambit. So even if section 17-33 provides narrower grounds for relief to those detained "by virtue of civil process," it retains the baseline rule for petitioners excluded from that group but embraced by the statute's first sentence. *See* N.C.G.S. § 17-33. For that reason, petitioners "imprisoned or restrained" by modes other than "civil process" may still test the "legal cause" for their continued custody. *See id.*

Consider an analogy. Suppose a high school's attendance policy says:

> A student's absence from class may be excused if there is a reasonable basis for it. But freshmen and sophomores may only miss class for these reasons: (1) illness or (2) a family emergency.

A person reading that text would understand that juniors and seniors have more leeway than do freshmen and sophomores. The policy follows its general rule with specific strictures on a specific group of students. And the natural takeaway from that structure and language is that students exempt from the enumerated limits are governed by the default "reasonable basis" rule. Otherwise, there would be no reason for the restrictions at all. A senior, for instance, may justifiably miss class to take the SAT or visit a prospective college. But the same senior could also stay home if they caught the flu. Upperclassmen could thus offer a "reasonable basis" to excuse an absence based on grounds broader than—but including—the reasons available to freshmen and sophomores. By singling underclassmen out and fixing specific limits on them, the policy impliedly excludes other students from those strictures, retaining the default standard that generally controls.

The same principle applies to section 17-33. After setting a default rule for petitioners "imprison[ed] or restrain[ed]" in the modes captured by section 17-32, the statute offers specific guidance for people confined "by virtue of civil process" from a "legally constituted" court or authorized judicial officer. *Id.* But though that latter class of habeas petitioner is limited to discrete grounds for relief, detainees outside that group—including criminal defendants—may still challenge the "legal cause" for their imprisonment or its "continuance." *See id.*

Finally, surrounding provisions affirm section 17-33's extension to criminal cases. Take section 17-30, which applies to a petitioner "detained upon any criminal accusation." N.C.G.S. § 17-30 (2023). For those types of claims, the court may withhold an "order for the discharge of such party" until the district attorney has received "sufficient notice" of the proceedings. *Id*. The provision thus contemplates criminal defendants' recourse to habeas discharge, the relief covered and controlled by section 17-33.

The statutes after section 17-33 point the same way. For instance, sections 17-34 and 17-35 flesh out the other remedies listed in section 17-32—namely, remand and bail. Those provisions set rules for "the party" referenced in section 17-32 and accordingly extend their reach to forms of criminal process. *See* N.C.G.S. §§ 17-34, -35. Also notable, if a court discharges a habeas petitioner—the remedy detailed in section 17-33—yet another statute protects that person from being "again imprisoned or detained for the same cause," except by order of the presiding court. N.C.G.S. § 17-38 (2023). Section 17-38 illustrates that "imprisonment" and "detention" are distinct forms of confinement embraced by section 17-33. *See id*. And it underscores the importance the legislature placed on discharge as a remedy. To give effect to that measure of relief, the statute prescribes a $2,500 penalty for anyone who unlawfully reimprisons someone whom habeas has freed. *Id*. In those ways, too, statutory context shows that section 17-33 is part of—and intertwined with—a habeas regime that reaches civil "restraint" and criminal "imprisonment" alike.

Most damning for the majority, section 17-33(2) blesses habeas claims when a defendant's "original imprisonment was lawful," but a later "act, omission or event" requires discharge. N.C.G.S. § 17-33(2). That language prefigures and provides for habeas petitions otherwise precluded by subsection 17-4(2). A "lawful" prison sentence is, by necessity, one authorized by a "final judgment" from a "competent" court. *See In re Swink*, 243 N.C. 86, 90 (1955) (explaining that the "lawful imprisonment of a person who pleads or is found guilty of a criminal offense" must rest on a "valid judgment of a court of competent jurisdiction"); *see also In re Burton*, 257 N.C. 534, 540 (1962).

So section 17-33, as written, cannot cohabit with the version of subsection 17-4(2) concocted by the majority. If, as the majority holds, a valid conviction kills habeas petitions at the threshold, then nothing that follows a duly imposed sentence could ever warrant a petitioner's discharge. Whenever a defendant's "original imprisonment was lawful"—and precisely *because* the "original imprisonment was lawful"—the

majority would foreclose habeas relief. By reading subsection 17-4(2) to demand that result, the majority renders section 17-33 a ticket to nowhere—a curious result for an opinion that claims fidelity to plain text. *Cf.* Scalia & Garner, at 174 ("[I]t is no more the court's function to revise by subtraction than by addition").

The majority launders its holding through a hodgepodge of analytical moves, none sound. As its first ploy, the majority wrests subsection 17-4(2) from the statutory scheme and reads it in a vacuum. Measured against itself, the majority proclaims subsection 17-4(2)'s language "definite" and "unambiguous." It then converts that artificial clarity into an airtight rule, mandating that "inquiry into the availability of habeas relief" must end with subsection 17-4(2). But the majority's fragmentary analysis is methodologically infirm and logically bankrupt. In truth, subsection 17-4(2)'s lucidity is manufactured—it appears "definite" and "unambiguous" only because the majority erases everything that says differently.

From that first misstep, the majority makes a second. It scrubs disfavored habeas statutes of relevance, converting subsection 17-4(2) into an impenetrable command. The majority recasts that provision as a flat decree: habeas courts "*must* summarily deny [an] application" from a person detained under a final judgment. Per the majority, every other provision in Chapter 17—including section 17-33—kicks in "only when [an] application is allowed" in line with subsection 17-4(2). Courts must woodenly apply that provision without "consider[ing] a petitioner's application in light of th[ose] subsequent provisions." Translation: subsection 17-4(2) overrides all the statutes that come after. So that provision, as interpreted by the majority, is no mere "gatekeeper"—it is a gate closer for habeas claims that should otherwise proceed.

The majority does not merely shut the habeas doors; it seals them closed. It announces that section 17-33 has no bearing on section 17-4, as the former does not apply to criminal process and "is not relevant until after an application to prosecute the writ has been granted." But in that holding, too, the majority repeats its earlier flaws. As its opening move, the Court selectively excerpts section 17-33's text. It omits the statute's first sentence, insisting that the second is the only "relevant portion." The majority does not justify that excision or explain why just some of the legislature's words are "relevant." But we soon understand the gambit, as the majority offers its carefully snipped text as proof that section 17-33 *only* applies to "civil process."

That conclusion overlooks the statute's full language and its fit with neighboring provisions. True to form, the majority ignores section

17-33's linguistic and spatial nexus to section 17-32, which expressly extends habeas review to "commitment[s] for any criminal or supposed criminal matter." N.C.G.S. § 17-32. It ignores section 17-33's application to "imprisonment," N.C.G.S. § 17-33, the quintessential mode of criminal confinement, *see In re Swink*, 243 N.C. at 90. And it ignores the internal structure and logical mechanics of section 17-33's text.[6]

As explained earlier, section 17-33's mention of "civil process" qualifies, rather than defines, the scope of discharge relief. Recall the provision's opening sentence. In capacious terms, it requires a petitioner's release if there is no "legal cause" for his imprisonment or "the continuance thereof." N.C.G.S. § 17-33. The next sentence tempers the opening rule for petitioners confined "by virtue of civil process."[7] *Id.* For that sliver of habeas petitioners, discharge is proper "only" in specified cases. *Id.* True, that language does not apply to criminal defendants. But section 17-33's first sentence *does*, as those petitioners are "imprison[ed]," *id.*, and "such imprisonment" includes "commitment for any criminal or supposed criminal matter," *see* N.C.G.S. § 17-32. So for petitioners detained through mechanisms other than "civil process," section 17-33's default rule holds firm. Defendants like Mr. Daw may thus seek habeas relief when their "continu[ed]" imprisonment is shorn of "legal cause." N.C.G.S. § 17-33.

Against that backdrop, the majority's cramped reading of subsection 17-4(2) cannot stand. At least, not if the legislature passed the laws

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6. To justify its cherry-picked reading of section 17-33, the majority contends that Mr. Daw "has not argued that there is no legal cause for his detention under the [provision's] first sentence." That observation might matter if it was at all relevant to today's holding. But rather than confining its analysis to a particular part of section 17-33, the majority flatly forecloses the statute's availability for people in Mr. Daw's shoes.

7. This reasoning takes "civil" at face value, accepting for argument's sake that the term imports a distinction between civil versus criminal law. But the precedent and post-Civil War context surrounding section 17-33's enactment suggest that its drafters used "civil" to distinguish civilian courts from the military's justice system. *See*, *e.g.*, *Cox v. Gee*, 2 Win. 131, 132 (1864) (denying habeas petition from soldier in Confederate Army and explaining that a soldier is in "military custody" not reachable "through *civil* tribunals, until at least, his term of enlistment expires") (emphasis added); *id.* at 133 ("Legitimately inquiry in such cases goes only to the extent of ascertaining whether the prisoner is rightfully in the army. If so, the *civil* tribunals leave him to the military, to be dealt with according to their rules and regulations.") (emphasis added); *In re Bryan*, 60 N.C. 1, 42 (1863) (affirming judiciary's jurisdiction and duty to "discharge [a] *citizen* whenever it appears that he is unlawfully restrained of his liberty by an officer of the Confederate States") (emphasis added); *In re Moore*, 64 N.C. 802, 808–10 (1870). Even accepting the civil-criminal dichotomy—as the majority uncritically does—section 17-33's reference to "civil process" does not extinguish the statute's application to criminal proceedings.

it did. And not if bedrock interpretive rules are followed. Properly read, section 17-33 creates an exception to subsection 17-4(2). Though the latter provision generally withholds habeas relief from duly incarcerated petitioners, the former varies that rule in specific cases. So even if a defendant's "original imprisonment was lawful," he may test the "legal cause" for his "continu[ed]" restraint based on an intervening "act, omission or event." *See* N.C.G.S. § 17-33(2). That interpretation accounts for the context and language of the habeas statutes, allowing the "specific" guidance of section 17-33 to supplement the "more general" precept in subsection 17-4(2). *LexisNexis Risk Data Mgmt. v. N.C. Admin. Off. of the Cts.*, 368 N.C. 180, 187 (2015) (cleaned up). It respects the General Assembly's wisdom, presuming that the policy-making branch enacts statutes "with full knowledge of prior and existing law." *Fearrington v. City of Greenville*, 900 S.E.2d 851, 866 (N.C. 2024) (cleaned up). And it harmonizes the legislature's enactments, giving effect to the full statutory scheme and avoiding a construction that renders section 17-33 superfluous. *Id.* ("We presume . . . that the General Assembly does not adopt superfluous legislation." (cleaned up)).

In fact, there is special reason to pursue harmony here. The Drafting Committee of the habeas statutes foretold the "inevitab[ility] that imperfections will be found" in the newly enacted laws. N.C. Code Civ. P. of 1868, Second Report of the Code Commissioners. For courts facing those "imperfections," the Committee requested a "generous criticism of our labors," underscoring that each part was intended "to fit in and harmonize with the other[s]" as a "consistent whole." *Id.* It noted, too, that the separate statutory provisions carry independent force. *See id.* ("[T]here is scarce any part which can be altered without involving alteration in some or numerous others."). In other words, the legislature expressly disclaimed the fragmented approach the majority deploys today.

Allowing Mr. Daw's petition also aligns with settled understandings about the purpose and reach of habeas claims. This Court has long held that habeas is not an error-correcting mechanism. *See State v. Hooker*, 183 N.C. 763, 766 (1922). The writ allows relief from void judgments, not flawed ones. *See In re Burton*, 257 N.C. at 540–41. Subsection 17-4(2) codifies that distinction: If duly convicted, a defendant may not use habeas to relitigate the *merits* of a valid criminal judgment. Put simply, section 17-4 precludes appeals by another name. *See In re Palmer*, 265 N.C. 485, 486 (1965).

But section 17-33 permits—and Mr. Daw raises—a different type of claim. The statute contemplates cases where a defendant's sentence—and the final judgment authorizing it—was lawful when imposed. Even

so, the legislature left the habeas doors ajar if a later "act, omission or event" dissolves the "legal cause" for a once-valid imprisonment. N.C.G.S. § 17-33(2). When an inmate seeks relief under section 17-33, then, a court need not relitigate the merits of the original conviction or sentence. The question, instead, is whether intervening events have changed the nature of the confinement and eroded the legal justification for its "continuance"—an inquiry well-suited for habeas review. *See In re Renfrow*, 247 N.C. 55, 59 (1957) (explaining that the issue raised at a habeas "hearing for *alleged unlawful imprisonment* is whether petitioner is *then* being unlawfully deprived of his liberty") (second emphasis added).

Since section 17-33 claims do not allege error in a conviction, judgment, or original sentence, they fit with subsection 17-4(2)'s general prohibition on repackaged appeals. So read, subsection 17-4(2) can coexist with section 17-33. Even if a habeas petitioner may not attack the merits of a final criminal judgment, he *can* challenge added restraint not authorized by the original judgment—here, the alleged irresponsible exposure to a deadly and novel virus. *See State v. Austin*, 241 N.C. 548, 550–51 (1955) (explaining that a "properly convicted" defendant may, on habeas, attack punishment imposed in "excess of that authorized by law" without "disturbing the valid portion of the sentence"); *see also State v. Stafford*, 274 N.C. 519, 536 (1968) (noting that defendant sentenced in excess of legal bounds was "entitled to his discharge upon a writ of habeas corpus when he had served the time the court could lawfully impose").

Rather than apply the statutes enacted, the majority engineers those it would prefer. It is a regrettable choice—not just for the avenues it seals shut, but also for the interpretive rules it discards. By tunnel-visioning on subsection 17-4(2), the Court elevates an atomized provision into a blanket rule, minting an intratextual hierarchy without legislative blessing. It injects discord where the General Assembly intended harmony. And it exiles section 17-33 to superfluity—both on paper and in practice.

C. Precedent

Precedent cuts in Mr. Daw's favor, too. Our appellate courts have already interpreted the habeas statutes and rejected the majority's myopic reading. Some cases did so expressly, construing section 17-33 to allow habeas relief otherwise barred by subsection 17-4(2). Others did so implicitly by examining the merits of a habeas petition from a person detained under a valid final judgment. That caselaw confirms what the statutes makes clear: Though subsection 17-4(2) sets a general rule, section 17-33 allows habeas claims in a narrow subset of cases. So the

majority does not restore our habeas provisions to their longstanding meaning—it contorts their language and precedent interpreting it.

Begin with express rejections of the majority's new rule. In *In re Harris*, for instance, we endorsed a mental patient's recourse to habeas, "notwithstanding [subsection] 17-4(2)." 241 N.C. 179, 180 (1954). The petitioner in that case was committed to a state mental hospital. *Id.* at 179. After two years, he sought release, alleging that he was "of sound mind and entirely competent and capable of managing his own affairs." *Id.* The petitioner—invoking existing statutes—argued that a jury trial was the "permissible procedure by which he may be declared competent." *Id.* at 180 (cleaned up). We disagreed, explaining that his "remedy is by habeas corpus." *Id.* (emphasis omitted). That conclusion sprang from the same habeas statutes in place today. Section 17-32 obliged courts to examine whether "the party imprisoned is entitled to his discharge." *Id.* (citing N.C.G.S. § 17-32). And that language fit with subsection 17-33(2)—a person may "become entitled to be discharged" based on "some act, omission or event" during his confinement. *Id.* at 181.

Fitting those provisions together, we explained that "recovery from a mental disease after commitment to an institution would seem to be an 'event which has taken place afterwards,' within the meaning of [subsection] 17-33(2), entitling an inmate to discharge under [section] 17-32." *Id.* That "[wa]s so notwithstanding [subsection] 17-4(2)," we observed—in other words, section 17-33 coexisted with and offered a specific carve out to subsection 17-4(2)'s general summary denial rule. *Id.* at 180. Extending that logic, we repudiated earlier decisions barring habeas courts from examining whether a petitioner's current condition permitted their continued detention. *Id.* (citing *Ex parte Chase*, 193 N.C. 450 (1927)). Nor was *Harris* an anomaly—it built on other cases extending habeas relief in the face of subsection 17-4(2). *See State v. Queen*, 91 N.C. 659, 661–62 (1884) (granting habeas relief to a defendant confined under a constitutionally defective sentence, even though the contemporary version of subsection 17-4(2) directed "that the writ should be denied" to petitioners "imprisoned by virtue of the judgment of competent jurisdiction of the crime for which he is imprisoned").

The Court of Appeals has held the same for nearly fifty years. Since 1976, five cases have pointed to section 17-33 as a remedy for "a clear instance of constitutional infirmity," even when the petitioner's original imprisonment was lawful. *In re Stevens*, 28 N.C. App. 471, 474 (1976); *see also Hoffman v. Edwards*, 48 N.C. App. 559 (1980); *Freeman v. Johnson*, 92 N.C. App. 109 (1988); *State v. Leach*, 227 N.C. App. 399 (2013); *State v. Daw*, 277 N.C. App. 240 (2021).

Federal courts have distilled the same teaching from our habeas statutes, allowing validly incarcerated defendants to challenge aspects of their confinement via section 17-33 claims. *See*, *e.g.*, *Warren v. Smith*, No. 5:13-HC-2220-D, 2015 WL 631331, at *3 (E.D.N.C. Feb. 12, 2015) (citing subsection 17-33(2) and explaining that "[u]nder North Carolina law, [petitioner] can seek habeas relief for the alleged lack of due process in his parole revocation hearing and the revocation for failure to pay supervision fees"); *Bey v. Hooks*, No. 5:15-HC-2097-FL, 2018 WL 2465471, at *4 (E.D.N.C. June 1, 2018) (quoting subsection 17-33(2) and reasoning that North Carolina prisoners "may assert constitutional challenges to parole proceedings by filing a petition for writ of habeas corpus in state court"). On questions of state law, of course, federal decisions are not binding authority. But they still hold persuasive value—especially because they cohere with North Carolina precedent. Put simply, state and federal judges have read the same statutes and reached the same conclusion about the viability of section 17-33 claims. The consistency of that trend lays bare the majority's aberration from it.

Implicitly, too, our courts have rejected the majority's rigid interpretation of subsection 17-4(2). Our precedent has allowed duly imprisoned defendants to attack substantive infirmities in their continued incarceration. We have "frequently held" that "where a convicted criminal is detained under a sentence not authorized by law, he is entitled to be heard." *In re Holley*, 154 N.C. 163, 168 (1910). The most obvious case is when a defendant's sentence is "authorized in kind," but "extends in duration beyond what the law expressly permits." *Id*. That prisoner, we have explained, "may be relieved from further punishment" after "serving the lawful portion of the sentence." *Id*.; *see also State v. Phillips*, 185 N.C. 614, 619 (1923); *Austin*, 241 N.C. at 548 (granting habeas relief and ordering inmate discharged because he served the legal portion of his sentence and the remainder was thus excessive); *Ex parte Williams*, 149 N.C. 436, 438–39 (1908) (affirming habeas discharge for defendant pardoned by the governor "after conviction"); *State v. Burnette*, 173 N.C. 734, 736–38 (1917) (allowing defendant jailed under suspended judgments to bring habeas claim "attack[ing] the validity of the sentence" because he "was entitled to a public hearing in the court" rather than "before the trial justice acting privately in his office"); *State v. Massey*, 265 N.C. 579, 580–81 (1965) (per curiam) (reversing denial of habeas petition and ordering defendant released because a misprint in penal statutes "created confusion," leading trial judge to give defendant "excessive sentences" for consolidated misdemeanors and, in turn, three later convictions for escaping prison); *State v. Niccum*, 293 N.C. 276 (1977) (considering habeas challenge to legality

of defendant's continued imprisonment beyond the maximum term for committed youthful offenders).

Key here, we have allowed prisoners to raise constitutional challenges to their ongoing confinement. *See*, *e.g.*, *Queen*, 91 N.C. at 661–62; *Phillips*, 185 N.C. at 619–22 (awarding habeas release on due process grounds because trial court allowed nonjudicial officers to decide whether defendant violated the terms of his suspended sentence without formal process); *State v. McBride*, 240 N.C. 619, 622 (1954) (reversing denial of habeas petition and ordering immediate release on apparent due process grounds because trial court erroneously revoked suspended sentence without any "finding that the defendant violated any one of the conditions upon which his sentence was suspended").

In *Jones*, perhaps our most recent foray, we assessed whether a habeas petitioner serving a life sentence was lawfully imprisoned. *Jones v. Keller*, 364 N.C. 249 (2010). In that case, the petitioner did not dispute the integrity of his original conviction or sentence. Instead, he lodged statutory and constitutional challenges to a Department of Corrections (DOC) policy for awarding good time credits. *Id.* at 251. As a rule, the DOC did not apply those credits to prisoners who—like the petitioner—were serving life sentences. *Id.* at 254. On habeas, the petitioner challenged the DOC's approach. In his view, withholding those time credits violated his "rights to due process and to equal protection." *Id.* at 256. And if his "good time, gain time, and merit time [were] credited to his life sentence"—"statutorily defined as a sentence of eighty years"—he was entitled to release. *Id.* at 251. Because the DOC unconstitutionally refused to apply those time credits, he urged, his continued imprisonment was unlawful and redressable on habeas. *Id.* On the merits, this Court sided with the DOC. *Id.* at 260.

But our reasoning was more important than the result. For *Jones* to make any sense, the petitioner's constitutional arguments must have mattered to the availability of habeas relief. If they did not and subsection 17-4(2) categorically withdraws the writ from lawfully imprisoned defendants, then this Court had no need to consider the constitutional merits. But we did—and thoroughly, too. *Id.* at 255 (deciding case by "only" considering "whether DOC's interpretation that Jones's good time, gain time, and merit time credits were not awarded to him for purposes of unconditional release is statutorily and constitutionally permissible"). *Jones* thus rests on an implicit premise key to this case: A habeas petitioner may attack his continued imprisonment on constitutional grounds, even if his original sentence were lawful.

Our precedent has (or had) good company—other state courts have construed their habeas statutes the same way. New York's highest court, for instance, has blessed habeas challenges to "any *further* restraint *in excess* of that permitted by the judgment or constitutional guarantees." *People ex rel. Brown v. Johnston*, 174 N.E.2d 725, 726 (N.Y. 1961) (cleaned up). Other states have followed suit. *See, e.g.*, *Beacham v. Walker*, 231 Ill. 2d 51, 58 (2008); *Penrod v. Cupp*, 581 P.2d 934, 935 (Or. 1978); *State ex rel. Cole v. Tahash*, 129 N.W.2d 903, 907 (Minn. 1964). And especially relevant here, Colorado's Supreme Court—interpreting a statute nearly identical to ours—has held that "any restriction in excess of legal restraint that substantially infringes on basic rights may be remedied through habeas corpus." *Marshall v. Kort*, 690 P.2d 219, 221–22 (Colo. 1984) (en banc), *overruled in part by Jacobs v. Carmel*, 869 P.2d 211 (Colo. 1994) (en banc); *see also Fahie v. Government of the Virgin Islands*, 73 V.I. 443, 449 (2020) ("[T]he statute specifically provides that a writ may be issued '[w]hen the imprisonment was at first lawful, yet by some act, omission, or event which has taken place afterwards, the party has become entitled to a discharge.' Discovering evidence that was not previously available is by definition 'some act, omission, or event,' and if that evidence is sufficiently conclusive as to a prisoner's innocence it may make the prisoner 'entitled to a discharge.' ").

D. History

The majority pairs its lopsided textual analysis with an equally myopic recitation of history. It flags two stops along habeas' historical journey, noting statutes passed in 1836 and 1854. Both enactments withheld habeas relief to prisoners held under final judgments, as did "the common law and the English Habeas Corpus Act of 1679." But to hear the majority tell it, history ended there. It ignores later developments expanding the writ and extending habeas to petitioners held under a valid criminal judgment. Viewed in its entirety, the historical arc of habeas confirms its embrace of claimants like Mr. Daw.

Habeas corpus has a long pedigree, tracing "its origin long prior to Magna Charta." *In re Holley*, 154 N.C. at 168. Pollinated by the common law, North Carolina embraced the "great writ" as the "most important, perhaps, in our system of government." *Id.* As in England, habeas empowered courts to examine whether a person was "wrongfully imprisoned or restrained of his liberty" and release him "if imprisoned against law." *In re Bryan*, 60 N.C. 1, 45 (1863).

But though a key legal protection, habeas was an imprecise remedy in early North Carolina. Our first Declaration of Rights, for instance,

referenced the writ obliquely, preserving the right of "every Freeman restrained of his Liberty[,] . . . to inquire into the Lawfulness thereof, and to remove the same if unlawful." N.C. Const. of 1776, Declaration of Rights, § XIII. Instead, habeas was a creature of statute—and a diminutive creature at that. The 1854 Revised Code, as the majority recounts, gave the writ a narrow berth, instructing that a petitioner "condemned by judgment given against him" shall "be presently remanded, where he shall remain until discharged in due course of law." N.C. Revised Code of 1854, ch. 31, § 111.

But in 1868, two legal developments cemented the writ's "prominent place in our organic law." *In re Holley*, 154 N.C. at 168. For one, North Carolina adopted a new constitution that expressly guaranteed habeas. *See* N.C. Const. of 1868, art. I, § 21. That same year, the General Assembly chiseled that constitutional guarantee into statutes, adopting a package of habeas provisions that included what is now sections 17-4 and 17-33. *See* Proceedings in Habeas Corpus, ch. 116, §§ 19, 20, 1868–'69 N.C. Public Laws 291, 297–98. The majority gestures to the 1868 expansion of habeas, conceding that the legislature "enacted a more comprehensive statutory scheme." But it ignores *how* the General Assembly enlarged the writ's scope.

Unlike the 1854 Code, the 1868 provisions allowed a prisoner to seek habeas relief when an unforeseen "act, omission or event" entitled him to discharge, even when the original confinement was lawful. *See* Proceedings in Habeas Corpus, ch. 116, § 20(2), 1868–'69 N.C. Public Laws 291, 298. So though the pre-Civil War statute aligned with the majority's reading, the legislature overhauled that regime, extending habeas where it was before foreclosed. As this Court recently explained, the changes "ma[de] to a statute's text over time provide evidence of the statute's intended meaning." *See Wynn v. Frederick*, 385 N.C. 576, 582 (2023). And here, those historical changes point in Mr. Daw's favor—by breaking from earlier provisions, the General Assembly consciously rejected the cramped vision of habeas available at common law and adopted by the majority today. In broader view, too, the legislature adopted section 17-4 and section 17-33 at the same time, betokening those provisions' congruence and independent force. Weighing in on that point, the Drafting Committee confirmed that each part of the newly enacted habeas statutes was intended "to fit in and harmonize with the other[s]" as a "consistent whole." N.C. Code Civ. P. of 1968, Second Report of the Code Commissioners.

Also important is the legislature's tacit approval of habeas claims like Mr. Daw's. This Court invoked subsection 17-33(2) in 1954, endorsing

habeas relief "notwithstanding [subsection] 17-4(2)." *In re Harris*, 241 N.C. at 180. The Court of Appeals took up that torch in 1976—in a string of five cases, it has blessed section 17-33 as an exception to subsection 17-4(2). If the General Assembly disagreed with that reading, it has had seventy years to correct our precedent and forty-eight for the Court of Appeals'. It has not. *Cf. In re G.B.*, 377 N.C. 106, 118 (2021) (pointing to "decades" old precedent and emphasizing that "[a]t no point during th[e] interim time period . . . has the Legislature chosen to amend the pertinent statute to alter our holding").

This is not because the General Assembly ignored habeas altogether. In 1967—over a decade after we endorsed a claim under subsection 17-33(2)—the legislature modified the habeas provisions to remove child-custody cases. *See* An Act to Rewrite the Statutes Relating to Custody and Support of Minor Children, ch. 1153, § 1, 1967 N.C. Sess. Laws 1772, 1772. And over a decade after that amendment, the General Assembly replaced other post-conviction filings with motions for appropriate relief, but expressly preserved recourse through habeas. *See* N.C.G.S. § 15A-1411(c) (1978) ("The availability of relief by motion for appropriate relief is not a bar to relief by writ of habeas corpus."). Reading subsection 17-4(2) to engulf section 17-33 would thus rewrite statutes that the General Assembly has left untouched.

III. Section 17-33 allows Mr. Daw to test the constitutionality of his continued incarceration during COVID-19.

As a matter of statutory interpretation, this case should be straightforward. Though subection 17-4(2) forecloses habeas petitions that simply relitigate the merits of a conviction or sentence, section 17-33 carves a different lane for a different type of claim. Despite the former's "general prohibition," the latter provides "specific permission," *see* Scalia & Garner, at 183, allowing a discrete class of petitioner to test the "legal cause" for their "continu[ed]" imprisonment, N.C.G.S. § 17-33. Harmonizing subsection 17-4(2) with section 17-33 honors the legislature's chosen words, respects the context and interrelation of the habeas provisions, coheres with precedent, and tracks habeas' statutory evolution. On a deeper level, too, it aligns with the purpose of the writ and its role in our constitutional scheme.

The "principal object" of habeas is to free "a party from illegal restraint." *State v. Miller*, 97 N.C. 451, 454 (1887). Above all, it is "an adaptable remedy," not a "static, narrow, formalistic" device. *Boumedienne v. Bush*, 553 U.S. 723, 779–80 (2008) (quoting *Jones v. Cunningham*, 371 U. S. 236, 243 (1963)). From its roots in medieval England, the writ

"has grown to achieve its grand purpose" as a tool against "all manner of illegal confinement." *Id.* (quoting 3 William Blackstone, Commentaries *131). Consistent with that historical sweep, habeas serves to "effect discharge from any confinement contrary to the Constitution or fundamental law, even though imposed pursuant to conviction by a court of competent jurisdiction." *Preiser v. Rodriguez*, 411 U.S. 475, 485 (1973). A prisoner placed "under additional and unconstitutional restraints during his lawful custody" may "arguabl[y]" invoke habeas to "remove the restraints making the custody illegal." *Id.* at 499.

In my view, a duly imprisoned defendant may seek habeas relief when the state violates his constitutional rights and exacts restraint in "excess" of the sentence imposed. *In re Holley*, 154 N.C. at 168. As this Court has recognized, "basic constitutional rights adhere inside as well as outside the prison walls." *State v. Primes*, 314 N.C. 202, 208 (1985). Confinement is thus unlawful—and so habeas available—when a person is "imprisoned contrary to the law of the land." *In re Holley*, 154 N.C. at 168; *see also Phillips*, 185 N.C. at 619 (holding that a habeas petitioner's "sentence [wa]s void, being in contravention of [his] constitutional rights"). That is, when a constitutional violation is layered atop an otherwise valid detention, that extra sanction pushes the confinement into impermissible terrain. *See id.* Or, to use the language of section 17-33, an "act, omission or event" has converted the lawful "original imprisonment" into one without "legal cause." *See* N.C.G.S. § 17-33; *cf. Goble v. Bounds*, 281 N.C. 307, 311 (1972) ("[A] prisoner takes with him into the prison certain rights which may not be denied him.").

That is because a "conviction and incarceration deprive [a defendant] only of such liberties as the law has ordained he shall suffer for his transgressions." *Coffin v. Reichard*, 143 F.2d 443, 445 (6th Cir. 1944) (per curiam). The Constitution itself delimits any incursions on inmates' liberty interests, as "persons sentenced to prison are not stripped of all constitutional rights at the prison gate." *Primes*, 314 N.C. at 208; *see also Johnston*, 174 N.E.2d at 726 (cleaned up) (affirming that a defendant "validly convicted and placed under the jurisdiction of the Department of Correction" is not "divested of all rights and unalterably abandoned and forgotten by the remainder of society"). By necessity, then, the "fact that a person is legally in prison does not prevent the use of habeas corpus to protect his other inherent rights." *Coffin*, 143 F.2d at 445. A defendant "in lawful custody" may invoke the writ when the government violates "some right to which he is lawfully entitled even in his confinement," such as the "right to personal security against unlawful invasion." *Id.* By breaching those constitutional protections, the state

makes "imprisonment more burdensome than the law allows or curtails [a defendant's] liberty to a greater extent than the law permits." *Id.* (cleaned up). In other words, the government exacts "*further* restraint *in excess* of that permitted by the judgment or constitutional guarantees." *Johnston*, 174 N.E.2d at 726. Habeas is thus available to fulfill its traditional role: "alleviat[ing] the oppression of unlawful imprisonment," *id.*, and redressing "[a]ny unlawful restraint of personal liberty," *Coffin*, 143 F.2d at 445.

Those principles apply to Mr. Daw's claim, understanding that he may not have been able to prove the alleged facts. He does not dispute his conviction or sentence—by all accounts, his trial was fair and his original punishment just. Instead, he argues that COVID-19 changed the nature of his imprisonment, varying the sentence served from the one authorized by law. His petition highlights the unique danger of COVID-19 for prisoners with respiratory conditions, a danger that threated to turn a term of years into a death sentence. And when Mr. Daw sought release, that risk was real. In June 2020, the prisons were overcrowded and the state's policies inadequate. Because of his medical history and the state's meager response to the pandemic, Mr. Daw urged that his continued imprisonment during COVID-19 was cruel and unusual punishment.

Mr. Daw was sentenced to prison, not COVID-19. Though incarceration carries implicit risks, avoidable exposure to a dangerous virus is not one of them. *See Helling v. McKinney*, 509 U.S. 25, 33 (1993). It is "cruel and unusual punishment to hold convicted criminals in unsafe conditions." *Youngberg v. Romeo*, 457 U. S. 307, 315–16 (1982). For that reason, the state violates the Eighth Amendment by "ignor[ing] a condition of confinement that is sure or very likely to cause serious illness and needless suffering," *Helling*, 509 U.S. at 33. When the state defies that constitutional safeguard, it exacts "*further* restraint *in excess* of that permitted by the judgment or constitutional guarantees." *Johnston*, 9 N.Y.2d at 485. Applied here, if the state deliberately ignored Mr. Daw's exposure to a "serious, communicable disease," then it inflicted "needless suffering" in violation of his rights and beyond his lawful sentence. *Helling*, 509 U.S. at 31–33. On habeas, then, section 17-33 allowed Mr. Daw to test the constitutionality of his continued confinement under the state's COVID-19 policies. Rather than attacking an error in his original conviction or sentence, he sought relief because a later event—his alleged "compelled exposure" to a uniquely dangerous virus—was an "unnecessary and wanton infliction of pain" beyond his lawful punishment. *See Estelle v. Gamble*, 429 U.S. 97, 104–05 (1976) (explaining that the state's "deliberate indifference to serious medical needs of prisoners

constitutes the unnecessary and wanton infliction of pain proscribed by the Eighth Amendment" (cleaned up)).

IV. Conclusion

I would dismiss this case as moot rather than weaponizing a long-dead controversy to bar habeas courts from redressing unconstitutional imprisonment. On the merits, I would apply the statutes the legislature enacted, adhere to our precedent, and allow Mr. Daw to file and litigate his habeas petition under section 17-33. The majority effectively erases that provision, replacing the legislature's words with the pre-Civil War version of the law. All the normal tools of statutory interpretation—language, context, precedent, and history—rebuff the majority's stilted reading. Today's holding is the latest effort to turn the Great Writ into a paper tiger. It extinguishes an important safeguard of fundamental freedoms. With respect, I dissent.

Justice RIGGS dissenting.

I agree with Justice Earls' analysis of the mootness exception issue and write separately to emphasize how ill-advised it is for this Court to take cases where our decision has no practical effect and the matter needs no prompt resolution. Indeed, the majority gives such short shrift to its mootness exception analysis that it becomes clear that the majority was determined to issue a decision significantly altering habeas law in this state, regardless of the propriety of the case utilized to do so. This kind of ends-driven jurisprudence is antithetical to the principle of judicial restraint. Making dramatic change to our law via a case in which the issue is no longer justiciable only confirms that this Court believes it is in a law-making role and elevates judicial activism over judicial restraint.

While defendant Philip Brandon Daw raised important questions about the State's responsibility to ensure the physical safety of those confined during a global pandemic, Mr. Daw's situation no longer required this Court to act. Mr. Daw, who suffers from asthma, was incarcerated at Harnett Correctional Institution (HCI) during the summer of 2020—the height of the Coronavirus Pandemic. Due to his chronic lung disease and the documented heightened susceptibility of incarcerated people to the coronavirus, Mr. Daw sought habeas relief. In particular, Mr. Daw's petition argued that the conditions at HCI were "cruel and unusual" and thus, violated the Eighth Amendment to the United States Constitution. The trial court rejected his argument. Mr. Daw then sought

review from the Court of Appeals. While that appeal was pending, the North Carolina Department of Public Safety, acting under N.C.G.S. § 148-4, expanded the qualifications for participation in its Extended Limits of Confinement Program. Among the criteria were having "a 2020 or 2021 release date and underlying health conditions deemed by CDC that increase a person's risk of severe illness from COVID-19." Because Mr. Daw met those criteria, he was subsequently released.

With Mr. Daw no longer incarcerated at HCI, his writ of habeas corpus now seeks no actual relief. Thus, because this case was moot and did not fall under the public interest exception, I dissent.[1]

MOOTNESS & THE PUBLIC INTEREST EXCEPTION

The general rule is simple: Our courts "do not decide moot cases." *Chavez v. McFadden*, 374 N.C. 458, 467 (2020); *see also State ex rel. Martin v. Sloan*, 69 N.C. 128, 128 (1873) (opining that when "neither party has any interest in the case except as to cost[,]" this Court "[is] not in the habit of deciding the case"). Mootness is a creature of "judicial restraint" rather than "a lack of jurisdiction," *Chavez*, 374 N.C. at 467 (quoting *Cape Fear River Watch v. N.C. Env't Mgmt. Comm'n*, 368 N.C. 92, 100 (2015)), and counsels us to avoid "second guess[ing] the actions of the legislative and executive branches," thereby respecting the separation of powers, *Cmty. Success Initiative v. Moore*, 384 N.C. 194, 206–07 (2023). Our "courts will not entertain or proceed with a cause merely to determine abstract propositions of law." *In re Peoples*, 296 N.C. 109, 147 (1978). Moreover, by only sticking to "live controversies, we 'ensur[e] concrete adverseness that sharpens the presentation of issues.' " *Walker v. Wake Cnty. Sheriff's Dep't*, 385 N.C. 300, 304 (2023) (order) (Earls, J., concurring in part and dissenting in part) (alteration in original) (quoting *Comm. to Elect Dan Forest v. Emps. Pol. Action Comm.*, 376 N.C. 558, 595 (2021)).

But, as with most rules in law and life, there are exceptions. In few words, the majority here says the public interest exception applies. This Court first acknowledged the public interest exception in *North Carolina State Bar v. Randolph*, 325 N.C. 699 (1989) (per curiam), which arose out of an alleged Rules of Professional Conduct violation by a probate attorney who paid himself attorney's fees using the estate's funds. *Id.* at 700. The trial court ordered that the State Bar be added as a party to a lawsuit brought by the estate's administratrix and then ordered the State

1. I agree with Justice Earls that no other exception applies but do not address those exceptions in detail because no other exceptions have been addressed in this case.

Bar to dismiss the grievance filed with it against the probate attorney. *Id.* at 701. The State Bar disputed the trial court's authority to take these actions. *Id.* But because both the trial court and the State Bar exonerated the attorney of any wrongdoing, *id.* at 700, on appeal the defendant probate attorney argued that the case was moot, *id.* at 701. This Court only briefly addressed the mootness question, declaring that it had plenary discretion to "consider a question that involves a matter of public interest, is of general importance, and deserves prompt resolution." *Id.* This Court applied the exception and reversed the trial court because the Court "conclude[d] that a jurisdictional dispute between the superior court and the North Carolina State Bar presents such a question." *Id.*

Since *Randolph*, this Court has considered the public interest exception at least three times, often with little explication of its use of the criteria. *See Granville Cnty. Bd. of Comm'rs v. N.C. Hazardous Waste Comm'n*, 329 N.C. 615 (1991); *Cape Fear*, 368 N.C. 92; *Chavez*, 374 N.C. 458. First, in *Granville*, the County sought to enjoin the North Carolina Hazardous Waste Management Commission from proceeding with designating a site for a newly planned hazardous waste treatment facility. *Granville*, 329 N.C. at 616–17. During this litigation, the Commission halted consideration of the site in controversy, and the State was ultimately "expelled" from further participation in the regional multistate agreement, requiring North Carolina to construct and operate a hazardous waste treatment facility. *Id.* at 621–22. Given these developments, the Court concluded that the case was moot. *Id.* at 622. Nevertheless, the Court reached the merits of the dispute "[b]ecause the process of siting hazard waste facilities involves the public interest and deserves prompt resolution in view of its general importance." *Id.* at 622–23.

Then, in *Cape Fear River Watch*, this Court was tasked with determining whether a trial court erred in partially reversing an Environmental Management Commission declaratory ruling. That ruling addressed the application of groundwater protection rules to coal ash lagoons that received operating permits before a certain date. 368 N.C. at 93. Shortly after the trial court's order, the General Assembly enacted N.C.G.S. § 143-215.1(k), which subjected all coal ash lagoons to the Commission's rule, irrespective of the date the lagoon was first permitted. *Id.* at 98. The Court determined that this new legislation rendered the case moot. *Id.* at 98–100. The Court further refused to invoke the public interest exception because, although "the appropriate response to the environmental issues associated with the operation of coal ash lagoons is clearly a matter of significant public interest," there was no "indication that any

decision [the Court] might make . . . would have any practical impact." *Id.* at 100; *see also id.* at 451 ("[W]e believe that we should refrain from issuing what amounts to an advisory opinion . . . .").

Most recently in *Chavez*, this Court addressed whether state judges had the authority to grant habeas relief for individuals held in custody pursuant to an agreement under section 287(g) of the Immigration and Nationality Act. 374 N.C. at 460–61. Two habeas petitioners challenged their custody in the Mecklenburg County Jail and the trial court ordered that they be immediately brought for a habeas hearing, but the Sheriff refused to produce either petitioner to the trial court. *Id.* at 462. That court then ruled in favor of the petitioners and ordered that they be discharged from custody, but the Sheriff instead delivered them to federal custody. *Id.* at 462–63. Because both petitioners were no longer detained at Mecklenburg County Jail, the parties conceded that the case was moot. *Id.* at 468. Still, this Court invoked the public interest exception and decided the case because (1) "lawful and unlawful immigration have become the subject of much debate in North Carolina in recent years" and (2) "several law enforcement agencies across our State continue to operate pursuant to [section] 287(g) agreements." *Id.* The *Chavez* Court's decision to hear the case boiled down to "the likelihood that [similar] issues . . . [would] continue to arise in the future." *Id.*

In light of this precedent on the public interest exception, I think it is clear that the majority's logic is flawed. The majority begins its brief analysis with factors this Court has never considered in deciding whether the public interest exception applies. The majority expresses concern with the scope of the opinion below, describing it as "expansive" and "not limited to the COVID context" because, despite affirming the trial court's denial of the petition, the Court of Appeals did not hold as this Court does today that Mr. Daw was not entitled to bring the petition. Even assuming this concern somehow speaks to a likelihood that the question will reoccur, which is a stretch, the majority misses the mark because under the public interest exception, this Court focuses on whether similar issues will arise based on similar facts. *See Chavez*, 374 N.C. at 468 (considering whether there is a "likelihood that issues similar to those that have been debated *by the parties to this case* will continue to arise in the future" (emphasis added)). Moreover, the majority's characterization of the scope of the decision is questionable: Just because the Court of Appeals interpreted a law of general applicability does not mean that court issued an expansive opinion unrestricted to Mr. Daw's specific set of facts. *See State v. Daw*, 277 N.C. App. 240, 261 (2021) (denying any relief to Mr. Daw under the habeas statute based on

the petition's evidentiary failures, thus not expanding the applicability of the habeas statute). And regardless, such a consideration is again not relevant to our analysis under our mootness exception precedent.

The majority also reasoned that the public interest exception is necessarily invoked because the opinion below now binds the Court of Appeals and trial courts and the decision below relies on prior Court of Appeals cases. But the majority is off target again. Analysis of the mootness factors and exceptions under this Court's precedent actually supports an opposite result when, as here, the issue presented is mooted by an intervening, unilateral act by one party. *State ex rel. Utils. Comm'n v. S. Bell Tel. & Tel. Co.*, 289 N.C. 286, 288 (1976). In other words, because of Mr. Daw's release from HCI—an intervening event by the State—"a dispute between the parties to this appeal no longer exists." *Id*. Even using the majority's own logic about precedential effect and reliance on prior decisions, the majority should have, at most, limited itself to dismissing this appeal and vacating the judgment below.

Finally, the majority ends its brief analysis of the public interest exception on an ironic note: by noting habeas corpus's "essential function of providing relief for those unlawfully restrained of their liberty" as a justification for why the majority should consider a moot case with no immediate or practical implications. To be clear, this decision eviscerates that function for state post-conviction relief. And in order to achieve this result, the majority had to misapply the public interest exception test to even decide this case.

Specifically, while public health and habeas law generally are matters of public interest, Mr. Daw's specific case no longer had any public interest tied to it. Mr. Daw's habeas petition related to *his* chronic medical condition while he was at HCI during the height of the Coronavirus Pandemic, which has since been significantly mitigated. This situation is markedly different than that in *Chavez*, in which this Court noted that "lawful and unlawful immigration have become the subject of much debate in North Carolina in recent years" and thus ruled that the case concerned the public interest. *Chavez*, 374 N.C. at 468. Today, with the availability of vaccines and better understanding of how the disease is spread, the perception of the physical consequences of confinement of people with certain underlying health conditions and their heightened susceptibility to the coronavirus is different and less concerning when compared with the situation in the summer of 2020.

This case also does not require prompt resolution, which further weighs against invoking the public interest exception. Mr. Daw is no

longer in the State's custody at HCI and thus, is no longer eligible for habeas relief. Mr. Daw's exact situation is unlikely to occur again given that the Coronavirus Pandemic has abated as a result of the development of vaccines and a better understanding of how to prevent transmission. Or, at least, fears of future public health crises and the effect of pre-existing conditions on susceptibility to future viruses are too nonspecific and unsupported to justify invocation of the exception on this record. This case also stands in stark contrast to *Chavez*, in which the Court was particularly concerned with the great likelihood that a similar case would arise in the future because "several law enforcement agencies across our State continue to operate pursuant to § 287(g) agreements." *Id.* at 468.

There is also no need for prompt resolution of this case for the exact reason the majority points out—our General Assembly structured habeas relief by enacting N.C.G.S. §§ 17-4(2) and 17-33(2) over a century ago and has not significantly altered that relief, insofar as it relates to the case here today, since then. *See Cape Fear*, 368 N.C. at 100 (refusing to invoke the public interest exception because the General Assembly already enacted legislation addressing the parties' issue). The majority highlights that the opinion below relied on prior decisions interpreting sections 17-4(2) and 17-33(2), *see*, *e.g.*, *State v. Leach*, 227 N.C. App. 399 (2013); *Hoffman v. Edwards*, 48 N.C. App. 559 (1980); *In re Stevens*, 28 N.C. App. 471 (1976), but in the nearly fifty years that those cases have been on the books, the General Assembly has not acted contrary to those decisions, *see Connette ex rel. Gullatte v. Charlotte-Mecklenburg Hosp. Auth.*, 382 N.C. 57, 80 (2022) (Barringer, J., dissenting) ("Of course, the legislature, which is not bound by stare decisis, could have at any time in the last ninety years enacted a different rule . . . ."). As amici note, our General Assembly's "inactivity in the face of the [judiciary's] repeated pronouncements [on this issue] can only be interpreted as acquiescence by, and implicit approval from, that body." *In re T.R.P.*, 360 N.C. 588, 594 (2006) (second alteration in original) (quoting *Rowan Cnty. Bd. of Educ. v. U.S. Gypsum Co.*, 332 N.C. 1, 9 (1992)); *see also State v. Steen*, 376 N.C. 469, 483 (2020) (affirming the decision of the Court of Appeals because, in part, "the General Assembly ha[d] not taken any action tending to suggest" disagreement with prior appellate decisions interpreting the Statute at issue). If our legislature sees no need to disrupt a liberal construction of a habeas statute—statutes freeing "those unlawfully restrained of their liberty"—I see no need for us to claw back that reading.

Although habeas undoubtedly is of "general importance," it does not follow that a mooted habeas issue automatically qualifies for review

under the public interest exception. *See Chavez*, 374 N.C. at 468–69 (only invoking the public interest exception at the intersection of contentious disagreement over the application of federal immigration law in the habeas context rather than on the importance of habeas alone); *In re Popp*, 298 N.E.2d 529, 531 (Ohio 1973) (refusing to invoke the public interest exception in a habeas case in that "there [was] no confinement" and "[t]here [were] remedies to attack the collateral issues raised by petitioner, other than this high prerogative writ"), *syllabus abrogated by In re Klepper*, 361 N.E.2d 427 (Ohio 1977) (per curiam). As other jurisdictions have acknowledged, if matters of legal importance were per se exceptions to mootness, the exception would swallow the rule. *See, e.g.*, *Commonwealth Edison Co. v. Ill. Com. Comm'n*, 51 N.E.3d 788, 791 (Ill. 2016) ("The public interest exception is narrowly construed and requires a clear showing of each of its criteria. . . . Indeed, the public interest exception is invoked only on 'rare occasions' when there is an extraordinary degree of public interest and concern." (internal citations omitted)).

Thus, I believe the majority improperly invoked the public interest exception to mootness to reach the merits of this case. I agree with Justice Earls that it is inappropriate to rewrite habeas law the way the majority has here. Without making any representations regarding the likelihood of success of Mr. Daw's petition, were the case not moot, I would agree that he is entitled to petition for habeas relief and be heard on the merits of his claims.

STATE v. PHILLIPS

[386 N.C. 513 (2024)]

STATE OF NORTH CAROLINA
v.
ANGELA BENITA PHILLIPS

No. 281A23

Filed 23 August 2024

Assault—with a deadly weapon inflicting serious injury—jury instructions—castle doctrine—proportionality of force used—improper

In a prosecution for assault with a deadly weapon inflicting serious injury arising from defendant having shot the victim after the victim entered defendant's front porch, the trial court erred by instructing the jury that defendant did "not have the right to use excessive force" when defending her home, even under the castle doctrine. Based on the statutory formulation of the castle doctrine, which provides that a lawful occupant of a home who uses deadly force against an intruder is presumed to have had a reasonable fear of imminent death or serious bodily harm, the jury could not consider the proportionality of defendant's force unless it found that: (1) defendant was not entitled to the presumption of reasonable fear, or (2) defendant qualified for the presumption to apply, but the State adequately rebutted the presumption. Instead of granting defendant a new trial, the matter was remanded to the Court of Appeals with instructions to analyze whether the trial court's error was prejudicial.

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, 290 N.C. App. 660 (2023), vacating judgment entered 11 May 2022 by Judge James F. Ammons, Jr. in Superior Court, Cumberland County and remanding for a new trial. Heard in the Supreme Court on 11 April 2024.

Joshua H. Stein, Attorney General, by Hyrum J. Hemingway, Assistant Attorney General, for the State.

Mary McCullers Reece, for defendant.

BERGER, Justice.

An individual has a fundamental right to defend his or her home from unlawful intrusion. This principle of personal liberty is grounded in natural law and English common law. *See* Semayne's Case (1604) 77 Eng. Rep. 194, 5 Co. Rep. 91 a. (stating "[t]hat the house of every one is to him as his . . . castle and fortress, as well for his defence against injury and violence"). Commonly known as the castle doctrine, the legislature codified and expanded the fundamental right of defense of habitation in Chapter 14 of the North Carolina General Statutes. Thus, the common law may aid our understanding, but statutes set the boundaries of the law in this area. *See News & Observer Publ'g Co. v. State ex rel. Starling*, 312 N.C. 276, 281 (1984) ("When the General Assembly as the policy making agency of our government legislates with respect to the subject matter of any common law rule, the statute supplants the common law and becomes the law of the State.").

This case presents us with the opportunity to clarify the castle doctrine as established by the legislature. For the reasons set forth herein, we modify and affirm the decision of the Court of Appeals.

I. Factual and Procedural Background

On 4 April 2021, Latonya Dunlap approached defendant's home because she believed defendant had complained about her to their landlord. Witness testimony differed as to whether Ms. Dunlap was angry or intoxicated when she entered defendant's front porch and knocked on the door. Witness accounts also differed as to what exactly occurred next, but all generally agreed that a brief confrontation followed, during which defendant either slapped Ms. Dunlap or struck her in the head with a gun.

Accounts of Ms. Dunlap's actions at this point are conflicting, but witnesses agreed that defendant subsequently fired multiple shots at Ms. Dunlap. One of these shots struck Ms. Dunlap's left side under her chest, causing injuries that required removal of her spleen and pancreas and left her permanently disabled.

Defendant was arrested and later indicted for assault with a deadly weapon with intent to kill inflicting serious injury. At trial, defendant asserted the affirmative defenses of self-defense and defense of habitation, also known as the castle doctrine, and requested the relevant pattern jury instructions. The trial court expressed its concern over the

castle doctrine instruction during the charge conference because, in its view, "self-defense is—whatever the form the legislature puts it—self-defense is to preserve life. It's not to give somebody a license to take somebody's life simply because they've come on their property."

The trial court therefore proposed altering the castle doctrine instruction by including an instruction that defendant did "not have the right to use excessive force." When defendant's counsel objected and pointed out that such prohibition "is used in the common law definition . . . , not the statutory law," the trial court asked, "[I]t's your argument that I can use deadly force at my door on anybody including a little Girl Scout selling cookies . . . ?" The trial court then stated, "Well, this is a troubling statute. . . . I still think this is a correct statement of the law and I do have reservations about it, but I have reservations about the whole thing."

As is relevant here, the trial court initially instructed the jury on the castle doctrine as follows:

> If the defendant assaulted the victim to prevent a forcible entry into the defendant's home or to terminate the intruder's unlawful entry the defendant's actions are excused and the defendant is not guilty. The State has the burden of proving to you from the evidence beyond a reasonable doubt that the defendant did not act in lawful defense of the defendant's home. The defendant was justified in using deadly force if such force was being used to prevent a forcible entry into the defendant's home, the defendant reasonably believed the intruder would kill or inflict serious bodily harm to the defendant or others in the home, or intended to commit a felony in the home and the defendant reasonably believed that the degree of force the defendant used was necessary to prevent a forcible entry or to terminate the unlawful entry into the defendant's home.
>
> A defendant does not have the right to use excessive force. The defendant had the right to use only such force as reasonably appeared necessary to the defendant under the circumstances to protect the defendant from death or great bodily harm. In making this determination you should consider the circumstances as you find them to exist from the evidence including the size, age, and strength of

> the defendant as compared to the victim; the fierceness of any assault upon the defendant; and whether the victim possessed a weapon.

Immediately following this portion of the instructions, a juror asked the trial court: "Sir, can you repeat the last." The trial court acknowledged that "[i]t is confusing . . . let me just start over" and began the recitation of instructions again. As is relevant here, the trial court then instructed the jury that:

> [A]bsent evidence to the contrary, the lawful occupant of a home is presumed 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 another if both of the following apply. The person against whom the defensive force was used was in the process of unlawfully and forcefully entering or had unlawfully and forcefully entered a home or if that person had removed or was attempting to remove another person against their will from the home, and two, that the person who uses the defensive force knew or had reasonable grounds to believe that an unlawful and forcible entry or unlawful or forcible act was occurring or had occurred.
>
> However, the defendant does not have the right to use excessive force. The defendant had the right to use only such force as reasonably appeared necessary to the defendant under the circumstances to protect the defendant from death or great bodily harm. In making this determination you should consider the circumstances you find to have existed from the evidence including the size, age, and strength of the defendant as compared to the victim; the fierceness of the assault, if any, upon the defendant; and whether the victim possessed a weapon. Again, you, the jury, determine the reasonableness of the defendant's belief from the circumstances appearing to the defendant at the time.

The jury determined that defendant did not act with the intent to kill Ms. Dunlap, and she was found guilty of assault with a deadly weapon inflicting serious injury. The trial court sentenced defendant to twenty-five to forty-two months incarceration, and defendant timely appealed.

At the Court of Appeals, defendant argued that the trial court "erroneously instructed the jury" on the castle doctrine defense "by including an instruction on the prohibition of excessive force." *State v. Phillips*, 290 N.C. App. 660, 660 (2023). A majority of the Court of Appeals' panel agreed with defendant and determined that "[u]nder the Castle Doctrine, excessive force is impossible unless the State rebuts the Castle Doctrine presumption" that the defendant held a reasonable fear of death or serious injury. *Id.* at 664. The majority reasoned that because the trial court's instruction on excessive force essentially eliminated the jury's ability to resolve the factual issue of whether such presumption was rebutted, the instruction was erroneous. *Id.* at 665. "Because the trial court's instruction was both erroneous and confusing," the majority concluded that defendant was prejudiced by this error, vacated the trial court's judgment, and remanded the matter for a new trial. *Id.* at 665–66.

One judge dissented, arguing that the trial court did not err because the statutory castle doctrine defense "track[s] consistently with . . . common law defenses," including the common law prohibition against excessive force. *Id.* at 668 (Hampson, J., dissenting). The State appealed based on the dissent and argues that the castle doctrine statute preserves the common law's prohibition on excessive force. As this issue involves questions of statutory interpretation, we review de novo. *See State v. Lamp*, 383 N.C. 562, 569 (2022).

II. Analysis

A. The Castle Doctrine's Evolution in North Carolina

"A man's house, however humble, is his castle, and his castle he is entitled to protect against invasion." *State v. Gray*, 162 N.C. 608, 613 (1913) (cleaned up). Thus, it is well-settled that "[a]n attack on the house or its inmates may be resisted by taking life." *Id.* (cleaned up). This fundamental principle of defense of habitation is known as the castle doctrine. Though the law has consistently protected one's right to defend his or her home with deadly force, the circumstances under which this use of force has been permitted by the courts have vacillated and evolved over the last century and a half.

In 1883, this Court considered a case in which the defendant's home was surrounded by an armed "band of young men" who "marched round his house, blowing horns, ringing bells and firing guns and pistols." *State v. Nash*, 88 N.C. 618, 620 (1883). The defendant "submitted to the humiliating indignity and remained within doors, until his little daughter . . . ran to him with her face bleeding." *Id.* Believing that his daughter had been shot, the defendant "seized his gun and went to the

door, saw the flash of fire-arms, and shot into the crowd," wounding one of the men. *Id.*

The trial court denied the defendant's request to testify as to the above information, and he was convicted of assault with a deadly weapon. *Id.* at 622. This Court awarded a new trial, reasoning that even though the defendant's daughter had in fact been injured by running into a table—not by a gunshot—the defendant "ought to have been acquitted" if he "ha[d] reasonable ground to believe that his daughter had been shot, and the assault upon him and his house was continuing." *Id.* at 620.

Thirty years later, this Court decided *Gray*, a case in which the defendant killed a man who, along with three other men, was attempting to break into the defendant's home. 162 N.C. at 612. The trial court instructed the jury that the killing would be justified if the victim was attempting to unlawfully enter the home and if the defendant reasonably believed deadly force was necessary to protect himself or his family, but that such justification would only be available if the jury found that one of the men outside was armed with a pistol. *Id.* at 611. The defendant was convicted of manslaughter and sentenced to three years imprisonment. *Id.* at 612.

This Court awarded the defendant a new trial, holding that the "guilt or innocence of the defendant does not depend upon the presence of a pistol in the hands of the deceased," but rather on the "existence of a reasonable apprehension that [the defendant] or some member of his family was about to suffer great bodily harm" or a "reasonable belief that it was necessary to kill in order to prevent the violent and forceful entry of an intruder into his home." *Id.*

By 1966, this Court recited the evolving common law formulation of the castle doctrine as:

> When a trespasser enters upon a man's premises, makes an assault upon his dwelling, and attempts to force an entrance into his house in a manner such as would lead a reasonably prudent man to believe that the intruder intends to commit a felony or to inflict some serious personal injury upon the inmates, a lawful occupant of the dwelling may legally prevent the entry, even by the taking of the life of the intruder. Under those circumstances, the law does not require such householder to flee or remain in his house until his assailant is upon him, but he may open his door and shoot his assailant, if such course is apparently

> necessary for the protection of himself or family. But the jury must be the judge of the reasonableness of defendant's apprehension. A householder will not, however, be excused if he employs excessive force in repelling the attack, whether it be upon his person or upon his habitation.

State v. Miller, 267 N.C. 409, 411 (1966) (cleaned up).

In 1979, this Court noted that "the distinction between the rules governing defense of habitation and self-defense in the home is a fine one indeed." *State v. McCombs*, 297 N.C. 151, 158 (1979). In an attempt to prevent further blurring of that fine line, this Court concluded that under the common law formulation "the use of deadly force in defense of the habitation is justified only to *prevent* a forcible entry into the habitation," and that "[o]nce the assailant has gained entry . . . the usual rules of self-defense replace the rules governing defense of habitation, with the exception that there is no duty to retreat." *Id.* at 156–57 (emphasis added).

In 1994, the General Assembly, the policy-making branch of our government, spoke on this issue when it enacted N.C.G.S. § 14-51.1. *See* An Act to Permit the Use of Deadly Force Against an Intruder Under Certain Circumstances and to Provide that a Lawful Occupant Does Not Have a Duty to Retreat from an Intruder, as Provided at Common Law, ch. 673, § 1, 1994 N.C. Sess. Laws 360. This statute provided that:

> (a) A lawful occupant within a home or other place of residence is justified in using any degree of force that the occupant reasonably believes is necessary, including deadly force, against an intruder to prevent a forcible entry into the home or residence or to terminate the intruder's unlawful entry (i) if the occupant reasonably apprehends that the intruder may kill or inflict serious bodily harm to the occupant or others in the home or residence, or (ii) if the occupant reasonably believes that the intruder intends to commit a felony in the home or residence.
>
> (b) A lawful occupant within a home or other place of residence does not have a duty to retreat from an intruder in the circumstances described in this section.

> (c) This section is not intended to repeal, expand, or limit any other defense that may exist under the common law.

N.C.G.S. § 14-51.1 (1999) (repealed 2011). In contrast to the common law formulation that permitted the use of deadly force only to "[p]revent a forcible entry into the habitation," *McCombs*, 297 N.C. at 156, the plain language of section 14-51.1 allowed the use of deadly force to "terminate the intruder's unlawful entry." N.C.G.S. § 14-51.1(a) (repealed 2011). Thus, "[i]n enacting N.C.G.S. § 14-51.1, the General Assembly broadened the defense of habitation to make the use of deadly force justifiable whether to *prevent* unlawful entry into the home or to *terminate* an unlawful entry by an intruder." *State v. Blue*, 356 N.C. 79, 89 (2002).

Despite this broadening of the common law formulation, however, section 14-51.1 retained the common law's prohibition against excessive force. *See* N.C.G.S. § 14-51.1(a) (repealed 2011) ("A lawful occupant . . . is justified in using any degree of force that the occupant *reasonably believes* is necessary . . . ." (emphasis added)); *see also Miller*, 267 N.C. at 411 ("A householder will not, however, be excused if he employs excessive force in repelling the attack . . . ."); *Gray*, 162 N.C. at 612 ("The guilt or innocence of the defendant . . . depend[s] upon . . . the reasonable belief that it was necessary to kill."); *Nash*, 88 N.C. at 622 ("The defendant must judge, at the time, of the ground of his apprehension, and he must judge at his peril; for it is the province of the jury on the trial to determine the reasonable ground of his belief.").

In 2011, the General Assembly repealed section 14-51.1 and replaced it with a more detailed statutory scheme that expanded and clarified use of force protections. *See* An Act to Provide When a Person May Use Defensive Force and to Amend Various Laws Regarding the Right to Own, Possess, or Carry a Firearm in North Carolina, S.L. 2011-268, § 2, 2011 N.C. Sess. Laws 1002, 1004. This statutory scheme provides, in relevant part, that:

> [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 *either* of the following applies:
>
> (1) He or she reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or herself or another.

> (2) Under the circumstances permitted pursuant to G.S. 14-51.2 [the castle doctrine statute].

N.C.G.S. § 14-51.3(a) (2023) (emphasis added). Thus, the State argues that "the common law prohibition on excessive force survives enactment of North Carolina's uniform statutory defensive-force law" and the trial court properly instructed that defendant, "in relying on the statutory Castle Doctrine, was prohibited from using excessive force."

However, as section 14-51.3(a) provides that a person is "justified in the use of deadly force" if they possess a reasonable belief "that such force is necessary" *or* if the force is used "[u]nder the circumstances permitted" by the castle doctrine statute, the statute's plain language allows for two separate grounds justifying the use of deadly force. The former requires the person to demonstrate a reasonable belief that the degree of force used was necessary to prevent imminent death or great bodily harm, or, in other words, that the degree of force used was proportional and not excessive. *See id.* § 14-51.3(a)(1). The latter does not. *See id.* § 14-51.3(a)(2). Instead, it requires *only* that the person demonstrate their use of deadly force occurred "[u]nder the circumstances permitted" by the castle doctrine statute. *Id.* To resolve this case, we must therefore examine what is permitted under the castle doctrine.

B. Operation of Section 14-51.2

The castle doctrine statute, entitled "Home, workplace, and motor vehicle protection; presumption of fear of death or serious bodily harm," is a clear and concise statutory enactment that has yet to be fully interpreted by this Court. *Id.* § 14-51.2. Because this case squarely raises questions of the statute's meaning, we take this opportunity to clarify the scope of the castle doctrine in North Carolina.[1]

As is relevant here, the statute provides:

> (a) The following definitions apply in this section:
>
> (1) Home. — A building or conveyance of any kind, to include its curtilage, whether the building or conveyance is temporary or permanent, mobile or immobile, which has a

1. Although our analysis here focuses on lawful occupants of a home defending against an unlawful and forcible entry, the statute applies equally to lawful occupants of motor vehicles and workplaces. *See* N.C.G.S. § 14-51.2(b). Our analysis and focus on facts particularly relevant to this case should not be construed to dilute applicability in these areas or other statutorily prescribed circumstances.

roof over it, including a tent, and is designed as a temporary or permanent residence.

. . . .

(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.

(c) The presumption set forth in subsection (b) of this section shall be rebuttable and does not apply in any of the following circumstances:

(1) The person against whom the defensive force is used has the right to be in or is a lawful resident of the home, motor vehicle, or workplace, such as an owner or lessee, and there is not an injunction for protection from domestic violence or a written pretrial supervision order of no contact against that person.

(2) The person sought to be removed from the home, motor vehicle, or workplace is a child or grandchild or is otherwise in the lawful custody or under the lawful guardianship of the person against whom the defensive force is used.

(3) The person who uses defensive force is engaged in, attempting to escape from, or using the home, motor vehicle, or workplace to further any criminal offense that involves the use or threat of physical force or violence against any individual.

(4) The person against whom the defensive force is used is a law enforcement officer or bail bondsman who enters or attempts to enter a home, motor vehicle, or workplace in the lawful performance of his or her official duties, and the officer or bail bondsman identified himself or herself in accordance with any applicable law or the person using force knew or reasonably should have known that the person entering or attempting to enter was a law enforcement officer or bail bondsman in the lawful performance of his or her official duties.

(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.

(d) A person who unlawfully and by force enters or attempts to enter a person's home, motor vehicle, or workplace is presumed to be doing so with the intent to commit an unlawful act involving force or violence.

(e) A person who uses force as permitted by this section is justified in using such force and is immune from civil or criminal liability for the use of such force, unless the person against whom force was used is a law enforcement officer or bail bondsman who was lawfully acting in the performance of his or her official duties and the officer or bail bondsman identified himself or herself in accordance with any applicable law or the person using force knew or reasonably

> should have known that the person was a law enforcement officer or bail bondsman in the lawful performance of his or her official duties.
>
> (f) A lawful occupant within his or her home, motor vehicle, or workplace does not have a duty to retreat from an intruder in the circumstances described in this section.
>
> (g) This section is not intended to repeal or limit any other defense that may exist under the common law.

N.C.G.S. § 14-51.2.

The statute operates as follows. First, any person who "unlawfully and by force enters or attempts to enter" a home is "presumed to be doing so with the intent to commit an unlawful act involving force or violence," and this presumption is non-rebuttable. *Id.* § 14-51.2(d). Second, a lawful occupant of a home who knows or has reason to believe such unlawful entry or attempted entry occurred or is occurring, and who uses force against the intruder that is intended or likely to cause death or serious bodily injury, is "presumed to have held a reasonable fear of imminent death or serious bodily harm" and has no duty to retreat from the intruder. *Id.* § 14-51.2(b), (f). Finally, if a lawful occupant of a home uses deadly force as permitted by this statute, he or she is "immune from civil or criminal liability for the use of such force," subject only to a narrow exception not relevant here. *Id.* § 14-51.2(e).

However, the statutory presumption of a lawful occupant's reasonable fear of death or serious bodily harm is "rebuttable and does not apply in *any* of the . . . circumstances" listed in subsection (c). *Id.* § 14-51.2(c) (emphasis added). The plain language of subsection (c), and the legislature's clear intent to significantly broaden castle doctrine protections by repealing section 14-51.1 and enacting section 14-51.2, compels the conclusion that the presumption of reasonable fear may be rebutted only by the circumstances set forth in subsection (c).

Practically, if the presumption could be rebutted by other circumstances, such as the victim's relative size or strength, it would serve no purpose. There is no meaningful difference between a jury considering whether a victim's inferior strength rebutted the presumption of the defendant's reasonable fear under the castle doctrine statute and a jury considering whether a victim's inferior strength undercut the defendant's attempt to demonstrate his or her reasonable fear under

the general self-defense statute. Accordingly, we hold that the castle doctrine's statutory presumption of reasonable fear may only be rebutted by the circumstances contained in section 14-51.2(c).

The expansive protections afforded to lawful occupants of a home does not mean that the castle doctrine is "a license to kill" or that the statute allows for "open season on Girl Scouts and trick-or-treaters." *State v. Copley*, 900 S.E.2d 904, 913 (N.C. 2024). The castle doctrine's primary legal protection—the presumption of reasonable fear—will only apply when the defendant satisfies the specific statutory requirements as detailed above. *See* N.C.G.S. § 14-51.2(b). However, if those requirements are met and the circumstances in section 14-51.2(c) are not present, the presumption applies, and the individual is "immune from civil or criminal liability."[2] *Id.* § 14-51.2(e).

C. Excessive Force and the Presumption of Reasonable Fear

It is fundamental that a jury must be properly instructed on the law. *See State v. Walston*, 367 N.C. 721, 730 (2014) ("The jury charge is one of the most critical parts of a criminal trial."); *State v. Lee*, 370 N.C. 671, 674 (2018) ("Where competent evidence of self-defense is presented at trial, the defendant is entitled to an instruction on this defense, as it is a substantial and essential feature of the case." (cleaned up)). Thus, absent a pretrial determination of immunity, when a defendant asserts the castle doctrine defense at trial, the jury must first determine whether the defendant is entitled to the presumption as set forth in section 14-51.2(b). If the jury finds that the defendant is not entitled to the presumption, the castle doctrine statute does not apply and the jury must determine the defendant's culpability under section 14-51.3, the general self-defense statute.

Alternatively, if the jury finds that the defendant is entitled to the presumption, it must then determine whether the State has rebutted the presumption by proving any of the circumstances set forth in section 14-51.2(c). If the jury finds that the State has rebutted the presumption, the jury must determine whether the defendant's use of force was proportional. However, if the jury finds that the State failed to rebut the presumption, the defendant *must* be acquitted in accordance with section 14-51.2(e). *See Copley*, 900 S.E.2d at 914 ("When a defendant lawfully defends his home in line with section 14-51.2 and the State does

2. However, justification for defensive force, whether under general self-defense or the castle doctrine, is not available to certain individuals. *See* N.C.G.S. § 14-51.4.

not rebut the statutory presumption of reasonableness, his force is a justified defensive measure immune from criminal culpability.").

In this case, the trial court told defendant's counsel that "self-defense is—*whatever the form the legislature puts it*—self-defense is to preserve life. It's not to give somebody a license to take somebody's life simply because they've come on their property." (Emphasis added.) The trial court then instructed the jury that even if the castle doctrine applied, "the defendant does not have the right to use excessive force" and that "[t]he defendant had the right to use only such force as reasonably appeared necessary . . . to protect the defendant from death or great bodily harm."

Notwithstanding the trial court's seeming acknowledgment that its instruction was contrary to law, the State argues that "the trial court did not err by instructing that defendant, in relying on the statutory Castle Doctrine, was prohibited from using excessive force" because "the common law prohibition on excessive force survives enactment of" section 14-51.2. The State does not "dispute[ ] that the General Assembly possesses the authority to displace the common law through legislative action," *State v. McLymore*, 380 N.C. 185, 190 (2022), or contest our recent holding that "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." *State v. Benner*, 380 N.C. 621, 632 (2022). Instead, the State argues that because the castle doctrine statute does "not address an aspect of the common law of self-defense," i.e., the prohibition against excessive force, "the common law [prohibition] remains intact." *McLymore*, 380 N.C. at 191 n.2.

The common law prohibition against excessive force is a proportionality requirement under which a defendant must demonstrate their reasonable belief that the degree of force used was necessary to prevent the threatened harm. This common law principle is now codified in the general self-defense statute, which justifies "the use of deadly force" where the defendant "reasonably believe[d] that such force [wa]s necessary to prevent imminent death or great bodily harm to himself or herself or another." N.C.G.S. § 14-51.3(a)(1).

Such is not the case in the castle doctrine context, however. By repealing section 14-51.1 and enacting a more comprehensive statutory scheme, the General Assembly abrogated this principle for the lawful occupants of homes, businesses, and automobiles. As noted above, the legislature has provided that "a person is justified in the use of deadly force and does not have a duty to retreat" in two separate scenarios. *Id.*

§ 14-51.3(a). First, if such person "reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or herself or another." *Id.* § 14-51.3(a)(1). Second, if such person uses deadly force "[u]nder the circumstances permitted pursuant to G.S. 14-51.2," the castle doctrine statute. *Id.* § 14-51.3(a)(2).

Thus, where deadly force is used under the circumstances permitted by the castle doctrine statute, the person "is presumed to have held a reasonable fear of imminent death or serious bodily harm." *Id.* § 14-51.2(b). And "[a] person 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." *Id.* § 14-51.2(d).

"Where the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must give it its plain and definite meaning, and are without power to interpolate, or superimpose, provisions and limitations not contained therein." *State v. Camp*, 286 N.C. 148, 152 (1974) (cleaned up). Further, a "marked difference in . . . two clauses, standing as they do in such close juxtaposition," as is the case with sections 14-51.3(a)(1) and (2), "gives clear indication that the Legislature intended to make a distinction" between the provisions. *Prendergast v. Prendergast*, 146 N.C. 225, 226 (1907).

The plain language of sections 14-51.2 and 14-51.3 demonstrates that if a lawful occupant of a home is cloaked with the protections afforded by the castle doctrine and the State fails to rebut the statutory presumption that the lawful occupant had reasonable fear, he or she is justified in the use of force, including deadly force. This is so because unlike the general self-defense statute, the castle doctrine statute itself provides that it is presumptively reasonable for a lawful occupant of a home to (1) perceive an intruder as a deadly threat and (2) respond to that threat with deadly force.

We therefore agree with the Court of Appeals' statement below that "[u]nder the Castle Doctrine, excessive force is impossible unless that State rebuts the Castle Doctrine presumption" by proving one of the five circumstances listed in section 14-51.2(c). *Phillips*, 290 N.C. App. at 664. Had the General Assembly intended to require lawful occupants to demonstrate a reasonable belief that deadly force was necessary, it would not have written a statute that explicitly provides the contrary.

Here, the trial court twice instructed the jury that even if defendant properly invoked the castle doctrine, she nonetheless "d[id] not have the right to use excessive force." As we have detailed herein, the jury should not have considered the proportionality of defendant's force unless the

jury found that either (1) defendant did not qualify to invoke the castle doctrine, or (2) defendant qualified, but the State properly rebutted the presumption of reasonable fear. Because the trial court's instruction failed to accurately recite the law as defined by the legislature, we affirm the portion of the Court of Appeals' decision concluding that this instruction was erroneous.

However, an error in a criminal trial does not warrant disregarding a jury's finding of guilt unless that error prejudiced the defendant. "A nonconstitutional error," like the instructional error here, "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.' " *State v. Maske*, 358 N.C. 40, 57 (2004) (quoting N.C.G.S. § 15A-1443(a) (2003)). A defendant bears the burden of demonstrating such prejudice under section 15A-1443(a).

Here, the entirety of the Court of Appeals' prejudice analysis was that "[b]ecause the trial court's instruction was both erroneous and confusing, there is a reasonable possibility that the jury would have reached a different result if it received a proper instruction." *Phillips*, 290 N.C. App. at 665. As a determination of error is a prerequisite to reaching the question of prejudice, it appears the sole basis for the Court of Appeals' prejudice reasoning was that the trial court's instruction probably confused the jury. This, standing alone, is insufficient. Because the Court of Appeals failed to conduct an appropriate inquiry, we remand to the Court of Appeals for a proper prejudice analysis.

III. Conclusion

It has long been recognized that an individual has a fundamental right to defend his or her home from unlawful intrusion. The General Assembly, as the policy making branch of our government, has twice chosen to expand that common law principle by broadening the set of circumstances under which deadly force is justified. The Court of Appeals correctly concluded that the trial court below erred by improperly instructing the jury to consider the proportionality of defendant's force even if she was entitled to the castle doctrine defense. However, the Court of Appeals failed to properly analyze whether defendant was prejudiced by such error. Accordingly, we AFFIRM the Court of Appeals' determination of error but VACATE its prejudice determination and REMAND for proper consideration.

AFFIRMED IN PART, VACATED AND REMANDED IN PART.

Justice EARLS concurring in part and dissenting in part.

The Court finds error in the trial court's instruction and remands on the issue of prejudice. I agree that the jury instruction was erroneous. As delivered, it muddled the scope and nature of lawful defensive force embraced by the castle doctrine, codified in N.C.G.S. § 14-51.2. As the Court rightfully acknowledges, though, the castle doctrine is not a "license to kill." I expand on that point and explain why section 14-51.2 is not a blank check for violence.

Today a creature of legislation rather than common law, the castle doctrine functions as a "burden-shifting provision." *State v. Copley*, 900 S.E.2d 904, 913 (N.C. 2024) (cleaned up). On the front end, as the majority explains, the statute creates a rebuttable presumption of reasonable fear "when the defendant satisfies the specific . . . requirements" of N.C.G.S. § 14-51.2(b). That presumption is the linchpin of the castle doctrine—or, to borrow the majority's words, its "primary legal protection." It permits defensive force against specific conduct from a specific type of interloper—one who "unlawfully and forcefully enter[s]" a protected space. N.C.G.S. § 14-51.2(b)(1). The statute is also clear that the protected space is not only the interior of a home but also includes its "curtilage."[1] N.C.G.S. § 14-51.2(a)(1).

The logic is as follows: A trespasser who illicitly and forcibly invades another's home, car, or workplace "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). For that reason, an occupant aware of that unlawful and forcible entry is presumed to reasonably fear death or grievous harm at the trespasser's hands. *See* N.C.G.S. § 14-51.2(b). If the presumption applies and goes unrebutted by the State, it permits the occupant to fend off the intruder with deadly force. N.C.G.S. § 14-51.2(f).

At the same time, the presumption of reasonable fear delimits resort to violence. If a person does not "unlawfully and forcefully" enter another's property, their conduct does not fit the conditions listed in subsection 14-51.2(b). In that case, the statutory presumption of reasonable fear does not attach and deadly force is not permitted. Said another way, lethal force is not the appropriate response to a lawful and unforceful

1. "[T]he curtilage of the home will ordinarily be construed to include at least the yard around the dwelling house as well as the area occupied by barns, cribs, and other outbuildings." *State v. Frizzelle*, 243 N.C. 49, 51 (1955); *see also State v. Blue*, 356 N.C. 79, 86 (2002).

entry onto property. Unless an ingress triggers the elements set by subsection 14-51.2(b), it does not activate the castle doctrine.

That is why, as the Court recognizes, the castle doctrine does not declare "open season on Girl Scouts and trick-or-treaters." *Copley*, 900 S.E.2d at 913. When those groups step onto another's porch, their entry is generally lawful because of the "implicit license that typically permits [a] visitor to approach the home by the front path." *Id.* (quoting *State v. Grice*, 367 N.C. 753, 757 (2015) (cleaned up)). That implicit license also extends to a neighbor who knocks on the door to borrow a lawnmower, or a UPS worker who delivers a package. *See Florida v. Jardines*, 569 U.S. 1, 6–7 (2013) (examining general contours of implicit license). In the same vein, the castle doctrine does not shield a homeowner who "invites the victim to his house" and "shoots them as they enter the front gate." *Copley*, 900 S.E.2d at 913. That, too, is because the entry was lawful—the unwitting invitee crossed the threshold with the owner's blessing.

These examples illustrate the castle doctrine's implicit limits. Whether selling cookies, seeking candy, delivering a package, or accepting an owner's invite, each hypothetical entrant came onto another's land lawfully and without force. Since none of those entrants "satisf[y] the specific statutory requirements" of subsection 14-51.2(b), the presumption of reasonable fear would not attach and permit deadly force.

Those examples also underscore the need for lucid and complete jury instructions in cases like Ms. Phillips'.[2] A proper explanation of the law would have given jurors "a clear decision tree" for examining Ms. Phillips' force and, in turn, her criminal liability. *See Copley*, 900 S.E.2d at 915 (Barringer, J., concurring). First, jurors should have decided whether Ms. Dunlap "unlawfully and forcefully entered" Ms. Phillips' porch in line with subsection 14-51.2(b). That inquiry would consider whether an implicit license permitted Ms. Dunlap's entry, the scope of that license, and whether Ms. Dunlap exceeded it, thus rendering

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2. Accurate jury instructions are, of course, a necessity in all criminal trials. *See Copley*, 900 S.E.2d at 915 ("Under principles of due process, jury instructions infected with legal error often require a new trial."). But as members of this Court have recently observed, instructions on "the various self-defense provisions that are now in place" have proven uniquely susceptible to confusion. *See id.* (Barringer, J., concurring) ("It is greatly concerning that our State's pattern jury instructions continue to leave jurors confused on what they may or may not consider in self-defense and castle doctrine circumstances . . . Instructions that provide jurors with a clear decision tree are critical for a jury to be able to accurately determine whether the presumptions provided by § 14-51.2 have been rebutted. A jury must intentionally and methodically determine whether that presumption has been rebutted.").

her presence unlawful. The jury's answer on that issue would dictate whether the presumption of reasonable fear attached and whether the castle doctrine applied at all.

For the same reason, it would equip jurors to select and employ the proper self-defense standard. If Ms. Dunlap's entry did not meet the predicates listed in subsection 14-51.2(b), the presumption of reasonable fear would not come into play. That is, if Ms. Dunlap was lawfully on the property, the castle doctrine's key presumption would not apply. *See* N.C.G.S. § 14-51.2(e); *see also Copley*, 900 S.E.2d at 914. In that event, jurors would scrutinize Ms. Phillips' actions under section 14-51.3, rather than section 14-52.2.

On the other hand, if jurors concluded that Ms. Dunlap's entry was "unlawful[ ] and forceful[ ]" as required by subsection 14-51.2(b), that finding would trigger the presumption of reasonableness. *See* N.C.G.S. § 14-51.2(b). It would also point jurors to their next task: Deciding whether the State rebutted the presumption and therefore "dislodged" the castle doctrine's protections. *See Copley*, 900 S.E.2d at 911 (citing N.C.G.S. § 14-51.2(c)). Here, however, the jury instructions did not accurately explain the law, thus depriving jurors of the "clear decision tree" needed to assess the legality of Ms. Phillips' force. *See id.* at 915 (Barringer, J., concurring).

I part ways with the majority on prejudice. In this case, that question is fairly presented and ripe for review—it was teed up by the majority and dissent below, briefed by the parties, and encompassed by the record. Rather than remanding to the Court of Appeals, I would reach and resolve whether Ms. Phillips has shown a reasonable possibility of a different result but for the trial court's error. *See State v. Maske*, 358 N.C. 40, 57 (2004).

Punting the prejudice analysis back to the lower courts is an unnecessary drain on judicial resources. It forces Ms. Phillips and the State to reargue an issue already raised, briefed, and ripe for decision. Throughout our precedent, this Court has declined to remand cases based on the same interests at stake here—"judicial economy," "fairness to the parties," and settling protracted litigation. *See N.C. Dep't of Env't & Nat. Res. v. Carroll*, 358 N.C. 649, 665 (2004); *see also Mann Media, Inc. v. Randolph Cnty. Plan. Bd.*, 356 N.C. 1, 15–16 (2002) (explaining that remand would disserve "the interests of judicial economy" because the "central issue" remaining "involves evaluation of evidence" and the "entire record of the hearing is before us").

Because I would decide whether the trial court's error prejudiced Ms. Phillips, I dissent from the Court's decision to remand.

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

BLUEPRINT 2020 OPPORTUNITY ZONE FUND, LLLP v. 10 ACADEMY ST. QOZB I, LLC

[386 N.C. 533 (2024)]

BLUEPRINT 2020 OPPORTUNITY ZONE FUND, LLLP, AND WOODFOREST CEI-BOULOS OPPORTUNITY FUND, LLC

v.

10 ACADEMY STREET QOZB I, LLC; CITISCULPT, LLC; CS-10 SOUTH ACADEMY ST, LLC; CITISCULPT SC, LLC; 10 ACADEMY STREET, LLC; CITISCULPT FUND SERVICES, LLC; 10 ACADEMY OPPORTUNITY ZONE FUND I, L.L.C.; CHARLES LINDSEY MCALPINE; AND MICHAEL J. MILLER

From N.C. Business Court
23CVS001931-590

From Mecklenburg
23CVS001931-590

No. 107A24

ORDER

The parties' joint motion for limited remand and stay is allowed. This matter is remanded to the trial court for the limited purpose of permitting the parties to seek trial court approval of a sale of the subject property to an alternative buyer. This Court retains jurisdiction over the appeal. All proceedings in this Court, including all further briefing deadlines, are stayed until the first of one of the following occurs: (a) the parties jointly file a motion to dismiss the appeal as moot; (b) any party to the appeal files a motion to dissolve the stay for good cause; or (c) two hundred and twenty-five days have elapsed from the date of this Order. If the appeal is not dismissed and the stay is dissolved, the Court will set a deadline for the Appellees' briefs to be filed.

By order of the Court in Conference, this the 1st day of August 2024.

/s/ Riggs, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 1st day of August 2024.

s/Grant E. Buckner

Grant E. Buckner
Clerk of the Supreme Court

COHANE v. HOME MISSIONERS OF AMERICA

[386 N.C. 534 (2024)]

GREGORY COHANE

v.

THE HOME MISSIONERS OF AMERICA D/B/A GLENMARY HOME MISSIONERS, ROMAN CATHOLIC DIOCESE OF CHARLOTTE, NC, AND AL BEHM

From N.C. Court of Appeals
22-143

From Mecklenburg
21CVS10855

No. 278A23

ORDER

Young Men's Christian Association of Northwest North Carolina d/b/a/ Kernersville Family YMCA's Motion for Leave to File Amicus Brief is hereby allowed. Plaintiff-Appellee is allowed leave to file a reply to the Amicus Brief on or before 19 July 2024. Plaintiff's Motion to Strike Brief of Amicus Curiae Young Men's Christian Association of Northwest North Carolina d/b/a/ Kernersville Family YMCA and Motion for Sanctions are hereby denied.

By order of the Court in Conference, this the 5th day of July 2024.

Riggs, J. recused.

/s/ Allen, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 5th day of July 2024.

s/Grant E. Buckner

Grant E. Buckner
Clerk of the Supreme Court

COLONIAL PLAZA PHASE TWO, LLC v. CHERRY'S ELEC. TAX SERVS., LLC

[386 N.C. 535 (2024)]

COLONIAL PLAZA PHASE TWO, LLC, D/B/A COLONIAL PLAZA MALL	From N.C. Court of Appeals 23-159
v.	From Edgecombe 15CVD51
CHERRY'S ELECTRONIC TAX SERVICES, LLC	

No. 268P23

ORDER

Defendant's petition for writ of certiorari is allowed for the limited purpose of vacating the Court of Appeals' 25 September 2023 order and remanding the matter to that court for reconsideration in light of *Blevins v. Town of W. Jefferson*, 182 N.C. App. 675 (2007), *rev'd for reasons stated in the dissent*, 361 N.C. 578 (2007) (per curiam).

By order of the Court in Conference, this the 21st day of August 2024.

/s/ Riggs, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 23rd day of August 2024.

s/Grant E. Buckner

Grant E. Buckner
Clerk of the Supreme Court

ROY A. COOPER, III, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF NORTH CAROLINA

v.

PHILIP E. BERGER, IN HIS OFFICIAL CAPACITY AS PRESIDENT PRO TEMPORE OF THE NORTH CAROLINA SENATE; TIMOTHY K. MOORE, IN HIS OFFICIAL CAPACITY AS SPEAKER OF THE NORTH CAROLINA HOUSE OF REPRESENTATIVES; THE STATE OF NORTH CAROLINA; NORTH CAROLINA ENVIRONMENTAL MANAGEMENT COMMISSION; AND JOHN (JD) SOLOMON, IN HIS OFFICIAL CAPACITY AS CHAIR OF THE NORTH CAROLINA ENVIRONMENTAL MANAGEMENT COMMISSION; CHRISTOPHER M. DUGGAN, IN HIS OFFICIAL CAPACITY AS VICE-CHAIR OF THE NORTH CAROLINA ENVIRONMENTAL MANAGEMENT COMMISSION; AND YVONNE C. BAILEY, TIMOTHY M. BAUMGARTNER, CHARLES S. CARTER, MARION DEERHAKE, MICHAEL S. ELLISON, STEVEN P. KEEN, H. KIM LYERLY, JACQUELINE M. GIBSON, JOSEPH REARDON, ROBIN SMITH, KEVIN L. TWEEDY, ELIZABETH J. WEESE, AND BILL YARBOROUGH, IN THEIR OFFICIAL CAPACITIES AS COMMISSIONERS OF THE NORTH CAROLINA ENVIRONMENTAL MANAGEMENT COMMISSION

From N.C. Court of Appeals
24-440

From Wake
23CV28505-910

No. 131P24

ORDER

Plaintiff Roy A. Cooper, III, in his official capacity as Governor of North Carolina, filed a motion and suggestion of recusal seeking the recusal of Justice Philip E. Berger, Jr., in this case. Justice Berger referred the motion to this Court by a special order entered on 24 June 2024. Under this Court's Recusal Procedure Order of 23 December 2021, a justice who receives a recusal or disqualification motion may either (1) rule on the motion or (2) refer the motion to the Court for decision. 379 N.C. 693 (2021). For the reasons explained below, we DENY the motion.

The Governor argues that recusal is necessary pursuant to Canon III.C.(1)(d)(i) and (iii) of the Code of Judicial Conduct because Justice

Berger's father, Senator Philip E. Berger, is a defendant and has a direct, personal, and substantial interest in the outcome of this case.[1] In support of this contention, the Governor notes that the legislation which is the subject of this lawsuit confers certain powers on the President Pro Tempore of the Senate, a post currently held by Senator Berger. For example, Senate Bill 512 authorizes the President Pro Tempore to recommend for Senate approval three—an increase of one—of the Coastal Resources Commission's thirteen members and seven—an increase of four—of the Board of Transportation's twenty members. *See* An Act to Increase the Accountability of Public Boards and Commissions to the Citizens of North Carolina by Changing the Appointment Structure of Those Boards and Commissions, S.L. 2023-136, §§ 4.1.(a), 5.1(a), https://www.ncleg.gov/EnactedLegislation/SessionLaws/PDF/2023-2024/SL2023-136.pdf.

Based on the facts before us, we do not agree that the Code of Judicial Conduct bars Justice Berger's participation in this case. Senator Berger is a party to this litigation solely in his official capacity as President Pro Tempore, not in any personal capacity. State law requires the President Pro Tempore to be joined as a defendant in lawsuits that dispute the constitutionality of statutes. N.C.G.S. § 1A-1, Rule 19(d) (2023). In such litigation, state law regards the President Pro Tempore as a stand-in for the General Assembly.

> It is the public policy of the State of North Carolina that in any action in any North Carolina State court in which the validity or constitutionality of an act of the General Assembly . . . is challenged, the General Assembly, *jointly through the Speaker of the House of Representatives and the President Pro Tempore of the Senate*, constitutes the legislative branch of the State of North Carolina . . . .

N.C.G.S. § 1-72.2(a) (2023) (emphasis added). *See also* N.C.G.S. § 1A-1, Rule 19(d) (2023) ("The Speaker of the House of Representatives and the President Pro Tempore of the Senate, *as agents of the State through the General Assembly*, must be joined as defendants in any civil action challenging the validity of a North Carolina statute . . . ." (emphasis added)).

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1. "On motion of any party, a judge should disqualify himself/herself in a proceeding . . . where . . . [t]he judge or the judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person . . . [i]s a party to the proceeding . . . [or] . . . [i]s known by the judge to have an interest that could be substantially affected by the outcome of the proceeding[.]" North Carolina Code of Judicial Conduct, Canon III.C(1)(d)(i), (iii) (2020).

Thus, as a matter of law and public policy, Senator Berger represents the interests of the General Assembly in this case, not his own. *See Mullis v. Sechrest*, 347 N.C. 548, 554 (1998) ("[O]fficial-capacity suits are merely another way of pleading an action against the governmental entity."); *Harwood v. Johnson*, 326 N.C. 231, 238 (1990) ("A suit against defendants in their official capacities, as public officials . . . is a suit against the State.").

Our view is consistent with the substance of the challenged legislation. It grants appointment powers to the office of the President Pro Tempore, not to Senator Berger personally. *E.g.*, S.L. 2023-136, § 5.1.(a) (adding one member of the Coastal Resources Commission to be "appointed by the General Assembly upon recommendation of the President Pro Tempore of the Senate"). Senator Berger will lose those powers the moment he ceases to occupy that office, even if he remains a member of the Senate.[2]

The Governor also argues that Justice Berger's recusal is mandatory under the Due Process Clause of the Fourteenth Amendment.[3] Again, we disagree.

Most recusal determinations do not raise constitutional issues. *Caperton v. A. T. Massey Coal Co.*, 556 U.S. 868, 876 (2009). When it comes to state courts, recusal rules based on familial relationships have traditionally been entrusted to the discretion of state legislatures. *See Tumey v. Ohio*, 273 U.S. 510, 523 (1927) ("[M]atters of kinship, personal bias, state policy, remoteness of interest, would seem generally to be matters merely of legislative discretion.").

In *Caperton*, the Supreme Court of the United States recognized that due process concerns can oblige a judge to recuse herself "when 'the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.' " 556 U.S. at 872 (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)). The Supreme Court identified two categories of cases wherein it had previously held that recusal was constitutionally necessary: (1) cases in which the judge had a

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2. It is possible that different facts would establish a basis for recusal even if Senator Berger were sued in his official capacity as President Pro Tempore. Recusal could be necessary, for instance, if challenged legislation conferred a financial benefit on the President Pro Tempore sufficient to give his close relations "a financial interest in the subject matter in controversy or in a party to the proceeding." North Carolina Code of Judicial Conduct, Canon III.C(1)(c).

3. "No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. XIV, § 2.

financial interest in the outcome and (2) criminal contempt proceedings in which the judge "was challenged because of a conflict arising from his participation in an earlier proceeding." *Id.* at 879–80. Based on the principles articulated in those precedents, the Court held that the Due Process Clause required a state supreme court justice to recuse himself from the appeal of a $50 million verdict against a corporation whose chairman had contributed more than $3 million to support the justice's campaign while the appeal was pending. *Id.* at 884–86.

This case does not involve any of the scenarios discussed in *Caperton*. The Governor has not argued that Justice Berger stands to gain anything from the outcome of this litigation or that this case played a role in his election.[4] Given this circumstance and the reality that the claims against Senator Berger are actually claims against the General Assembly, we conclude that the Due Process Clause does not compel Justice Berger's recusal.

"The ultimate question, and indeed the touchstone of all recusal issues, is 'whether the justice can be fair and impartial[.]' " *NAACP v. Moore*, 380 N.C. 263, 264 (2022) (Berger, J.) (internal quotation marks omitted). In his order denying a similar recusal motion in another case, Justice Berger explained that the lawsuit was really against the State, not against his father, and that he was confident in his ability to discharge the duties of his office in a fair and impartial manner. *Id.* We believe that Justice Berger can and will execute his responsibilities in this case fairly and impartially. The motion and suggestion of recusal is hereby DENIED.

By order of the Court in Conference, this the 21st day of August 2024.

/s/ Allen, J.
For the Court

Justice Berger did not participate in the consideration of this motion.

4. The Governor does allege that "Senator Berger is a powerful political ally who has materially supported his son's campaigns." This vague allegation of support falls far short of the detailed contribution records relied on by the Supreme Court in *Caperton*.

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 23rd day of August 2024.

s/Grant E. Buckner

Grant E. Buckner
Clerk of the Supreme Court

Justice RIGGS dissenting.

On 11 June 2024, Governor Cooper, the plaintiff in this action, moved to recuse Associate Justice Berger because the challenged legislation gives his father—Senator Phil Berger, the President Pro Tempore of the North Carolina Senate—new control over the Economic Investment Committee and multiple state commissions and boards. On the same day, in parallel litigation challenging a different statute on the same grounds, the Governor also sought the recusal of Justice Berger. Plaintiff-Respondent's Motion and Suggestion of Recusal or Disqualification of Associate Justice Berger, *Cooper v. Berger*, No. 132P24 (N.C. June 11, 2024). In both cases, according to the Governor, the North Carolina Code of Judicial Conduct and the Due Process Clause of the Fourteenth Amendment to the United States Constitution warrant Justice Berger's recusal. Justice Berger referred both motions to this Court. And today, the majority allows Justice Berger to participate in yet another case where his father is a named party with a direct interest in the outcome. *See*, *e.g.*, *Hoke Cnty. Bd. of Educ. v. State*, 385 N.C. 866, 867 (2024) (denying plaintiff's motion for Justice Berger to recuse in a case where "intervenor-defendant Senator Philip E. Berger . . . is a party to th[e] litigation solely in his official capacity as President Pro Tempore of the Senate"). Because I believe the plain language of the Code of Judicial Conduct requires Justice Berger's recusal, I respectfully dissent.

Canon 3C of the Code of Judicial Conduct provides that:

> (1) On a motion of any party 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:
>
> . . . .
>
> (d) The judge or the judge's spouse, or a person within the third degree of relationship

> to either of them, or the spouse of such a person:
>
> (i) Is a party to the proceeding, or an officer, director, or trustee of a party;
>
> (ii) Is acting as a lawyer in the proceeding;
>
> (iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding[.]
>
> . . . .

N.C. Code Jud. Conduct 3C(1) (emphases added).

Here, there is no question that Senator Berger is a person "within the third degree of relationship" to his son, Justice Berger. *See* N.C.G.S. § 104A-1 (2023) (describing how to compute degrees of kinship). The Code of Judicial Conduct does not exempt a judge from recusal even when their family member is a party in their official capacity. In fact, the plain language points the opposite way. By requiring recusal when a judge's family member is "an officer, director, or trustee of a party," the Code of Judicial Conduct establishes clear recusal standards when the judge's family member is party to a proceeding, even in their official capacity.

This Court has endorsed recusal when the familial relation is even more attenuated than that of a father and son. In a dispute involving the North Carolina Teachers' and State Employees' Retirement System, this Court identified that family members of five of the seven justices were retirees of the public school system. *Lake v. State Health Plan for Tchers. & State Emps.*, 376 N.C. 661, 663–64 (2021). These familial relationships included grandparents, mothers, a father, a mother-in-law, a brother-in-law, and an aunt. *Id.* The Court applied Canon 3D, concluding that the justices were "disqualified from participating in the consideration and decision of this case based upon one or more of the family relationships set forth above unless the parties and their lawyers file a written agreement stipulating that each justice's basis for disqualification is immaterial or insubstantial." *Id.* at 664. In that case, the Court noted that it could invoke the rule of necessity because "actual disqualification of a member of a court of last resort will not excuse such member from performing his official duty if failure to do so would result in a denial of a litigant's constitutional right to have" their case heard and, of course, four justices are required to hear a case. *Id.* (quoting *Boyce v. Cooper*, 357 N.C. 655, 655 (2003)). But in this case, the rule of necessity

does not apply because Justice Berger's recusal would not deny the parties their constitutional right to present a question to this Court.

Justice Berger himself has previously rejected a call for him to recuse in a case where his father was a party. *N.C. State Conf. of the NAACP v. Moore*, 380 N.C. 263, 263–64 (2022). And before this Court's January 2023 change in composition, he decided recusal motions on his own, as is his right. Now, though, Justice Berger has referred the motion to a newly-installed majority, which seemingly borrows from Justice Berger's old logic and approach. But just as Justice Berger's analysis was wrong then, this Court's ruling is wrong now.

The Code of Judicial Conduct is promulgated by this Court, as authorized by the legislature. *See* N.C.G.S. § 7A-10.1 (2023) ("The Supreme Court is authorized, by rule, to prescribe standards of judicial conduct for the guidance of all justices and judges of the General Court of Justice."). Certainly, we *could* change the Code of Judicial Conduct to exempt a judge from recusal when that judge's close family member is party to a case only in their official capacity.[1] But we have not done so. Instead, we have promulgated and enforced conduct rules that plainly require recusal for near-family relationships. Those rules apply to all judges across this state, not just those on this Court.

The wisdom of that approach is clear—both for fair outcomes and public confidence in the judiciary. *See* N.C. Code of Jud. Conduct, pmbl. ("An independent and honorable judiciary is indispensable to justice in our society . . . ."). Imagine a scenario where a defendant walks into a courtroom only to learn that the elected district attorney prosecuting his case is the son of the elected judge presiding over his case. Few defendants would have faith that the judicial system would produce a fair and unbiased outcome—even though both the district attorney and the judge are elected officials acting in their official capacity. And likely the public at large would find this scenario equally problematic, which is why the plain language of our canons do not make any distinction about "official capacity" and require recusal when a close family member is an attorney or party in a proceeding.

To achieve the desired outcome in this case, members of this Court who typically ascribe to a strict textualist philosophy are eager to add words to the Code of Judicial Conduct. I would not so interpret the Code of Judicial Conduct, particularly because the added and inferred

1. To be sure, though, we cannot by rule infringe upon the due process rights of the litigants who appear before us.

language is not fairly disclosed to all members of the judiciary bound by it. I suspect the reason we have not changed these rules is simple—the optics of overhauling existing ethics standards to accommodate Justice Berger and Senator Berger are problematic, to put it mildly. Any changes would have to undermine the canon's current language requiring recusal when a judge's family member is "a party to the proceeding, *or an officer, director, or trustee of a party*." N.C. Code of Jud. Conduct 3C(1)(d)(i) (emphasis added).

Also unavailing is the argument that Justice Berger does not need to recuse because "[m]ore than 2.7 million North Carolinians, knowing or at least having information available to them concerning [his] father's service in the Legislature, elected [Justice Berger] to consider and resolve significant constitutional questions." *N.C. State Conf. of the NAACP*, 380 N.C. at 264. Justice Berger's election to this Court does not exempt him from the same ethical standards that bind all judges. The fact that Justice Berger, just like any other justice, would need to recuse when the Code of Judicial Conduct so requires does not lessen the significance of his election. Importantly, too, while the parties in the case could stipulate or acquiesce to Justice Berger's participation, the Governor has not done so here, instead seeking Justice Berger's recusal. Again, there is no mechanism whereby a popular vote can override a party's right to seek relief under either the Code of Judicial Conduct or the Due Process Clause of the United States Constitution.

Moreover, unlike a case where familial relations are peripheral to the issues before us, *see N.C. State Conf. of the NAACP*, 380 N.C. 263, Senator Berger's prospective power hinges on our ruling in this case. For example, Session Law 2023-136, provides, among other things, a seat for Senator Berger (or his designee) on the Economic Investment Committee. Act of Oct. 10, 2023, Session Law 2023-136 § 1.1. https://www.ncleg.gov/EnactedLegislation/SessionLaws/PDF/2023-2024/SL2023-136.pdf. Session Law 2023-136 also expands Senator Berger's political influence by giving him control over multiple appointments to wide ranging executive and regulatory bodies, such as the Board of Transportation, the Commission for Public Health, the Coastal Resources Commission, the Wildlife Resources Commission, the Board of Directors of the University of North Carolina Health Care System, and the Utilities Commission. *Id.* at §§ 3.1–8.1, 10.1.

In the related case, Session Law 2023-139 gives Senator Berger new authority to nominate two of the eight members on the State Board of Elections, and to appoint the board's chair and executive director if the board fails to elect them. Act of Oct. 10, 2023, S.L. 2023-139 §§ 2.1, 2.5

https://ncleg.gov/EnactedLegislation/SessionLaws/PDF/2023-2024/SL2023-139.pdf. Session Law 2023-139 also gives Senator Berger the power to nominate one of the four members on each of the 100 county boards of election across the state and to appoint a chair if a county board fails to elect one. *Id.* at § 4.1.

Legislative Defendants argue that any benefits from the disputed legislation accrue to the *position* of President Pro Tempore of the North Carolina Senate rather than to Senator Berger himself. That contention is overly formalistic. The position of President Pro Tempore is currently occupied by Senator Berger. A favorable ruling for Legislative Defendants would thus augment Senator Berger's political power and influence for at least some period of time.

By denying the motion to recuse Justice Berger, this Court discards the plain language and clear dictate of Canon 3C. North Carolina is not alone in requiring judicial recusal. Other jurisdictions also require a judge to withdraw in cases of close familial or paternal relationships. *See, e.g.*, *United States v. Rechnitz*, 75 F.4th 131, 143 (2d Cir. 2023) (holding that a district court judge abused his discretion under 28 U.S.C. § 455(a), the federal canon requiring disqualification in any proceeding in which his impartiality might reasonably be questioned by not reassigning a case where the "judge had a close, near-paternal personal relationship with" a cooperating witness who was a participant in the criminal conduct for which the defendant was charged)[2]; *Miss. Comm'n on Jud. 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 judge's] impartiality in the case"); *In re Griego*, 181 P.3d 690, 693 (N.M. 2008) (disciplining a judge who gave family members favorable dispositions in traffic court because impartiality "required [the judge] to recuse himself in cases involving family members").

Because I think the Code of Judicial Conduct unequivocally requires recusal here, it is not necessary to even reach the due process grounds

2. Scholars examining judicial recusals in the federal courts have identified close familial relations as a clear-cut basis for recusal. *See* Dane Thorley, *The Failure of Judicial Recusal and Disclosure Rules: Evidence from a Field Experiment*, 117 Nw. U. L. Rev. 1277, 1302 (2023) (recognizing "familial relationships" as a conflict "subject to bright-line [federal] per se recusal rules" in which "less judicial discretion [to refuse recusal] is involved" and where refusal to recuse would "almost certainly result in successful appeal and possibly an ethical sanction").

for the motion. I respectfully dissent from this Court's decision to deny the motion to recuse.

Justice EARLS joins in this dissent.

ROY A. COOPER, III, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF NORTH CAROLINA

v.

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

From N.C. Court of Appeals
24-406

From Wake
23CV29308-910

No. 132P24

ORDER

This matter is before the Court on plaintiff's motion and suggestion of recusal or disqualification of Associate Justice Berger. The motion largely restates arguments made in the motion and suggestion of recusal or disqualification filed by plaintiff in *Cooper v. Berger et al.*, No. 131P24. For the reasons set out in our order denying plaintiff's motion in that case, plaintiff's motion and suggestion of recusal or disqualification is hereby DENIED.

By order of the Court in Conference, this the 21 day of August 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 23 day of August 2024.

s/Grant E. Buckner

Grant E. Buckner
Clerk of the Supreme Court

Justice RIGGS dissenting.

On 11 June 2024, Governor Cooper, the plaintiff in this action, moved to recuse Associate Justice Berger because the challenged legislation

gives his father—Senator Phil Berger, the President Pro Tempore of the North Carolina Senate—new control over the State Board of Elections and county boards of elections. On the same day, in parallel litigation challenging a different statute on the same grounds, the Governor also sought the recusal of Justice Berger. Plaintiff-Respondent's Motion and Suggestion of Recusal or Disqualification of Associate Justice Berger, *Cooper v. Berger*, No. 131P24 (N.C. June 11, 2024). In both cases, according to the Governor, the North Carolina Code of Judicial Conduct and the Due Process Clause of the Fourteenth Amendment to the United States Constitution warrant Justice Berger's recusal. Justice Berger referred both motions to this Court. And today, the majority allows Justice Berger to participate in yet another case where his father is a named party with a direct interest in the outcome. *See*, *e.g.*, *Hoke Cnty. Bd. of Educ. v. State*, 385 N.C. 866, 867 (2024) (denying plaintiff's motion for Justice Berger to recuse in a case where "intervenor-defendant Senator Philip E. Berger . . . [ ] is a party to th[e] litigation solely in his official capacity as President Pro Tempore of the Senate"). Because I believe the plain language of the Code of Judicial Conduct requires Justice Berger's recusal, I respectfully dissent.

Canon 3C of the Code of Judicial Conduct provides that:

> (1) On motion of any party 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:
>
> . . . .
>
> (d) The judge or the judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:
>
> (i) Is a party to the proceeding, or an officer, director, or trustee of a party;
>
> (ii) Is acting as a lawyer in the proceeding;
>
> (iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding[.]
>
> . . . .

N.C. Code Jud. Conduct, Canon 3C(1) (emphases added).

Here, there is no question that Senator Berger is a person "within the third degree of relationship" to his son, Justice Berger. *See* N.C.G.S. § 104A-1 (2023) (describing how to compute degrees of kinship). The Code of Judicial Conduct does not exempt a judge from recusal even when their family member is a party in their official capacity. In fact, the plain language points the opposite way. By requiring recusal when a judge's family member is "an officer, director, or trustee of a party," the Code of Judicial Conduct establishes clear recusal standards when the judge's family member is party to a proceeding, even in their official capacity.

This Court has endorsed recusal when the familial relation is even more attenuated than that of a father and son. In a dispute involving the North Carolina Teachers' and State Employees' Retirement System, this Court identified that family members of five of the seven justices were retirees of the public school system. *Lake v. State Health Plan for Tchers. & State Emps.*, 376 N.C. 661, 663–64 (2021). These familial relationships included grandparents, mothers, a father, a mother-in-law, a brother-in-law, and an aunt. *Id.* The Court applied Canon 3D, concluding that the justices were "disqualified from participating in the consideration and decision of this case based upon one or more of the family relationships set forth above unless the parties and their lawyers file a written agreement stipulating that each justice's basis for disqualification is immaterial or insubstantial." *Id.* at 664. In that case, the Court noted that it could invoke the rule of necessity because "actual disqualification of a member of a court of last resort will not excuse such member from performing his official duty if failure to do so would result in a denial of a litigant's constitutional right to have" their case heard, and of course, four justices are required to hear a case. *Id.* (quoting *Boyce v. Cooper*, 357 N.C. 655, 655 (2003)). But in this case, the rule of necessity does not apply because Justice Berger's recusal would not deny the parties their constitutional right to present a question to this Court.

Justice Berger himself has previously rejected a call for him to recuse in a case where his father was a party. *N.C. State Conf. of the NAACP v. Moore*, 380 N.C. 263, 263–64 (2022). And before this Court's January 2023 change in composition, he decided recusal motions on his own, as is his right. Now, though, Justice Berger has referred the motion to a newly-installed majority, which seemingly borrows from Justice Berger's old logic and approach. But just as Justice Berger's analysis was wrong then, this Court's ruling is wrong now.

The Code of Judicial Conduct is promulgated by this Court, as authorized by the legislature. *See* N.C.G.S. § 7A-10.1 (2023) ("The Supreme Court is authorized, by rule, to prescribe standards of judicial

conduct for the guidance of all justices and judges of the General Court of Justice."). Certainly, we *could* change the Code of Judicial Conduct to exempt a judge from recusal when that judge's close family member is party to a case only in their official capacity.[1] But we have not done so. Instead, we have promulgated and enforced conduct rules that plainly require recusal for near-family relationships. Those rules apply to all judges across this state, not just those on this Court.

The wisdom of that approach is clear—both for fair outcomes and public confidence in the judiciary. *See* N.C. Code of Jud. Conduct, pmbl. ("An independent and honorable judiciary is indispensable to justice in our society . . . ."). Imagine a scenario where a defendant walks into a courtroom only to learn that the elected district attorney prosecuting his case is the son of the elected judge presiding over his case. Few defendants would have faith that the judicial system would produce a fair and unbiased outcome—even though both the district attorney and the judge are elected officials acting in their official capacity. And likely the public at large would find this scenario equally problematic, which is why the plain language of our canons do not make any distinction about "official capacity" and require recusal when a close family member is an attorney or party in a proceeding.

To achieve the desired outcome in this case, members of this Court who typically ascribe to a strict textualist philosophy are eager to add words to the Code of Judicial Conduct. I would not so interpret the Code of Judicial Conduct, particularly because the added and inferred language is not fairly disclosed to all members of the judiciary bound by it. I suspect the reason we have not changed these rules is simple—the optics of overhauling existing ethics standards to accommodate Justice Berger and Senator Berger are problematic, to put it mildly. Any changes would have to undermine the canon's current language requiring recusal when a judge's family member is "a party to the proceeding, *or an officer*, *director*, *or trustee of a party*." N.C. Code of Jud. Conduct, Canon 3C(1)(d)(i) (emphasis added).

Also unavailing is the argument that Justice Berger does not need to recuse because "[m]ore than 2.7 million North Carolinians, knowing or at least having information available to them concerning [his] father's service in the Legislature, elected [Justice Berger] to consider and resolve significant constitutional questions." *N.C. State Conf. of the NAACP*, 380 N.C. at 264. Justice Berger's election to this Court does

1. To be sure, though, we cannot by rule infringe upon the due process rights of the litigants who appear before us.

not exempt him from the same ethical standards that bind all judges. The fact that Justice Berger, just like any other justice, would need to recuse when the Code of Judicial Conduct so requires does not lessen the significance of his election. Importantly, too, while the parties in the case could stipulate or acquiesce to Justice Berger's participation, the Governor has not done so here, instead seeking Justice Berger's recusal. Again, there is no mechanism whereby a popular vote can override a party's right to seek relief under either the Code of Judicial Conduct or under the Due Process Clause of the United States Constitution.

Moreover, unlike a case where familial relations are peripheral to the issues before us, *see N.C. State Conf. of the NAACP*, 380 N.C. 263, Senator Berger's prospective power hinges on our ruling in this case. For example, Session Law 2023-139 gives Senator Berger new authority to nominate two of the eight members on the State Board of Elections and to appoint the board's chair and executive director if the board fails to elect them. Act of Oct. 10, 2023, S.L. 2023-139 §§ 2.1, 2.5 https://ncleg.gov/EnactedLegislation/SessionLaws/PDF/2023-2024/SL2023-139.pdf.[2] Additionally, Session Law 2023-139 gives Senator Berger the power to nominate one of the four members on each of the 100 county boards of election across the state and to appoint a chair if a county board fails to elect one. *Id.* at § 4.1.

In the related case, Session Law 2023-136, provides, among other things, a seat for Senator Berger (or his designee) on the Economic Investment Committee. Act of Oct. 10, 2023, Session Law 2023-136 § 1.1 https://www.ncleg.gov/EnactedLegislation/SessionLaws/PDF/2023-2024/SL2023-136.pdf. Further Session Law 2023-136 expands Senator Berger's political influence by giving him control over multiple appointments to wide ranging executive and regulatory bodies, such as the Board of Transportation, the Commission for Public Health, the Coastal Resources Commission, the Wildlife Resources Commission, the Board of Directors of the University of North Carolina Health Care System, and the Utilities Commission. *Id.* at §§ 3.1–8.1, 10.1.

Legislative Defendants argue that any benefits from the disputed legislation accrue to the *position* of President Pro Tempore of the

2. The full name of Session Law 2023-139 is "An Act to Revise the Structures of the North Carolina State Board of Elections and County Board of Elections, to Revise the Emergency Powers of the Executive Director of the State Board of Elections, to Make Clarifying Changes to Senate Bill 512 of the 2023 Regular Session, to Make Additional Conforming and Clarifying Changes to Implement Photo Identification for Voting, and to Amend the Time for Candidates and Vacancy Appointees to File Statements of Economic Interests."

North Carolina Senate rather than to Senator Berger himself. That contention is overly formalistic. The position of President Pro Tempore is currently occupied by Senator Berger. A favorable ruling for Legislative Defendants would thus augment Senator Berger's political power and influence for at least some period of time.

By denying the motion to recuse Justice Berger, this Court discards the plain language and clear dictate of Canon 3C. North Carolina is not alone in requiring judicial recusal. Other jurisdictions also require a judge to withdraw in cases of close familial or paternal relationships. *See*, *e.g.*, *United States v. Rechnitz*, 75 F.4th 131, 143 (2d Cir. 2023) (holding that a district court judge abused his discretion under 28 U.S.C. § 455(a), the federal canon requiring disqualification in any proceeding in which his impartiality might reasonably be questioned by not reassigning a case where the "judge had a close, near-paternal personal relationship with" a cooperating witness who was a participant in the criminal conduct for which the defendant was charged)[3]; *Miss. Comm'n on Jud. 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 judge's] impartiality in the case"); *In re Griego*, 181 P.3d 690, 693 (N.M. 2008) (disciplining a judge who gave family members favorable dispositions in traffic court because impartiality "required [the judge] to recuse himself in cases involving family members").

Because I think the Code of Judicial Conduct unequivocally requires recusal here, it is not necessary to even reach the due process grounds for the motion. I respectfully dissent from this Court's decision to deny the motion to recuse.

Justice EARLS joins in this dissent.

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3. Scholars examining judicial recusals in the federal courts have identified close familial relations as a clear-cut basis for recusal. *See* Dane Thorley, *The Failure of Judicial Recusal and Disclosure Rules: Evidence from a Field Experiment*, 117 Nw. U. L. Rev. 1277, 1302 (2023) (recognizing "familial relationships" as a conflict "subject to bright-line [federal] per se recusal rules" in which "less judicial discretion [to refuse recusal] is involved" and where refusal to recuse would "almost certainly result in successful appeal and possibly an ethical sanction").

NORTH CAROLINA BAR AND TAVERN ASSOCIATION, ET AL.

v.

ROY A. COOPER, III, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF NORTH CAROLINA

From N.C. Court of Appeals
22-725

From Wake
20CVS6358

No. 126PA24

ORDER

The parties' Joint Motion to Amend Briefing Schedule is denied; however, the Court on its own motion extends the briefing deadlines as follows. Plaintiffs' brief responding to defendant's opening brief and opening briefing for the issues allowed in plaintiffs' cross-petition is due 28 August 2024. Defendant's brief responding to plaintiffs' opening brief and replying to plaintiffs' response to defendant's opening brief is due 18 September 2024. Plaintiff's reply brief is due 2 October 2024.

By order of the Court in Conference, this the 24th day of July 2024.

/s/ Riggs, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 24th day of July 2024.

s/Grant E. Buckner

Grant E. Buckner
Clerk of the Supreme Court

N.C. STATE BAR v. CUMMINGS

[386 N.C. 553 (2024)]

THE NORTH CAROLINA STATE BAR	From N.C. Court of Appeals P24-328
v.	
MARK CUMMINGS	From N.C. State Bar 22DHC25

No. 143P24

ORDER

With regard to Defendant's Petition for Writ of Supersedeas, this Court hereby dismisses the Petition for Writ of Supersedeas without prejudice to defendant's ability to seek a writ of supersedeas from the Court of Appeals.

Regarding Plaintiff's Motion to Dissolve the Stay, this Court hereby allows the motion. The temporary stay allowed on 11 June 2024 is hereby dissolved.

By order of the Court in Conference, this the 21st day of August 2024.

/s/ Riggs, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 23rd day of August 2024.

s/Grant E. Buckner

Grant E. Buckner
Clerk of the Supreme Court

RODGERS v. NASH HOSPITALS, INC.

[386 N.C. 554 (2024)]

H.D. RODGERS, EXECUTOR OF THE ESTATE OF RUTH RODGERS, DECEASED	From N.C. Court of Appeals 24-125
v.	From Nash 19CVS820
NASH HOSPITALS, INC., SC SURGICALISTS OF NORTH CAROLINA, P.C., PROVIDENCE ANESTHESIOLOGY ASSOCIATES PA, MARCUS LYNN WEVER, M.D., AND ANDREA KAY FULLER, M.D.	

No. 205P24

ORDER

On 29 July 2024, defendants filed a Joint Petition for Writ of Supersedeas and Motion for Temporary Stay. Defendants also filed a Joint Petition for Writ of Certiorari. This Court allows defendants' Temporary Stay of all further proceedings, including the 9 September 2024 trial and impending payment of monetary sanctions. This Temporary Stay shall remain in place until the Court of Appeals has completed its review of plaintiff's Motion to Dismiss Appeal in COA24-125. The Court of Appeals is hereby directed to rule on plaintiff's Motion to Dismiss Appeal within thirty days of the entry of this order.

By order of the Court in Conference, this the 7th day of August 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 August 2024.

s/Grant E. Buckner

Grant E. Buckner
Clerk of the Supreme Court

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

FROM N.C. BUSINESS COURT
23CV006408-910

FROM WAKE
23CV006408-910

No. 38A24

ORDER

Upon consideration of the brief filed by MV Realty in this matter, the appeal is dismissed *ex mero motu* as interlocutory; the case is remanded to the Business Court for further proceedings not inconsistent with this order of dismissal.

By order of the Court in Conference, this the 21st day of August 2024.

/s/ Riggs, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 23rd day of August 2024.

s/Grant E. Buckner

Grant E. Buckner
Clerk of the Supreme Court

STATE v. DIXON

[386 N.C. 556 (2024)]

STATE OF NORTH CAROLINA	From N.C. Court of Appeals 21-471
v.	
NATHANIEL E. DIXON	From Buncombe 16CRS84811-12; 17CRS106

No. 13P24

ORDER

On 12 January 2024, defendant filed a Notice of Appeal Based Upon a Constitutional Question and a Petition for Discretionary Review. On 25 January 2024, the State filed a Motion to Dismiss Appeal. By this order, defendant's Petition for Discretionary Review is denied and the State's Motion to Dismiss Appeal is allowed. There being no majority opinion in the Court of Appeals, by this order that court's opinion in this matter is hereby unpublished.

By order of the Court in Conference, this the 21st day of August 2024.

/s/ Riggs, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 23rd day of August 2024.

s/Grant E. Buckner

Grant E. Buckner
Clerk of the Supreme Court

STATE v. RADOMSKI

[386 N.C. 557 (2024)]

STATE OF NORTH CAROLINA	From N.C. Court of Appeals 23-340
v.	
JOSEPH JOHN RADOMSKI, III	From Orange 21CRS51423

No. 137P24

ORDER

Upon consideration of the petition filed on the 25th of June 2024 by the State in this matter for discretionary review of the decision of the Court of Appeals pursuant to G.S. 7A-31, the following order was entered and is hereby certified to the North Carolina Court of Appeals:

Denied by order of the Court in conference, this the 21st day of August 2024.

s/ Allen, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 23rd day of August 2024.

Grant E. Buckner
Clerk of the Supreme Court

s/M.C. Hackney
Assistant Clerk

Justice RIGGS dissenting.

This case raises an important question about the reach of the Second Amendment: Whether the parking lot of a public university is a "sensitive place" in which the government may restrict the use and possession of firearms. *See State v. Radomski*, 901 S.E.2d 908, 914 (N.C. Ct. App. 2024) (opining that a parking lot serving a university healthcare building and adjacent to undergraduate dormitories and a college football stadium is not "educational in nature" and, thus, not a "sensitive place"). The Court of Appeals ruled a state law unconstitutional as applied to Mr. Radomski, but the breadth of the opinion below implicates so many more than just him. *See id.* Rather than provide much needed clarity on a law that reflects the legislature's intent to keep children safe from

gun violence on educational grounds, and thereby provide clarity to law enforcement and school administrators on how to reconcile the duly enacted legislation with the Court of Appeals' ruling, this Court leaves an ambiguous, bare-bones lower court opinion standing. This inaction allows a cloud of uncertainty to potentially endanger our students and most certainly make much more difficult the work of law enforcement officers and school administrators. For the reasons below, I dissent.

I. Sensitive Places Doctrine

The Second Amendment of the United States Constitution protects "the right of the people to keep and bear Arms." U.S. Const. amend. II. The Amendment's applicability to state firearm regulations was largely unexamined until the United States Supreme Court's decision in *District of Columbia v. Heller*, 554 U.S. 570 (2008). *See id.* at 625 ("It should be unsurprising that such a significant matter has been for so long judicially unresolved. For most of our history, the Bill of Rights was not thought applicable to the States, and the Federal Government did not significantly regulate the possession of firearms by law-abiding citizens."); *see also State v. Kerner*, 181 N.C. 574, 575 (1921) ("The [S]econd [A]mendment . . . does not apply, for it has been repeatedly held by the United States Supreme Court . . . that the first ten amendments to the United States Constitution are restrictions upon the Federal authority and not upon the states."). In *Heller*, the Court focused heavily on the Second Amendment's meaning and, most important here, concluded that arms-bearing rights have bounds. *See Heller*, 554 U.S. at 626 ("Like most rights, the right secured by the Second Amendment is not unlimited.").

In particular, the *Heller* Court recognized the soundness of "long-standing . . . laws forbidding the carrying of firearms in sensitive places such as schools and government buildings." *Id.*; *see also McDonald v. City of Chicago*, 561 U.S. 742, 786 (2010) (same); *United States v. Rahimi*, 144 S. Ct. 1889, 1902 (2024) (reiterating *Heller*'s limits on gun rights). Such prohibitions were deemed "presumptively lawful," *Heller*, 554 U.S. at 627 n.26, which is telling coming from a staunchly originalist opinion, *see* Julia Hesse & Kevin Schascheck II, *The Expansive 'Sensitive Places' Doctrine: The Limited Right to 'Keep and Bear' Arms Outside the Home*, 108 Cornell L. Rev. Online 218, 246 (2024) [hereinafter Hesse, *Expansive 'Sensitive Places' Doctrine*] ("The sensitive places doctrine does not call for an originalist inquiry because the doctrine is not the product of an originalist analysis. This is because such a view of the sensitive places doctrine, or any other presumptively lawful category under *Heller*, would fail to make structural sense when reading *Heller* as a whole. *Heller* is a deeply originalist opinion.").

Two years ago, in *New York State Rifle & Pistol Association, Inc. v. Bruen*, 597 U.S. 1 (2022), the United States Supreme Court elaborated on what is now coined the "sensitive places" doctrine:

> [W]e are . . . aware of no disputes regarding the lawfulness of [sensitive place] prohibitions. We therefore can assume it settled that these locations were "sensitive places" where arms carrying could be prohibited consistent with the Second Amendment. And courts can use analogies to those historical regulations of "sensitive places" to determine that modern regulations prohibiting the carry of firearms in *new* and analogous sensitive places are constitutionally permissible.

Id. at 30 (second alteration in original) (emphasis in original) (citations omitted). Applying that framework, *Bruen* held that the New York firearm law at issue did not permissibly regulate a "sensitive place" because it covered areas "where people typically congregate and where law-enforcement and other public-safety professionals are presumptively available." *Id.* at 30–31. To the Court, such an application of the "sensitive place" exception was "far too broad[ ]" and lacked a historical analog. *Id.* at 31; *see also id.* ("Respondents' argument would in effect exempt cities from the Second Amendment and would eviscerate the general right to publicly carry arms for self-defense . . . .").

II. Discussion

In the case at bar, Mr. Radomski was convicted of possessing a firearm on educational property for having in his vehicle—parked on Crescent Parking Lot, which is central to the UNC-Chapel Hill campus—a number of unsecured, long guns.[1] *Radomski*, 901 S.E.2d at 911–12. Using *Bruen* as guidance, the Court of Appeals, in an oddly designated as-applied challenge that was not preserved at trial, considered whether a university parking lot is a "sensitive place." *Id.* at 913–14. More specifically, the Court of Appeals focused on the constitutionality of North Carolina's statutory gun restrictions. *Id.* at 913–15.

In 1971, our General Assembly carefully crafted N.C.G.S. § 14-269.2(b) to limit firearm possession on educational campuses while providing a significant list of exceptions for citizens with permits

1. Mr. Radomski was specifically located at Crescent Parking Lot, *Radomski*, 901 S.E.2d at 911, which neighbors Kenan Stadium, UNC School of Medicine, Taylor Campus Health, and UNC Hospital, *see Crescent Visitor Parking Lot*, Univ. N.C. Chapel Hill, https://maps.unc.edu/parking/crescent-visitor-parking-lot/ (last visited Aug. 22, 2024).

or the need to carry weapons (so long as the weapons are properly secured). *See* An Act to Protect Persons on the Property of Any Public or Private Educational Institution from Persons Carrying Firearms or Other Weapons, ch. 241, § 1, 1971 N.C. Sess. Laws 176–77 (codified as amended at N.C.G.S. § 14-269.2 (2023)). Unlike the sweeping regulation in *Bruen*, section 14-269.2(b) narrowly prohibits firearms specifically on "educational property," barring the carrying or possession of guns on:

> Any school building or bus, school campus, grounds, recreational area, athletic field, or other property owned, used, or operated by any board of education or school board of trustees, or directors for the administration of any school.

N.C.G.S. § 14-269.2(a)(1) (2023).

Yet the Court of Appeals, with alarming brevity, truncated the statute's scope, holding:

> However, [Mr. Radomski] argues, and we agree, that the purpose of the "open-air parking lot situated between the emergency room entrance, a football arena, and another healthcare building[]" is not educational in nature; rather, its function is to provide "parking access to the health care facilities in the area, including the hospital where [Mr. Radomski] was trying to be seen for significant kidney health concerns."

Radomski, 901 S.E.2d at 914 (second alteration in original). According to that court, section 14-269.2(b) was not a presumptively lawful "sensitive place" restriction in Mr. Radomski's case because Crescent Parking Lot was not "educational in nature." *Id.* at 914. That court then continued with *Bruen*'s analogical test, which required the State to provide a sufficient historical analog to section 14-269.2(b) to pass Second Amendment muster. *Id.* at 914–15 ("The State argues that, 'even applying *Bruen*'s analogical test, N.C.G.S. § 14-269.2(b) easily passes constitutional review.' " (alteration accepted)). Because the Court of Appeals was unconvinced that the State met this burden, it concluded that section 14-269.2(b) unconstitutionally restricted Mr. Radomski's Second Amendment rights. *Id.* at 915.

On appeal, the State raises grave concerns about the legal soundness and practical consequences of the Court of Appeals distillation of Second Amendment jurisprudence. It notes that *Heller* specifically carved out the "sensitive place" doctrine to allow firearm regulations in

"schools and government buildings." *Heller*, 554 U.S. at 626. The State argues that doctrine applies here because UNC-Chapel Hill (1) is an educational campus and includes Crescent Parking Lot within its property grounds and (2) is a public research institution, entirely owned and operated by the State of North Carolina. According to the State, had the Court of Appeals properly applied the "sensitive places" analysis, it would have upheld the statute's constitutionality. Other courts have reached that conclusion in similar cases. *See United States v. Class*, 930 F.3d 460, 464 (D.C. Cir. 2019) (ruling that a parking lot roughly 1,000 feet from the entrance of the United States Capitol Building was "sufficiently integrated with the Capitol for *Heller*[ ]'s sensitive places exception to apply"); *Bonidy v. U.S. Postal Serv.*, 790 F.3d 1121, 1125 (10th Cir. 2015), *cert. denied*, 577 U.S. 1216 (2016) (concluding that a parking lot was a sensitive place because it should be "considered as a single unit with the postal building," which was attached to and exclusively served by the lot); *United States v. Dorosan*, 350 F. App'x 874, 875 (5th Cir. 2009), *cert. denied*, 559 U.S. 983 (2010) (applying the sensitive places doctrine to a government-owned parking lot after considering the government's ownership of the lot and the lot's government purpose); *State v. Schofield*, No. 1608024954, 2023 WL 7276650, at *3 (Del. Super. Ct. Nov. 3, 2023) (extending the sensitive places doctrine to a public sidewalk in a school zone because *Bruen* broadly categorizes schools as sensitive places), *aff'd*, 314 A.3d 1077 (Del. 2024); *Wade v. Univ. of Mich.*, No. 330555, slip op. at 13 (Mich. Ct. App. July 20, 2023) (rejecting the argument that "the entire campus is not a 'sensitive area' " as "untenable because it would require that certain 'areas' of the University be partitioned off from other areas of the University"), *on remand from* 981 N.W.2d 56 (Mich. 2022); *cf.* Hesse, *Expansive 'Sensitive Places' Doctrine* at 251 ("Whatever courts may eventually decide constitutes a sensitive place, that sensitive place will have a buffer zone around it. Conceptually, the buffer zone includes places that are sensitive by virtue of their proximity to the core sensitive place.").

The Court of Appeals invoked Rule 2 to address the unpreserved constitutional issue because of the "newly percolating and widely occurring issue" of Second Amendment jurisprudence. *Radomski*, 901 S.E.2d at 913. Yet by not taking this case, this Court allows an intermediate appellate court to invalidate a duly enacted state law and provides no clarity on the limits of the "as applied" nature of its invalidation. *See id.* at 919 (concluding vaguely that "[t]he application of N.C.G.S. § 14-269.2(b) to [Mr. Radomski's] conduct under these facts unconstitutionally restricts [his] Second Amendment protections."). Put another way, where is the limit to the Court of Appeals' ruling? Is a library

parking lot not "educational" in nature? Is a dormitory parking lot not "educational" in nature? What about a classroom parking lot? And it is far from clear that the Court of Appeals' ruling is limited to parking lots. Universities offer gymnasiums, food halls, and recreational facilities, among many other amenities, to their students—places outside the classroom that address student well-being. It may very well be a fair reading that the Court of Appeals' decision calls into question whether the State can regulate the possession of unsecured firearms in school gyms. In our inaction, we do a great disservice today to the safety of this state's children, and we undermine the important work of school administrators and law enforcement who are reconciling compliance with our state's laws and our judiciary's rulings.

III. Conclusion

Instead of evaluating the Court of Appeals' application of *Bruen*, this Court stays quiet. That silence is destabilizing and unwarranted. By enacting section 14-269.2(b), the General Assembly aimed to balance public-safety needs with our citizens' Second Amendment rights. *See State v. Conley*, 374 N.C. 209, 219 (2020) (Morgan, J. dissenting, with Newby, J. joining) ("[I]t is clear that the legislature intended that the presence of any gun or other firearm on educational property generate a heightened degree of concern . . . . The obvious legislative intent of this focused statutory enactment is to prevent violence in the schools located in North Carolina."). Whether the legislature struck the right balance is a crucial question, one particularly suited for and worthy of judicial evaluation. *See Rahimi*, 144 S. Ct. at 1898 ("As we explained in *Bruen*, the appropriate analysis involves considering whether the challenged regulation is consistent with the principles that underpin our regulatory tradition. A court must ascertain whether the new law is relevantly similar to laws that our tradition is understood to permit, applying faithfully the balance struck by the founding generation to modern circumstances." (cleaned up)).

By declining to examine the decision below, this Court dodges important questions about the constitutionality of North Carolina's gun regulations—on school property in particular and in "sensitive spaces" more generally. In other matters, this Court has taken the position that any time the Court of Appeals invalidates an act of the General Assembly, it is a matter of public importance and jurisprudence warranting merits review. *See State v. Grady*, 372 N.C. 509, 521–22 (2019) ("[W]e presume that laws enacted by the General Assembly are constitutional . . . ." (quoting *Cooper v. Berger*, 370 N.C. 392, 413 (2018))); *Hart v. State*, 368 N.C. 122, 126 (2015) ("[W]e begin with a presumption that the laws duly

enacted by the General Assembly are valid." (citing *State ex rel. Martin v. Preston*, 325 N.C. 438, 449 (1989))). Because I believe we should say *something*, I respectfully dissent.

Justice EARLS joins in this dissenting opinion.

ZANDER v. ORANGE CNTY., N.C.

[386 N.C. 564 (2024)]

ELIZABETH ZANDER AND EVAN GALLOWAY	From N.C. Court of Appeals 22-691
v.	From Orange 17CVS166
ORANGE COUNTY, NC AND THE TOWN OF CHAPEL HILL	From Orange 17CVS166

No. 426A18-2

ORDER

Pursuant to N.C. R. App. P. 30(f), this Court hereby allows Plaintiffs' Motion to Submit the Case for Review to the extent that the Court will decide the case on the record and briefs already filed. With regard to Plaintiffs' Motion to Deny Defendants Permission to Participate in Oral Argument, that motion is hereby dismissed as moot.

Defendants' Motion to Preclude Plaintiffs from Participating in Oral Argument is also hereby dismissed as moot. Defendants' Motion in the Alternative to Dismiss Appeal is denied.

By order of the Court in Conference, this the 2nd day of July 2024.

Riggs, J. recused.

/s/ Allen, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 2nd day of July 2024.

s/Grant E. Buckner

Grant E. Buckner
Clerk of the Supreme Court

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3P23-7	State of North Carolina v. Joseph Edwards Teague, III	1. Def's Pro Se Motion to Intercede in this Matter 2. Def's Pro Se Motion to Vacate Conviction, Dismiss All Charges, and Correct the Record with Prejudice with Appropriate Relief as the Court May Find Right	1. Dismissed 2. Dismissed
3P24	In re 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. Denied 3. Denied
13P24	State v. Nathaniel E. Dixon	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA21-471) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. --- 2. Special Order 3. Special Order
24P23-4	SCGVIII-Lakepointe, LLC v. Vibha Men's Clothing, LLC; Kalishwar Das	Def's Pro Se Motion for Petition for Comprehensive Review	Dismissed **Dietz, J., recused** **Riggs, J., recused**
25P23-4	Kalishwar Das v. SCGVIII Lakepointe, LLC in c/o Mr. John F. Morgan, Jr. Plt's	Pro Se Motion for Petition for Rehearing	Dismissed **Dietz, J., recused** **Riggs, J., recused**
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 4. Plt's Motion to Amend Response with Additional Authority 5. Defs' Motion to Strike or Disregard Portions of Amicus Brief of the North Carolina Real Estate Commission	1. Allowed **03/07/2024** Dissolved 2. Denied 3. Denied 4. Allowed **03/12/2024** 5. Dismissed as moot

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39A24-2	Chauncey Peele v. Melba Hodges Peele	Def's Pro Se Motion to Dismiss	Dismissed
40P24	State v. Kenneth Dylan Whitehead	Def's Petition for Writ of Certiorari to Review Order of the COA (COAP22-221)	Denied
45P24	State v. Robert Todd Guffey	Def's PDR Under N.C.G.S. § 7A-31 (COA22-1043)	Denied
53P23-2	John P. Cox v. Jessica Sadovnikov (now Impson)	1. Def's Motion for Temporary Stay (COA23-657) 2. Def's Petition for Writ of Supersedeas 3. Def's PDR Under N.C.G.S. § 7A-31 4. Def's Motion to Seal Docket	1. Allowed **06/27/2024** 2. 3. 4. **Dietz, J., recused**
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 4. Plts' Conditional PDR Under N.C.G.S. § 7A-31	1. Special Order **03/07/2024** 2. Denied 3. Denied 4. Denied
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. Allowed 3. Allowed
61P24	State v. Andrew Webster Boynton	Def's PDR Under N.C.G.S. § 7A-31 (COA23-484)	Denied
64A21-2	State v. Riley Dawson Conner	Def's PDR Under N.C.G.S. § 7A-31 (COA19-1087)	Denied
68A23	State v. Joshua Lee Burgess	Def's Motion to Bypass Court of Appeals	Allowed **07/25/2024**

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75A24	State of North Carolina *ex rel.* NC Utilities Commission, et al. v. Carolina Industrial Group for Fair Utility Rates II, et al.	1. Parties' Joint Motion to Consolidate 2. Parties' Joint Motion to Set Briefing Schedule	1. Allowed **07/05/2024** 2. Allowed **07/05/2024**
85P24-2	Paul Yongo Odindo v. Mary Terry Kanyi	1. Plt's Pro Se Petition for Writ of Certiorari to Review Order of the COA (COAP23-11) 2. Plt's Pro Se Motion for Appropriate Legal Fees and Costs and Other Damages	1. Denied 2. Denied **Riggs, J., recused**
88P24	Amy Delene Kean v. Warren Paul Kean	1. Def's Motion for Temporary Stay (COA23-46) 2. Def's Petition for Writ of Supersedeas 3. Def's PDR Under N.C.G.S. § 7A-31 4. Plt's Conditional PDR Under N.C.G.S. § 7A-31	1. Allowed **04/09/2024** Dissolved 2. Denied 3. Denied 4. Denied
89PA22	Eric Steven Fearrington, Craig D. Malmrose v. City of Greenville, Pitt County Board of Education	Plts' Petition for Rehearing	Denied **07/11/2024** **Dietz, J., recused**
93P24	State v. Jack Labrittan Smith	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA23-575) 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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94P24	Mike Causey, Commissioner of Insurance of North Carolina, Petitioner v. Southland National Insurance Corporation, Southland National Reinsurance Corporation, Bankers Life Insurance Company, Colorado Bankers Life Insurance Company, North Carolina Domiciled Insurance Companies, Respondents	1. Intervenor's (GBIG Holdings, LLC) PDR Under N.C.G.S. § 7A-31 (COA23-725) 2. Appellees' Motion to Expedite Consideration of PDR 3. Intervenor's (GBIG Holdings, LLC) Motion to Withdraw PDR	1. Dismissed as moot 2. Dismissed as moot 3. Allowed
99P24	State v. Lloyd Michael Stewart	Def's Pro Se PDR Under N.C.G.S. § 7A-31 (COA23-291)	Denied
102P19-12	State v. Christopher Lee Neal	Def's Pro Se Petition for Writ of Habeas Corpus	Denied **07/02/2024**
102P24	State v. Warren Douglas Jackson	Def's PDR Under N.C.G.S. § 7A-31 (COA23-727)	Denied
106P24-2	State v. Christopher D. Cromartie, Jr.	1. Def's Pro Se Motion for Certificate of Appealability 2. Def's Pro Se Motion for Appeal of June 26, 2024 Order 3. Def's Pro Se Motion for Second Extension of Time	1. Dismissed 2. Dismissed 3. Dismissed
107A24	Blueprint 2020 Opportunity Zone Fund, LLLP, and Woodforest CEI Boulos Opportunity Fund, LLC v. 10 Academy Street QOZB I, LLC; CitiSculpt, LLC; CS 10 South Academy St, LLC; CitiSculpt SC, LLC; 10 Academy Street, LLC; CitiSculpt Fund Services, LLC; 10 Academy Opportunity Zone Fund I, LLC; Charles Lindsey McAlpine; and Michael J. Miller	Parties' Joint Motion for Limited Remand and Stay	Special Order **08/01/2024**

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109PA22-2	McKinney, et al. v. Goins, et al.	Amici Curiae Jane Does 1 and 2's Motion for Leave to Participate in Oral Argument	Denied **07/22/2024** **Riggs, J., recused**
116P24	State v. Darnell Queen	Def's Pro Se Petition for Writ of Certiorari to Review Order of the COA (COAP24-166)	Denied
118P18-3	State v. Maurice L. Stroud	Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Mecklenburg County (COAP16-413)	Dismissed
120P24-2	Daniel T. Bryan and Lisa D. Bryan v. Barbara Snow Adams and Pamela Frederes	1. Plts' Pro Se Motion to Reconsider (COA23-714) 2. Plt's Pro Se Motion for Temporary Stay	1. Dismissed 2. Dismissed
121P24	Amanda Wallace v. District Judge Doretta Walker	Petitioner's Petition for Writ of Certiorari to Review Order of the COA (COAP23-854)	Denied
126PA24	North Carolina Bar and Tavern Association, et al. v. Roy A. Cooper, III, in his official capacity as Governor of North Carolina	Parties' Joint Motion to Amend Briefing Schedule	Special Order **07/24/2024**
131P16-32	State v. Somchai Noonsab	Def's Pro Se Motion for Exoneration	Dismissed
131P24	Roy A. Cooper, III, in his official capacity as Governor of the State of North Carolina v. Philip E. Berger, in his official capacity as President Pro Tempore of the North Carolina Senate; et al.	1. Legislative Defs' PDR Prior to a Determination by the COA (COA24-440) 2. Plt's Motion and Suggestion of Recusal or Disqualification of Associate Justice Berger	1. Denied 2. Special Order

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132P24	Roy A. Cooper, III, in his official capacity as Governor of the State of North Carolina v. Philip E. Berger, in his official capacity as President Pro Tempore of the North Carolina Senate; Timothy K. Moore, in his official capacity as Speaker of the North Carolina House of Representatives; and the State of North Carolina	1. Legislative Defs' PDR Prior to a Determination by the COA (COA24-406) 2. Plt's Motion and Suggestion of Recusal or Disqualification of Associate Justice Berger	1. Denied 2. Special Order
137P24	State v. Joseph John Radomski, III	1. State's Motion for Temporary Stay (COA23-340) 2. State's Petition for Writ of Supersedeas 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **06/07/2024** Dissolved 2. Denied 3. Denied
139A24	State of North Carolina *ex rel.* NC Utilities Commission, et al. v. CIGFUR III, et al.	1. Parties' Joint Motion to Consolidate 2. Parties' Joint Motion to Set Briefing Schedule	1. Allowed **07/05/2024** 2. Allowed **07/05/2024**
141P24	State v. Billy Nelson Wynne	Def's PDR Under N.C.G.S. § 7A-31 (COA23-586)	Denied
143P24	The North Carolina State Bar v. Mark Cummings	1. Def's Motion for Temporary Stay (COAP24-328) 2. Def's Petition for Writ of Supersedeas 3. Plt's Motion to Dissolve the Stay	1. Allowed **06/11/2024** 2. Special Order 3. Special Order
144P21-3	State v. Derrick Jervon Lindsay	Def's Pro Se Motion for Objection to Order of the Court	Dismissed

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144P24	Dr. Darren Masier v. North Carolina State University	1. Respondent's Motion for Temporary Stay (COAP24-318) 2. Respondent's Petition for Writ of Supersedeas 3. Respondent's Motion to Lift Stay Pending Appeal and Temporary Stay Order for the Limited Purpose of Allowing the Superior Court to Consider Motion to Vacate Challenged Order and Dismiss the Underlying Action 4. Respondent's Motion to Withdraw Petition for Writ of Supersedeas	1. Allowed **06/13/2024** 2. Withdrawn **08/06/2024** 3. Allowed **07/22/2024** 4. Allowed **08/06/2024**
146P24	In re Foreclosure of a Deed of Trust Michelle Y. Samuels	Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Mecklenburg County	Dismissed
147P24	In re M.G.B., T.J.B., H.E.D., Juveniles	Respondent-Grandmother's Pro Se PDR Under N.C.G.S. § 7A-31 (COA23-853)	Denied
153P24	Kustom U.S., Inc. v. Cathleen Collins Bryant	Def's Pro Se PDR Under N.C.G.S. § 7A-31 (COA23-370)	Denied
156P24	In re T.X.W., L.D.W., M.T.W.	1. Respondent-Mother's Pro Se Motion for Appeal of Right (COA17-855) 2. Respondent-Mother's Pro Se Motion to Proceed as Indigent	1. Dismissed 2. Allowed
162P18-3	State v. Ronnie Lee Ford	1. Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Guilford County (COA17-817) 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
163P24	State v. Tramella Tineak Hinton	1. Def's Pro Se Petition for Writ of Certiorari to Review Decision of the COA (COA23-673) 2. Def's Pro Se Motion for New Trial	1. Denied 2. Dismissed
164P21-2	State of North Carolina v. Terry Wayne Harris	Def's Pro Se Motion for PDR (COAP23-107)	Denied **Riggs, J., recused**

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166A24	State v. Jonathan Ray Lail	1. State's Motion for Temporary Stay (COA23-845) 2. State's Petition for Writ of Supersedeas 3. Notice of Appeal Based Upon a Dissent	1. Allowed **06/26/2024** 2. Allowed **07/15/2024** 3. ---
167P24	Kimarlo Ragland v. NC Division of Employment Security	1. Petitioner's Pro Se Motion for Notice of Appeal (COAP23-832) 2. Petitioner's Pro Se Petition for Writ of Certiorari to Review Order of the COA	1. Dismissed *ex mero motu* 2. Dismissed
167PA22	John Doe 1k v. Roman Catholic Diocese of Charlotte a/k/a Roman Catholic Diocese of Charlotte, NC	Def's Motion to Hold Oral Argument Contemporaneously with McKinney v. Gaston County Board of Education, No. 109PA22-2	Dismissed as moot **06/28/2024**
168P24	Andrew Alderete v. Sunbelt Furniture Xpress, Inc.	1. Def's Motion for Temporary Stay (COA23-896) 2. Def's Petition for Writ of Supersedeas 3. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed **06/28/2024** 2. Allowed 3. Allowed
168PA22	John Doe v. Roman Catholic Diocese of Charlotte a/k/a Roman Catholic Diocese of Charlotte, NC	Def's Motion to Hold Oral Argument Contemporaneously with McKinney v. Gaston County Board of Education, No. 109PA22-2	Dismissed as moot **06/28/2024**

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169P23-4	State v. Christopher Leon Minor	1. Def's Pro Se Motion for Rule 2 Petition 2. Def's Pro Se Motion to Proceed as Indigent 3. Def's Pro Se Motion for Custody Hearing 4. Def's Pro Se Motion for Post Conviction Discovery 5. Def's Pro Se Motion to Dismiss 6. Def's Pro Se Petition for Writ of Habeas Corpus 7. Def's Pro Se Motion to Proceed as Indigent 8. Def's Pro Se Motion for Custody Hearing 9. Def's Pro Se Motion to Dismiss 10. Def's Pro Se Motion for Post Conviction Discovery	1. Denied **07/15/2024** 2. Allowed **07/15/2024** 3. Dismissed **07/15/2024** 4. Dismissed **07/15/2024** 5. Dismissed **07/15/2024** 6. Denied **07/15/2024** 7. Allowed **07/15/2024** 8. Dismissed **07/15/2024** 9. Dismissed **07/15/2024** 10. Dismissed **07/15/2024** **Riggs, J., recused**
175P24	State v. Demistrus McKinley Ingram	1. State's Motion for Temporary Stay (COA23-748) 2. State's Petition for Writ of Supersedeas 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **07/01/2024** 2. 3.
176P24	State v. Jalen O'Keith Watlington	1. State's Motion for Temporary Stay (COA22-972) 2. State's Petition for Writ of Supersedeas 3. State's PDR Under N.C.G.S. § 7A-31 4. Def's Conditional PDR Under N.C.G.S. § 7A-31	1. Allowed **06/28/2024** 2. 3. 4.
177P24	State v. Terry Wayne Norris, Jr.	1. State's Motion for Temporary Stay (COA23-889) 2. State's Petition for Writ of Supersedeas 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **06/28/2024** 2. 3.
178P24	Ayabuja Bey a/k/a Omar Clyburn v. David Smith d/b/a David Smith Towning	Plt's Pro Se Petition for Writ of Certiorari to Review Order of the COA (COAP24-388)	Dismissed

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181P24	State v. Toby Mitchell McDuffie, Jr.	Def's Pro Se PDR Under N.C.G.S. § 7A-31 (COA23-836)	Denied
183P24	State v. Kimberly Cable	1. State's Motion for Temporary Stay (COA23-192) 2. State's Petition for Writ of Supersedeas 3. State's PDR Under N.C.G.S. § 7A-31 4. Def's Conditional PDR	1. Allowed **07/08/2024** 2. 3. 4.
184P24	Markese Robinson v. North Carolina Department of Corrections	Petitioner's Pro Se Motion for PDR (COAP24-364)	Dismissed
185P24	State v. Larry T. Whitehurst	1. Def's Pro Se Motion for Notice of Appeal (COAP24-29) 2. Def's Pro Se Motion for PDR	1. Dismissed 2. Dismissed
188P24	In re E.H. & R.H.	1. Petitioner's Motion for Temporary Stay (COA23-864) 2. Petitioner's Petition for Writ of Supersedeas 3. Petitioner's PDR Under N.C.G.S. § 7A-31 4. Respondent Parents' PDR Under N.C.G.S. § 7A-31	1. Allowed **07/15/2024** 2. 3. 4.
191P24	In re J.R.S.	1. Respondent-Mother's Motion for Temporary Stay (COA23-976) 2. Respondent-Mother's Petition for Writ of Supersedeas 3. Respondent-Mother's PDR Under N.C.G.S. § 7A-31	1. Allowed **07/16/2024** Dissolved 2. Denied 3. Denied
192P24	State v. James E. Price	1. Def's Pro Se PDR Under N.C.G.S. § 7A-31 (COA22-915) 2. Def's Pro Se Motion to Waive Fees/Costs	1. Denied 2. Allowed **Riggs, J., recused**

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193P24	State v. Anthony Antonio Abraham, Jr.	1. Def's Pro Se Motion for Temporary Stay (COA23-954) 2. Def's Pro Se Petition for Writ of Supersedeas 3. Def's Pro Se Petition for Writ of Habeas Corpus 4. Def's Pro Se Petition for Writ of Certiorari to Review Order of the COA 5. Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Rowan County	1. Denied **07/16/2024** 2. Denied **07/16/2024** 3. Denied **07/16/2024** 4. Denied **07/16/2024** 5. Dismissed **07/16/2024**
193P24-2	State v. Anthony Antonio Abraham, Jr.	Def's Pro Se Motion for Notice of Appeal (COA23-954)	Dismissed
194P19-4	State v. David Ezell Simpson	Def's Pro Se Motion for PDR (COAP22-360)	Dismissed
194P24	State v. Christopher Harold Orr	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, Henderson County	1. Denied **07/22/2024** 2. Dismissed **07/22/2024** 3. Dismissed **07/22/2024**
197P24	State v. Arnold Travis Clark	1. Def's Motion for Temporary Stay (COA23-798) 2. Def's Petition for Writ of Supersedeas	1. Denied **07/25/2024** 2.
202P24	Julius William Woody and Shannon Chad Gaines, Plaintiffs v. Randy Lynn Vickrey, Individually and in His Capacities as Trustee of the Julius William Woody Trust and as Attorney-In-Fact for Julius William Woody, Defendant and Third-Party Plaintiff v. Carrie F. Vickrey and Donald G. Ayscue, Third-Party Defendants	1. Plts' and Third Party Defs' Motion for Temporary Stay (COA22-776) 2. Plts' and Third Party Defs' Motion for Writ of Supersedeas 3. Plts' and Third Party Defs' Notice of Appeal Based Upon a Constitutional Question 4. Def's (Randy Lynn Vickrey) Motion to Dismiss Appeal	1. Allowed **07/25/2024** 2. 3. 4.

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

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203P24	Java Warren and Jannifer Warren v. Cielo Ventures, Inc. d/b/a Servpro North Central Mecklenburg County	1. Def's Motion for Temporary Stay (COA22-926) 2. Def's Petition for Writ of Supersedeas 3. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed **07/26/2024** 2. 3.
205P24	H.D. Rodgers, Executor of the Estate of Ruth Rodgers, Deceased v. Nash Hospitals, Inc., Sc Surgicalists of North Carolina, P.C., Providence Anesthesiology Associates Pa, Marcus Lynn Wever, M.D., and Andrea Kay Fuller, M.D.	1. Defs' Motion for Temporary Stay (COA24-125) 2. Defs' Petition for Writ of Supersedeas 3. Defs' Petition for Writ of Certiorari to Review Order of the COA	1. Special Order **08/07/2024** 2. 3.
207P24	Dennis O'Keith Blackwell v. Honorable Senior Judge of Superior County of Pender County	Petitioner's Pro Se Petition for Writ of Certiorari to Review Order of the COA (COAP22-566)	Denied
263PA21-2	In re J.U.	Def's PDR Under N.C.G.S. § 7A-31 (COA20-812-2)	Denied
268P23	Colonial Plaza Phase Two, LLC, d/b/a Colonial Plaza Mall v. Cherry's Electronic Tax Services, LLC	Def's Petition for Writ of Certiorari to Review Decision of the COA (COA23-159)	Special Order
270P23	State v. Elton Joshua Pritchett, III	Def's PDR Under N.C.G.S. § 7A-31 (COA22-805)	Denied
274P23	State v. Robert Lee Price	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA22-1064) 2. Def's PDR Under N.C.G.S. § 7A-31 3. Def's Motion to Hold Appeal in Abeyance 4. State's Motion to Dismiss Appeal 5. Def's Motion to Amend PDR	1. --- 2. Denied 3. Dismissed as moot 4. Allowed 5. Allowed **Riggs, J., recused**

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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. Def-Appellants' Motion to Schedule Oral Argument Contemporaneously with McKinney v Gaston County Board of Education, No. 109PA22-2 2. Young Men's Christian Association of Northwest North Carolina d/b/a Kernersville Family YMCA's Motion for Leave to File Amicus Brief 3. Plt's Motion to Strike Brief of Amicus Curiae Young Men's Christian Association of Northwest North Carolina d/b/a Kernersville Family YMCA 4. Plt's Motion for Sanctions	1. Dismissed as moot **06/28/2024** 2. Special Order **07/05/2024** 3. Special Order **07/05/2024** 4. Special Order **07/05/2024** **Riggs, J., recused**
281P06-18	Joseph E. Teague, Jr., P.E., C.M. v. NC Department of Transportation, J.E. Boyette, Secretary	Plt's Pro Se Motion to Vacate Firing and Dismiss Charges with Prejudice	Dismissed
296P15-4	In re Ernest James Nichols	Petitioner's Pro Se Petition for Writ of Habeas Corpus	Denied **07/24/2024**
296P15-5	In re Ernest James Nichols	Petitioner's Pro Se Motion for Reconsideration	Dismissed **08/01/2024**
305P23	Jason Levine v. Sharetta S. Carter	1. Plt's Notice of Appeal Based Upon a Constitutional Question (COA23-113) 2. Plt's PDR Under N.C.G.S. § 7A-31	1. Dismissed *ex mero motu* 2. Denied
307P23	State v. Mario Wilson	1. State's Motion for Temporary Stay (COA21-34) 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 COA	1. Allowed **11/14/2023** 2. Allowed 3. Denied 4. Allowed
310P23-3	State v. Rocky J. Bryant	Def's Pro Se Motion for PDR (COAP23-177)	Dismissed **Riggs, J., recused**
323P23-4	Owl House Cafe, LLC, OHCGrill, LLC, Hamza Tebib v. 11th Prosecutorial District Attorney (Granville County)	1. Plt's Pro Se Motion for Victim's Right Enforcement 2. Plt's Pro Se Petition for Writ of Mandamus	1. Denied 2. Denied

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326P23-5	In re D.T.P. & B.M.P.	1. Respondent-Parents' Pro Se Petition for Writ of Certiorari (COA23-29) 2. Respondent-Parents' Pro Se Petition for Writ of Certiorari 3. Respondent-Parents' Pro Se Petition for Writ of Mandamus	1. Dismissed 2. Dismissed 3. Denied
334P09-3	In re Christopher N. Gooch v. Ronney Huneycutt, as Warden of Alexander Correctional Institution, Todd E. Ishee, as Secretary of the North Carolina Department of Adult Corrections	1. Petitioner's Pro Se Petition for Writ of Habeas Corpus 2. Petitioner's Pro Se Motion to Proceed *In Forma Pauperis*	1. Denied **07/09/2024** 2. Allowed **07/09/2024** **Riggs, J., recused**
350P23-2	Abdolhossain Motealleh v. Duke Health, et al.	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 Certiorari to Review Order of Superior Court, Wake County	1. Dismissed **08/05/2024** 2. Dismissed **08/05/2024** 3. Dismissed **08/05/2024**
353PA23	Cato Corporation, et al. v. Zurich American Insurance Company	1. Plts' Motion to Admit Gail A. McQuilkin Pro Hac Vice 2. Plts' Motion to Admit Benjamin J. Widlanski Pro Hac Vice 3. Plts' Motion to Admit Dwayne A. Robinson Pro Hac Vice	1. Allowed 2. Allowed 3. Allowed
405P11-2	State v. Nicholas Jermaine Steele	1. Def's Pro Se Petition for Writ of Mandamus and Prohibition 2. Def's Pro Se Motion on Procedure to Assert Right of Access 3. Def's Pro Se Petition for Writ of Habeas Corpus and Subpoena Duces Tecum	1. Dismissed **07/30/2024** 2. Dismissed **07/30/2024** 3. Denied **07/30/2024**
416P15-4	State v. Nijel Ramsey Lee	Def's Pro Se Motion for Appeal (COAP24-387)	Dismissed *ex mero motu* **07/12/2024**
416P15-5	Nijel Ramsey Lee v. Warden Ben Anderson	Petitioner's Pro Se Petition for Writ of Habeas Corpus	Denied **08/14/2024**

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426A18-2	Elizabeth Zander and Evan Galloway v. Orange County, NC and the Town of Chapel Hill	1. Plts' Motion to Deny Defs Permission to Participate in Oral Argument 2. Plts' Motion to Submit the Case for Review 3. Defs' Motion to Preclude Plts from Participating in Oral Argument 4. Defs' Motion in the Alternative to Dismiss Appeal	1. Special Order **07/02/2024** 2. Special Order **07/02/2024** 3. Special Order **07/02/2024** 4. Special Order **07/02/2024** **Riggs, J., recused**
475P20-3	State v. Solomon Nimrod Butler	Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Cumberland County	Denied
536P20-4	State v. Siddhanth Sharma	Def's Pro Se Petition for Writ of Certiorari to Review Decision of the COA (COA19-591)	Denied
580P05-32	In re David Lee Smith	1. Def's Pro Se Petition for Writ of Mandamus 2. Def's Pro Se Motion for Demand for Remand of Case with Instructions	1. Denied 2. Dismissed **Riggs, J., recused**

COWPERTHWAIT v. SALEM BAPTIST CHURCH, INC.

[386 N.C. 580 (2024)]

IAN COWPERTHWAIT, WILLIAM COWPERTHWAIT,
AND CATHERINE COWPERTHWAIT
v.
SALEM BAPTIST CHURCH, INC.

No. 263A23

Filed 18 October 2024

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 290 N.C. App. 262 (2023), affirming in part and reversing in part an order entered on 24 September 2021 by Judge Susan E. Bray in Superior Court, Forsyth County, and remanding the case. Heard in the Supreme Court on 19 September 2024.

Fox Rothschild, LLP, by Elizabeth Brooks Scherer and Nathan W. Wilson, and Smith Law Group, PLLC, by Steven D. Smith, for plaintiffs-appellees.

Bovis Kyle Burch & Medlin, LLC, by Alicia L. Bray and Camilla F. DeBoard, for defendant-appellant.

PER CURIAM.

In a divided opinion, the Court of Appeals affirmed in part the trial court's order vacating plaintiffs' Rule 41(a)(1) voluntary dismissal, reversed the portion of the trial court's order dismissing the case with prejudice, and remanded for the trial court to further consider which sanction short of dismissal with prejudice would be appropriate for plaintiffs' failure to prosecute. *Cowperthwait v. Salem Baptist Church, Inc.*, 290 N.C. App. 262 (2023). Defendant appealed based on the dissent. For the reasons stated in the dissenting opinion, the decision of the Court of Appeals is reversed.

REVERSED.

Justice BARRINGER concurring in part and dissenting in part.

I concur with my esteemed colleagues of the majority that the decision of the Court of Appeals should be reversed when applying the applicable standard of review—abuse of discretion. I write this dissent to clarify that the relevant time period to be considered is the "period of

time between the filing of the complaint and the ruling on [d]efendant's . . . motion." *Cowperthwait v. Salem Baptist Church, Inc.*, 290 N.C. App. 262, 271 (2023) (Stroud, C.J., concurring in result only in part, dissenting in part).

The judiciary has no role in deciding the soundness of public policy codified by the legislature. Applicable here, our legislature has decided that a plaintiff "who is [within the age of 18 years] at the time the cause of action accrued" is entitled to bring his or her action "within three years" after achieving the age of majority. N.C.G.S. § 1-17(a) (2023).

I am troubled by the trial court's finding that defendants "had been attempting to obtain the requested medical records of Ian Cowperthwait since at least 2014"—referencing a time period six years before the lawsuit was timely filed. Further concerning is the trial court's consideration that this case was "unusually old by virtue of the tolling of the statute of limitations applicable," therefore concluding that the "additional year-long delay" in prosecuting the action prejudiced the defendant. *Cowperthwait*, 290 N.C. App. at 267 (Stroud, C.J., concurring in result only in part, dissenting in part).

In my view, on these facts, the only time frame that is appropriately considered is after the claim was timely filed. Under the presumption of regularity, I must presume that the trial court did not inappropriately consider the period during which the statute of limitations was tolled. The Court of Appeals dissent stated, "[T]he trial court properly relied on the period of time between the filing of the complaint and the ruling on [d]efendant's . . . motion." *Id.* at 271. On its face, this is within the trial court's discretion.

Further, in accordance with judicial restraint, it is not necessary to reach the issue of whether "the claims of William and Catherine Cowperthwait were clearly barred by the statute of limitations." *Id.* at 269. Therefore, I do not concur with the majority on this issue.

Justice EARLS dissenting.

I would modify and affirm the decision of the Court of Appeals in this matter. I agree that the appropriate standard of review of the trial court's decision to dismiss the complaint with prejudice is abuse of discretion. However, I find that the trial court applied the wrong legal standard in assessing the relevant factors under *Wilder v. Wilder*, 146 N.C. App. 574 (2001). Because a trial court's error of law also constitutes an

abuse of discretion, and because questions of law are reviewed de novo, *In re Custodial Law Enf't Recording*, 383 N.C. 261, 268 (2022), I would hold that the trial court's order here was an abuse of discretion.

I. Facts & Procedural History

On 9 July 2020, Ian Cowperthwait and his parents, William and Catherine Cowperthwait (Cowperthwaits), commenced a negligence action against Salem Baptist Church, Inc. (Salem Baptist) in Superior Court, Forsyth County. This action stems from a June 2011 incident when Ian, who was a minor at the time, was allegedly injured while attending an overnight camp on a property owned and managed by Salem Baptist. Because Ian was eleven years old at the time of the incident, the statute of limitations was tolled as to his claims until three years after his eighteenth birthday pursuant to N.C.G.S. § 1-17(a). Therefore, the statute of limitations expired for Ian's claims on 9 July 2020.

Since at least 2014, Brotherhood Mutual Insurance Company (Insurance Company), Salem Baptist's liability insurer, had been communicating with Ian's parents to obtain Ian's medical records to resolve the claim.[1] Two weeks before the Cowperthwaits filed suit, the Insurance Company made a request for Ian's medical records for the purpose of evaluating the Cowperthwaits' claims. The Cowperthwaits' attorney assured the Insurance Company that he would provide the documents promptly. After the Cowperthwaits filed their complaint, the Insurance Company renewed its request for the medical documents. The Cowperthwaits' attorney did not consistently respond to these requests, but in December 2020, he again stated that he would try to obtain the medical records. The Cowperthwaits, however, did not produce the documents.

Based upon an agreement between the parties, Salem Baptist filed its answer in a document dated 4 January 2021, six months after the action was initiated.[2] On the same day, the Insurance Company's attorney served interrogatories and a formal request for production of documents. The

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1. The trial court's findings of fact specify that the Insurance Company and the Cowperthwaits had been in communication since at least 2014. However, there is no evidence in the record of any correspondence between the Insurance Company and the Cowperthwaits before June 2020.

2. Before the action was commenced, counsel for the Cowperthwaits agreed to an extension of time for Salem Baptist to file an answer "to allow time for records review and possible case resolution." No further details regarding this extension are in the record other than the fact it was agreed to.

parties agreed to extend the deadline for the Cowperthwaits to respond. But the Cowperthwaits failed to respond to the interrogatories and discovery requests by the 5 March 2021 deadline. In a 12 March 2021 e-mail, Salem Baptist's counsel asked that opposing counsel complete the discovery requests by 19 March 2021 and added that otherwise, "the matter [would] be ripe for a motion to compel and possible additional relief." On 19 March 2021, the Cowperthwaits' attorney informed Salem Baptist's counsel for the first time of "severe communication issues" with Ian due to his inpatient treatment for addiction issues. Despite this setback, the Cowperthwaits' attorney said he believed he could provide verified responses to the discovery requests by the next week. Nonetheless, by 16 June 2021, the discovery requests remained unanswered.

Because of the repeated delays, on 16 June 2021, Salem Baptist filed a motion to dismiss under Rule 41(b) or, in the alternative, a motion to compel discovery. One month after this motion was filed, on 15 July 2021, the Cowperthwaits finally responded to the discovery requests and interrogatories. In total, fifty-nine pages of medical records were produced; however, these medical records were incomplete, and no school records were provided.

After hearing the matter on 10 August and 8 September 2021, the trial court dismissed the Cowperthwaits' action for failure to prosecute. In its written order, the trial court applied the three-part test set forth in *Wilder*, 146 N.C. App. at 578, and made the following findings and conclusions:

> 2. The Court finds that the Plaintiffs have unreasonably delayed this matter. Although Ian Cowperthwait has been admitted to [addiction] treatment facilities since April of 2021, no explanation was given for the more than eight months that passed since the filing of the complaint before April of 2021. Moreover, the Court notes that Ian's parents, William and Catherine Cowperthwait[,] are named Plaintiffs. No explanation has been offered for their failure to prosecute the action.
>
> 3. The Court finds that the delay has prejudiced the Defendant. The case is already unusually old by virtue of the tolling of the statute of limitations applicable to Ian Cowperthwait due to his minor status (age 11) at the time of the incident. That incident occurred more than ten (10) years ago. The additional year-long delay in prosecuting this action has

> prejudiced the Defendant by exacerbating the inordinate amount of time since the incident, during which witnesses have moved and witness memories have inevitably faded.
>
> 4. Sanctions short of dismissal would be insufficient because the adverse effects of witness unavailability and faded memories that inevitably accompany lengthy periods of time cannot be reversed. Additionally, the court should not be expected to carry a personal injury action over multiple terms due to failure in prosecution.

The Cowperthwaits filed a timely notice of appeal to the Court of Appeals.

A divided panel of the Court of Appeals held that the trial court abused its discretion by dismissing the matter with prejudice. *Cowperthwait v. Salem Baptist Church, Inc.*, 290 N.C. App. 262, 269 (2023). The Court of Appeals reasoned that the trial court improperly considered the time during which the statute of limitations was tolled, opining that the tolling of the statute of limitations is "not a valid discretionary basis on which the trial court may dismiss the action for failure to prosecute." *Id.* at 268. Thus, the trial court abused its discretion when it dismissed the claim. *Id.* Chief Judge Stroud dissented in part, concluding that the plain language of the order reflected that the order was premised solely on the additional one-year delay caused by the Cowperthwaits' failure to obtain and provide the necessary records. *Id.* at 270–71 (Stroud, C.J., concurring in result only in part and dissenting in part). Chief Judge Stroud concluded that there was no abuse of discretion and accordingly that the dismissal should have been affirmed. *Id.* at 272.

The majority further concluded that it would be improper to address whether the statute of limitations applied to the parents. *Id.* at 265 n.1. Chief Judge Stroud also dissented from this point. *Id.* at 269–70 (Stroud, C.J., concurring in result only in part and dissenting in part). Salem Baptist filed a timely notice of appeal based on Chief Judge Stroud's dissent.

II. Analysis

Salem Baptist challenges two aspects of the Court of Appeals' decision: (1) whether the Court of Appeals erred by not reviewing the applicability of the statute of limitations; and (2) whether the Court of Appeals erred by holding that the trial court abused its discretion. Regarding the first issue, I agree that it was not raised at the trial court

and is therefore not properly before this Court. *See Value Health Sols., Inc. v. Pharm Rsch. Assocs.*, 385 N.C. 250, 272 (2023). To raise an issue on appeal, parties must present their arguments to the trial court by making a timely request, motion, or objection, and thereafter obtaining a ruling on that issue. *Id.*; *see also* N.C. R. App. P. 10(a)(1). Merely pleading a statute of limitations defense is insufficient to preserve the issue for appeal. *See Value Health Sols.*, 385 N.C. at 272 ("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 . . . ."). The record contains no evidence that Salem Baptist made a request, motion, or objection challenging some of the claims as time barred, nor does the record contain a ruling on any such issues.

A. The Court of Appeals Did Not Err When It Held the Trial Court Abused Its Discretion.

Salem Baptist's core contention is that the Court of Appeals erred by holding that the trial court abused its discretion when it dismissed the Cowperthwaits' claims with prejudice for failure to prosecute. Under Rule 41(b) of the North Carolina Rules of Civil Procedure, a defendant may move for dismissal of an action for "failure of the plaintiff to prosecute." N.C.G.S. § 1A-1, Rule 41(b) (2023). Unless otherwise specified, a dismissal for failure to prosecute constitutes an adjudication upon the merits. *Id.* But the rule does not define a "failure to prosecute." Therefore, the Court of Appeals relied upon its precedent in *Wilder*, 146 N.C. App. at 578, which prescribes a three-part analysis that trial courts must conduct before dismissing an action for failure to prosecute. Under *Wilder*, a trial court must consider the following factors before dismissing for failure to prosecute: "(1) whether the plaintiff acted in a manner which deliberately or unreasonably delayed the matter; (2) the amount of prejudice, if any, to the defendant; and (3) the reason, if one exists, that sanctions short of dismissal would not suffice." *Id.* As explained below, the trial court abused its discretion in applying each of the three *Wilder* factors. Therefore, the Court of Appeals did not err in reaching this conclusion. Moreover, we should formally adopt the *Wilder* factors; they are analogous to the standards applied under federal rules governing these circumstances.

1. Standard of Review

A trial court's involuntary dismissal under Rule 41(b) is a discretionary ruling. *Whedon v. Whedon*, 313 N.C. 200, 213 (1985). Discretionary rulings are reviewed for an abuse of discretion. *Orlando Residence*,

Ltd. v. All. Hosp. Mgmt. LLC, 375 N.C. 140, 154 (2020). A trial court's conclusions of law that are unsupported by competent findings of fact constitute an abuse of discretion. *See State v. Corbett*, 376 N.C. 799, 819, 820 (2021) (reasoning that the trial court abused its discretion when its conclusions of law were unsupported by competent findings of fact). A trial court's error of law is an abuse of discretion, and questions of law are reviewed de novo. *In re Custodial Law Enf't Recording*, 383 N.C. at 268.

***2. The Court of Appeals did not err in ruling that the trial court abused its discretion in applying* Wilder.**

As noted above, before dismissing a case under Rule 41(b) for failure to prosecute, the trial court must address the three *Wilder* factors: "(1) whether the plaintiff acted in a manner which deliberately or unreasonably delayed the matter; (2) the amount of prejudice, if any, to the defendant; and (3) the reason, if one exists, that sanctions short of dismissal would not suffice." 146 N.C. App. at 578. The trial court's determination of these factors must be supported by findings of fact, and failure to do so is grounds for reversal. *See id.* ("[T]he conclusion that there was prejudice to the defendant is insufficiently supported by factual findings, and must be vacated.").

a. The trial court misapprehended the law, and therefore abused its discretion, in finding that the Cowperthwaits caused an unreasonable delay.

As is implicit with the "failure to prosecute" designation, the *Wilder* test requires that the plaintiff have "acted in a manner which deliberately or unreasonably delayed the matter." *Id.* The delay must be caused by the plaintiff herself, and delays caused by counsel do not give cause to dismiss under *Wilder*. *Simmons v. Tuttle*, 70 N.C. App. 101, 105–06 (1984) (vacating trial court's dismissal under Rule 41(b) for failure to prosecute because the delay was not personally caused by the plaintiff). A plaintiff unreasonably delays a matter by failing to diligently and responsibly prosecute it. *Cf. Spencer v. Albemarle Hosp.*, 156 N.C. App. 675, 678–79 (2003) (reasoning that there was not an unreasonable delay because no evidence suggested that the plaintiff was not diligently prosecuting his case). No minimum or maximum passage of time defines a delay, and the Court of Appeals has held lapses of time as short as fifteen months to be sufficient to satisfy the delay prong of *Wilder*. *See, e.g.*, *Cohen v. McLawhorn*, 208 N.C. App. 492, 498–99, 505 (2010) (concluding that the plaintiff's failure to participate in fifteen months of proceedings constituted an unreasonable delay).

Unfortunately, North Carolina case law provides no clear guidance on what specifically constitutes a delay under *Wilder* beyond a failure to "diligent[ly] and responsibl[y]" prosecute the case. *Spencer*, 156 N.C. App. at 679. Nonetheless, the Fourth Circuit's decision in *Smink* is helpful for our understanding of this issue.[3] *Smink v. Comm'r*, No. 95-2158, 1996 WL 240026 (4th Cir. May 9, 1996) (per curiam) (unpublished). In examining whether the plaintiffs delayed proceedings through their conduct, the Fourth Circuit focused on their failure to meet discovery deadlines—which occurred over a relatively small two-month portion of a total eleven months of pretrial preparation. *See id.* at *2 ("[T]he Sminks failed to comply . . . with the Commissioner's discovery requests . . . . Further, the Sminks canceled or ignored appointments and ignored deadlines, document requests, and interrogatories."). Thus, it would be appropriate to frame our understanding of delay in this case by examining the extent of the Cowperthwaits' failure to meet discovery deadlines, as in *Smink*. *See id.*

In the instant case, the Cowperthwaits were served with interrogatories and a request for documents on 4 January 2021. The deadline to respond to these requests was 5 March 2021. These discovery requests were not responded to until 15 July 2021. However, the trial court excused delays after April 2021 because of Ian Cowperthwait's enrollment in in-patient treatment for addiction. Thus, the time frame during which the Cowperthwaits failed to diligently prosecute the action by failing to meet requisite deadlines is approximately one month. *See id.* (reasoning that the delay caused by failure to meet discovery deadlines was a contributing factor in the overall pattern of delay leading to dismissal of the action).

Here, the trial court found that the Cowperthwaits unreasonably delayed the matter for over *eight months*. But there were no discovery deadlines between July 2020 and March 2021, and so the Cowperthwaits could not cause a delay without deadlines to ignore. As this Court has recognized, a dismissal with prejudice is a "harsh sanction" that is "warranted only in extreme circumstances." *Whedon*, 313 N.C. at 215 (cleaned up). A one-month delay is not the extreme circumstance that

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3. Because of the lack of case law from this state, federal precedent is "pertinent for guidance and enlightenment as we develop the philosophy of our Rules of Civil Procedure." *Slattery v. Appy City, LLC*, 385 N.C. 726, 736 n.12 (2024) (cleaned up). Furthermore, Fourth Circuit case law is particularly persuasive because North Carolina is located in the Fourth Circuit and *Wilder* is partly based on the Fourth Circuit's test. *Wilder*, 146 N.C. App. at 577–78 (quoting the factors set forth in *Hillig v. Comm'r*, 916 F.2d 171, 174 (4th Cir. 1990)).

should qualify as unreasonable, especially in light of the severity of a dismissal with prejudice. *See id.* The trial court misapprehended what constitutes a delay under *Wilder*—a delay is, at minimum, a disregard of deadlines designed to ensure a timely resolution of the action.[4] *See Smink*, 1996 WL 240026, at *2 (reasoning that the plaintiffs caused delay by *inter alia* failing to meet discovery deadlines).

Although the trial court misapprehended the law, the Court of Appeals held that it did so in a different manner. In applying its *Wilder* analysis, the court below concluded that the trial court's order mistook the law by considering the time during which the statute of limitations was tolled.[5] *See Cowperthwait*, 290 N.C. App. at 268. The plain language of the order, however, focuses on "[t]he additional year-long delay" from the filing of the suit to the time of dismissal, not the ten-year delay from the tolling of the statute of limitations. As Chief Judge Stroud correctly wrote in her dissent, "the trial court properly relied on the period of time between the filing of the complaint and the ruling on Defendant's Rule 41 motion." *Id.* at 271 (Stroud, C.J., concurring in result only in part and dissenting in part).

Although the Court of Appeals' reasoning was erroneous, the trial court nonetheless misapprehended the law in applying *Wilder* to find the one-month delay unreasonable. Because the trial court misapprehended the delay element of *Wilder*, it abused its discretion. *See In re*

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4. This is not to say that a delay always requires the disregard of deadlines. The Court of Appeals has held that protracted and wholesale inaction can qualify as a delay. *See*, *e.g.*, *Greenshields, Inc. v. Travelers Prop. Cas. Co. of Am.*, 245 N.C. App. 25, 33 (2016) (concluding that over four years of complete inaction in a matter constitutes an unreasonable delay). But this case does not involve total inaction; it centers around dilatory but active proceedings and the "wholesale inaction" approach to the delay element of *Wilder* is not applicable here.

5. On this point, the Court of Appeals concluded that, as a matter of law, it is improper to weigh the delay caused by the tolling of the statute of limitations under the *Wilder* analysis. Neither the Cowperthwaits nor the Court of Appeals identifies case law supporting the proposition that *Wilder* forbids consideration of delays or prejudice stemming from the tolling of the statute of limitations. Nonetheless, I agree with the Court of Appeals. The General Assembly has made a policy choice regarding the time a minor's negligence action may be tolled, and this decision should be respected. *See* N.C.G.S. § 1-17(a)(1) (2023) (allowing tort claims to be tolled for minors until their twenty-first birthday). Punishing the plaintiff for benefiting from the General Assembly's policy choices regarding the statute of limitations is also inconsistent with the requirement that the plaintiff be personally responsible for any delays—the General Assembly, not the plaintiff, authorized a ten-year delay between the alleged negligence and initiation of the action. *See Simmons*, 70 N.C. App. at 105–06 (vacating trial court's dismissal under Rule 41(b) for failure to prosecute because the delay was not personally caused by the plaintiff).

Custodial Law Enf't Recording, 383 N.C. at 268 (explaining that a misapprehension of law is an abuse of discretion).

b. The trial court abused its discretion in finding that Salem Baptist was prejudiced by the delay because there were no findings of fact to support this conclusion.

No specific form of harm or prejudice is necessary to satisfy the second prong of *Wilder*, and prejudice has been found in a variety of contexts. *See Meabon v. Elliott*, 278 N.C. App. 77, 83–84 (noting that if witnesses die or move away, prejudice is obvious), *disc. rev. denied*, 379 N.C. 151 (2021); *Lentz v. Phil's Toy Store*, 228 N.C. App 416, 424 (2013) (concluding that cost of defending unnecessarily protracted litigation was sufficient to satisfy prejudice prong of *Wilder*); *Cohen*, 208 N.C. App. at 503–04 (concluding that harm to attorney's reputation from a protracted malpractice suit is prejudice that satisfies *Wilder*). Yet as with any conclusion of law, a finding of prejudice must be supported by competent findings of fact. *See Lauziere v. Stanley Martin Cmtys., LLC*, 271 N.C. App. 220, 227–28 (2020), *aff'd per curiam*, 376 N.C. 789 (2021).

Here, the trial court concluded that Salem Baptist was prejudiced by the delay because the delay "exacerbat[ed] the inordinate amount of time since the incident, during which witnesses have moved and witness memories have inevitably faded." But no findings of fact support this conclusion. Looking at the record, the only scintilla of evidence regarding prejudice comes from the August 2021 hearing. At that hearing, Salem Baptist referred to the unavailability of witnesses and their fading memories as justifications to dismiss but gave no specific examples. Again, the trial court did not make any findings of fact on this point. Nor is there evidence in the record to support such a finding.

The present case is very comparable to *Lauziere*. In that case, the Court of Appeals reversed a dismissal for failure to prosecute because "[n]o competent evidence in the Record support[ed] [the conclusion] that Defendants have been materially prejudiced." *Id.* at 224. As the court explained, no competent evidence supported the contention "that Defendants were prejudiced by the delay, were wrongfully deprived of a right to direct care, were burdened with substantial monetary expenses or were unable to recoup the same." *Id.* at 227. Here, as in *Lauziere*, no competent evidence in the record suggests that Salem Baptist was prejudiced by the delay. The allegations of witness unavailability and memory loss are unsupported by the record. For example, there is no evidence of any particular witness who became unavailable as a result of the month that discovery requests were delayed, and no findings of fact regarding other evidence that was destroyed during that period.

Because the trial court's conclusion of prejudice is unsupported by competent findings of fact, the trial court abused its discretion in finding that Salem Baptist was prejudiced by the delay. *See Corbett*, 376 N.C. at 820.

c. The trial court abused its discretion in finding that alternative sanctions were insufficient because that conclusion was unsupported by findings of fact.

All that is necessary under the third prong of *Wilder* is that the trial court at least consider "the reason, if one exists, that sanctions short of dismissal would not suffice." 146 N.C. App. at 578; *Ray v. Greer*, 212 N.C. App. 358, 364 ("The trial court is not required to impose lesser sanctions, but only to *consider* lesser sanctions." (quoting *In re Pedestrian Walkway Failure*, 173 N.C. App. 237, 251 (2005) (first emphasis omitted))), *cert. denied*, 365 N.C. 362 (2011). A trial court's consideration of alternative sanctions will be affirmed when "it may be inferred from the record that the trial court considered all available sanctions and the sanctions imposed were appropriate in light of [the party's] actions in th[e] case." *In re Pedestrian Walkway*, 173 N.C. App. at 251 (2005) (quoting *Hursey v. Homes by Design, Inc.*, 121 N.C. App. 175, 179 (1995) (cleaned up)).

Here, the trial court explained that "[s]anctions short of dismissal would be insufficient because the adverse effects of witness unavailability and faded memories that inevitably accompany lengthy periods of time cannot be reversed. Additionally, the [trial court] should not be expected to carry a personal injury action over multiple terms due to failure in prosecution." Although it is clear the trial court considered lesser sanctions and found them to be futile, no findings of fact support this proffered reason for dismissal. There is no evidence that witnesses were unavailable or had lost memories. Therefore, without competent findings of prejudice, the proffered reason for dismissal is an abuse of discretion, *see Corbett*, 376 N.C. at 820, and the purported logistical burden to the trial court is not enough to justify the extreme sanction of dismissal, *see In re Pedestrian Walkway*, 173 N.C. App. at 251 (explaining that affirmance of an order is proper if "the sanctions imposed were appropriate in light of [the party's] actions" during the litigation (cleaned up)).

3. The Court of Appeals did not err in holding that the trial court abused its discretion, and its holding should be modified and affirmed.

As explained above, the trial court abused its discretion in its application of *Wilder*. The Court of Appeals reached the same conclusion,

albeit for different reasons. *See Cowperthwait*, 290 N.C. App. at 268–69. Given this difference in reasoning but congruence in outcome, I would modify and affirm the decision of the Court of Appeals. *Cf. D.V. Shah Corp. v. VroomBrands, LLC*, 385 N.C. 402, 403–05 (2023) (modifying and affirming the decision of the Court of Appeals when this Court reached the same conclusion but for different reasons).

B. This Court Should Adopt the *Wilder* Test Because It Is Strongly Supported by Federal Case Law.

Although the trial court abused its discretion under *Wilder*, it would be prudent to consider if the *Wilder* test is the correct analysis to apply in resolving whether to dismiss for a failure to prosecute. We are not bound by *Wilder*. *See N. Nat'l Life Ins. Co. v. Lacy J. Miller Mach. Co.*, 311 N.C. 62, 76 (1984) ("This Court is not bound by precedents established by the Court of Appeals."). This Court has never expressly adopted the *Wilder* test to determine when a party fails to prosecute a claim.[6] This Court, not the Court of Appeals, has the final say over the laws of North Carolina. *Lea Co. v. N.C. Bd. of Transp.*, 308 N.C. 603, 610 (1983). In light of the substantial interests at stake, we should bring clarity and finality to how trial courts weigh dismissals for failure to prosecute. *See id.*

Rule 41 of North Carolina's Rules of Civil Procedure is analogous to Rule 41 of the Federal Rules of Civil Procedure. *Compare* N.C.G.S. § 1A-1, Rule 41(b) ("For failure of the plaintiff to prosecute . . . a defendant may move for dismissal of an action or of any claim therein against him.") *with* Fed. R. Civ. P. 41(b) ("If the plaintiff fails to prosecute . . . a defendant may move to dismiss the action or any claim against it."). Thus, in considering whether *Wilder* is the appropriate approach, we should rely on federal precedent because such case law is "pertinent for guidance and enlightenment as we develop the philosophy of our Rules of Civil Procedure." *Slattery v. Appy City, LLC*, 385 N.C. 726, 736 n.12 (2024) (cleaned up). As explained further below, the *Wilder* test is

6. In a per curiam opinion, this Court recently affirmed a decision of the Court of Appeals that applied *Wilder*. *See Lauziere*, 271 N.C. App. at 223. While this Court has held that per curiam opinions are binding, *State v. Elder*, 383 N.C. 578, 598 (2022), the per curiam affirmance of *Lauziere* never addressed the specifics of the *Wilder* test. In *Lauziere*, this Court wrote a single paragraph specifying that the case should comply with particular procedural rules on remand. 376 N.C. at 789, *aff'g per curiam*, 271 N.C. App. 220. There is no true decision or reasoning from this Court on *Wilder*, so we are not bound by stare decisis on this issue. *See State v. Ballance*, 229 N.C. 764, 767 (1949) (reasoning that where there is no real series of prior decisions, stare decisis does not command adherence to precedent).

reflective of the key considerations weighed by federal courts and should be employed as this State's analysis for failure to prosecute issues.

Each federal circuit court deploys a marginally different approach for the failure to prosecute analysis. *See* 9 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2370.1 (4th ed. 2004) (last updated June 2024), Westlaw. But several common factors are shared amongst the various analyses. *See id.*

To start, the federal circuits unanimously agree that dismissal with prejudice for failure to prosecute is an incredibly harsh course of action that should be reserved only for extreme circumstances. *See, e.g.*, *Hernandez v. City of El Monte*, 138 F.3d 393, 400 (9th Cir. 1998) ("Because dismissal is a harsh penalty, however, it is appropriate only in extreme circumstances of unreasonable delay." (cleaned up)). Thus, every federal circuit requires the trial court to at least consider alternative sanctions. *See, e.g.*, *Arnold v. ADT Sec. Servs., Inc.*, 627 F.3d 716, 722 (8th Cir. 2010) (recognizing that a trial court must consider, among other factors, the efficacy of less severe sanctions).

The federal circuits further agree that there must be dilatory or delayed conduct, either intentional or inadvertent, before dismissing for failure to prosecute. *See, e.g.*, *Pomales v. Celulanes Telefónica, Inc.*, 342 F.3d 44, 48 (1st Cir. 2003) (stating that "extremely protracted inaction (measured in years)" can justify dismissal with prejudice for failure to prosecute). Federal courts also recognize that a distinction should be drawn between the plaintiff's personal responsibility for the delay and their attorney's share of the blame. *See, e.g.*, *Carpenter v. City of Flint*, 723 F.3d 700, 704 (6th Cir. 2013) (explaining that a plaintiff should not be punished for neglect due solely to their lawyer's unexcused and erroneous actions). Additionally, all federal circuit courts look to the extent of prejudice created by dilatory conduct. *See, e.g.*, *Attkisson v. Holder*, 925 F.3d 606, 625 (4th Cir. 2019) (recognizing that a trial court should consider the amount of prejudice to the defendants caused by the inaction of the plaintiff).

Lastly, although specific considerations are helpful in guiding a trial court's ultimate decision, federal circuit courts tend to weigh the totality of the circumstances when deciding whether to dismiss for failure to prosecute. *See, e.g.*, *McMahan v. Deutsche Bank AG*, 892 F.3d 926, 932 (7th Cir. 2018) ("Ultimately, the decision to dismiss depends on all the circumstances of the case." (quoting *Kasalo v. Harris & Harris, Ltd.*, 656 F.3d 557, 561 (7th Cir. 2011))). The federal approaches to the failure to prosecute analysis are functionalist tests designed to guide, but not

dictate, how trial courts address the issue. *See, e.g.*, *Briscoe v. Klaus*, 538 F.3d 252, 263 (3d Cir. 2008) ("In balancing the [enumerated] factors, we do not have a 'magic formula' or 'mechanical calculation' . . . . While no single [ ] factor is dispositive, we have also made it clear that not all of the [ ] factors need be satisfied in order to dismiss a complaint." (cleaned up)).

Given this case law, the essential elements of the failure to prosecute analysis can be summarized as: (1) evidence of delay; (2) the plaintiff's personal responsibility for the delay; (3) the amount of prejudice to the defendant; and (4) consideration of alternative sanctions. And when these factors are compared with *Wilder*, it is evident that *Wilder* is well supported by federal case law. The factors promulgated in *Wilder* comport with the common factors utilized across the federal circuit courts. *Cf.* 146 N.C. App. at 578 (the three-part *Wilder* test). Given the guidance from the federal circuit courts and *Wilder*'s agreement with the common principles reflected in federal case law, this Court would be prudent to explicitly adopt the *Wilder* test.

III. Conclusion

The Court of Appeals did not err as to either issue before this Court. The statute of limitations defense was not properly preserved for appellate review, so the Court of Appeals did not err in refusing to address that issue. Furthermore, the trial court abused its discretion by not following the correct legal standard in applying the *Wilder* test. The trial court misapprehended the law regarding the delay prong of *Wilder*, and its legal conclusions regarding prejudice and the suitability of lesser sanctions were unsupported by competent findings of fact. Although the Court of Appeals reasoned through the failure to prosecute issue differently than I would, it nonetheless reached the correct holding. For these reasons, I would modify and affirm the decision of the Court of Appeals and remand the matter to that court for remand to the trial court for further proceedings.

Justice RIGGS joins in this dissenting opinion.

CHAD GARDNER, LISA GARDNER, LONNIE NORTON, HOPE NORTON, THE TOWN OF DOBBINS HEIGHTS, AND THE CITY OF HAMLET
v.
RICHMOND COUNTY

No. 140PA23

Filed 18 October 2024

Appeal and Error—interlocutory order—substantial right—sufficiency of factual basis

The decision of the Court of Appeals dismissing a town's appeal from an interlocutory order (in which the trial court dismissed the town's claims for lack of standing but allowed another municipality's claims to proceed) was reversed where the town provided in its statement of appellate review a sufficient factual basis for immediate review pursuant to *Creek Pointe Homeowner's Ass'n, Inc. v. Happ*, 146 N.C. App. 159 (2001) (allowing immediate review under similar circumstances). The matter was remanded for the lower appellate court to consider the parties' arguments on the issue of standing.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous, unpublished decision of the Court of Appeals, No. COA21-600 (N.C. Ct. App. May 2, 2023), dismissing the appeal as interlocutory. Heard in the Supreme Court on 24 September 2024.

The Brough Law Firm, PLLC, by Brady N. Herman and T.C. Morphis Jr., for plaintiff-appellant Town of Dobbins Heights.

McGuireWoods LLP, by Henry L. Kitchin Jr. and Dylan M. Bensinger, for defendant-appellee.

No brief for plaintiff-appellees Chad Gardner, Lisa Gardner, Lonnie Norton, Hope Norton, and City of Hamlet.

PER CURIAM.

Defendant Richmond County filed a motion to dismiss the claims of plaintiffs Town of Dobbins Heights (the Town) and City of Hamlet based on a lack of standing. The trial court entered an order granting

the motion as to the Town but denied it as to the other municipality. The Town appealed to the Court of Appeals.

Generally, a party has no right to an immediate appeal of an interlocutory order. In its brief to the Court of Appeals, the Town argued that it should be allowed to pursue an immediate appeal because otherwise "there would be the possibility of two trials (one for the remaining Plaintiffs and one for [the Town] if the Court [of Appeals] were to find that it has standing through a subsequent appeal)" and "[t]wo trials on the same issue would raise the possibility of inconsistent verdicts." *Gardner v. Richmond County*, No. COA21-600, slip op. at 4 (N.C. Ct. App. May 2, 2023) (unpublished). The Town further argued that the Court of Appeals had recognized the right to an immediate appeal in similar circumstances in *Creek Pointe Homeowner's Ass'n, Inc. v. Happ*, 146 N.C. App. 159 (2001). *Id.*

The Court of Appeals dismissed the Town's appeal, reasoning that the Town had "failed to demonstrate a substantial right that would be impacted by th[e] [c]ourt's failure to immediately hear its appeal." *Gardner*, slip op. at 6. According to the Court of Appeals, the Town had "simply cite[d] *Creek Pointe* and essentially assert[ed] [that] the holding in *Creek Pointe* require[d] immediate review of [the Town's] appeal without analysis." *Id.* at 5.

Our review of the Town's brief to the Court of Appeals reveals that the Town did more than baldly assert a right of immediate appeal under *Creek Pointe*. On the contrary, the statement of appellate review in the Town's brief adequately explained why the particular facts of this case satisfy the substantial rights test based on the holding in *Creek Pointe*. *See Creek Pointe*, 146 N.C. App. at 162. Since we agree that the Town articulated a sufficient factual basis to support appellate jurisdiction under *Creek Pointe*, we hold that the Court of Appeals erred in dismissing the Town's appeal. *See In re Civ. Penalty*, 324 N.C. 373, 384 (1989) (holding that when "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").

The decision of the Court of Appeals is reversed. On remand, the Court of Appeals should address the parties' competing arguments regarding the issue of standing.

REVERSED AND REMANDED.

IN RE K.P.W.

[386 N.C. 596 (2024)]

IN THE MATTER OF K.P.W.

No. 322A23

Filed 18 October 2024

Appeal pursuant to N.C.G.S. § 7A-30(2) from the unpublished decision of a divided panel of the Court of Appeals, No. COA23-205 (N.C. Ct. App. Nov. 7, 2023), vacating an order entered on 18 November 2022 by Chief Judge David V. Byrd in District Court, Wilkes County. Heard in the Supreme Court on 26 September 2024.

Erika Leigh Hamby for petitioner-appellant Wilkes County Department of Social Services.

Michelle FormyDuval Lynch for appellant Guardian ad Litem.

Wendy C. Sotolongo, Parent Defender, by J. Lee Gilliam, Assistant Parent Defender, for respondent-appellee father.

PER CURIAM.

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

REVERSED.

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

Justice EARLS dissenting.

I would affirm the decision of the Court of Appeals for the reasons stated in the majority opinion below. Therefore, I respectfully dissent.

SINGLETON v. N.C. DEP'T OF HEALTH & HUM. SERVS.

[386 N.C. 597 (2024)]

JAY SINGLETON, D.O., AND SINGLETON VISION CENTER, P.A.
v.
NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES; ROY COOPER, GOVERNOR OF THE STATE OF NORTH CAROLINA, IN HIS OFFICIAL CAPACITY; MANDY COHEN, NORTH CAROLINA SECRETARY OF HEALTH AND HUMAN SERVICES, IN HER OFFICIAL CAPACITY; PHIL BERGER, PRESIDENT PRO TEMPORE OF THE NORTH CAROLINA SENATE, IN HIS OFFICIAL CAPACITY; AND TIM MOORE, SPEAKER OF THE NORTH CAROLINA HOUSE OF REPRESENTATIVES, IN HIS OFFICIAL CAPACITY

No. 260PA22

Filed 18 October 2024

Constitutional Law—challenge to Certificate of Need law—claims not limited to as-applied challenge—facial challenge implicated—remand required

In a case challenging the constitutionality of North Carolina's Certificate of Need law, although plaintiffs asserted that their claims constituted an "as-applied" challenge, where the allegations in their complaint, if proven, could render the law unconstitutional in all its applications, the trial court and Court of Appeals mistakenly treated the claims exclusively as as-applied challenges rather than both as-applied and facial challenges. The lower courts' decisions were vacated and the matter was remanded for further proceedings.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 284 N.C. App. 104 (2022), dismissing in part and affirming in part an order entered on 11 June 2021 by Judge Michael O'Foghludha in Superior Court, Wake County. Heard in the Supreme Court on 17 April 2024.

Joshua Windham, Renée Flaherty, and Daniel Gibson for plaintiff-appellants.

Joshua H. Stein, Attorney General, by Ryan Y. Park, Solicitor General, Nicholas S. Brod, Deputy Solicitor General, Derek L. Hunter, Special Deputy Attorney General, and John H. Schaeffer, Assistant Attorney General, for defendant-appellees.

Fox Rothschild LLP, by Marcus C. Hewitt, for Bio-Medical Applications of North Carolina, Inc., amicus curiae; and Gary S. Qualls, Susan K. Hackney, and Anderson M. Shackelford for the Charlotte-Mecklenburg Hospital Authority d/b/a Atrium Health, University Health Systems of Eastern Carolina, Inc. d/b/a Vidant

Health, and Cumberland County Hospital System, Inc., d/b/a Cape Fear Valley Health System, amici curiae.

B. Tyler Brooks for Certificate of Need Scholars Thomas Stratmann, Christopher Koopman, and Matthew Mitchell, amici curiae.

Sellers, Ayers, Dortch & Lyons, P.A., by Elliot M. Engstrom, for Goldwater Institute, amicus curiae.

Jonathan D. Guze for the John Locke Foundation and Professor John V. Orth, amici curiae.

Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, by Iain M. Stauffer, for NCHA, Inc. d/b/a the North Carolina Healthcare Association, the North Carolina Healthcare Facilities Association, the North Carolina Chapter of the American College of Radiology, Inc., the North Carolina Senior Living Association, and the Association for Home and Hospice Care of North Carolina, amici curiae; and Parker Poe Adams & Bernstein LLP, by Robert A. Leandro, for the North Carolina Ambulatory Surgical Center Association, amicus curiae.

PER CURIAM.

This case involves a constitutional challenge to a series of statutes commonly known as the Certificate of Need law. *See* N.C.G.S. § 131E-175 *et seq.* (2023). Plaintiffs brought claims alleging that the Certificate of Need law violates their rights under the Monopolies Clause, Exclusive Emoluments Clause, and Law of the Land Clause of the North Carolina Constitution. *See* N.C. Const. art. I, §§ 19, 32, 34.

Plaintiffs described their constitutional claims as "as-applied" challenges in the complaint. Both the trial court and the Court of Appeals accepted plaintiffs' characterization of these claims and evaluated the claims as as-applied challenges.

After oral argument at this Court, we requested supplemental briefing from the parties on two issues, including the following: "Whether plaintiffs' constitutional claims, based on the facts alleged in the complaint, are facial challenges, as-applied challenges, or both, and what implications this has for our review of the Court of Appeals' decision and the trial court's order."

After reviewing the parties' submissions, we conclude that plaintiffs' complaint asserts both facial and as-applied challenges. We recognize

that plaintiffs initially characterized their claims as "as-applied" challenges and expressly sought declaratory and injunctive relief "as applied to Plaintiffs." But when courts distinguish between facial and as-applied challenges, the "label is not what matters." *Doe v. Reed*, 561 U.S. 186, 194 (2010). When the "plaintiffs' claim and the relief that would follow" could "reach beyond the particular circumstances of these plaintiffs," then that claim becomes "a facial challenge to the extent of that reach." *Id.*

Here, plaintiffs' complaint alleges facts that could undermine the Certificate of Need law's constitutionality far beyond the particular circumstances of these plaintiffs. Indeed, in their supplemental briefing, plaintiffs acknowledge that, should they prevail, the "need for relief that extends beyond [plaintiffs] will likely arise here" and "will likely entail facial relief."

We agree. The complaint contains allegations that, if proven, could render the Certificate of Need law unconstitutional in all its applications. *See In re Certificate of Need for Aston Park Hosp., Inc.*, 282 N.C. 542, 551–52 (1973). Accordingly, plaintiffs' complaint asserts both facial and as-applied challenges to the Certificate of Need law.

This is a crucial determination because a facial constitutional challenge to the validity of an act of the General Assembly is governed by additional jurisdictional and procedural criteria that do not apply to as-applied challenges. *See* N.C.G.S. § 1-267.1 (2023); N.C.G.S. § 1A-1, Rule 42(b)(4) (2023).

Because the trial court and the Court of Appeals mistakenly treated plaintiffs' claims exclusively as as-applied challenges, we vacate the decision of the Court of Appeals and remand this matter to the Court of Appeals with instructions to vacate the trial court's judgment and remand for further proceedings. On remand, the trial court should proceed as provided in N.C.G.S. § 1-267.1 and N.C.G.S. § 1A-1, Rule 42(b)(4).

Because we vacate the decision of the Court of Appeals on this basis, we need not address plaintiffs' challenges to that decision asserted in the briefing before this Court. However, for the benefit of the trial court on remand, we disavow the Court of Appeals' jurisdictional analysis concerning the exhaustion of administrative remedies and direct the trial court to this Court's recent decisions in *Askew v. City of Kinston*, 902 S.E.2d 722 (N.C. 2024), and *Kinsley v. Ace Speedway Racing, Ltd.*, 904 S.E.2d 720 (N.C. 2024).

VACATED AND REMANDED.

STATE OF NORTH CAROLINA
v.
KYLE ALLEN BURRIS

No. 198A23

Filed 18 October 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. 535 (2023), finding no error in the judgments entered 11 August 2021 by Judge Jacqueline D. Grant in Superior Court, Buncombe County. Heard in the Supreme Court on 25 September 2024.

Joshua H. Stein, Attorney General, by Derrick C. Mertz, Special Deputy Attorney General, for the State-appellee.

Kimberly P. Hoppin for defendant-appellant.

PER CURIAM.

AFFIRMED.

STATE v. KING

[386 N.C. 601 (2024)]

STATE OF NORTH CAROLINA
v.
JASON WILLIAM KING

No. 119A23

Filed 18 October 2024

Sentencing—driving while impaired—aggravating factors—found by trial judge instead of jury—harmless error review

In a prosecution for impaired driving, although the trial judge violated N.C.G.S. § 20-179(a1)(2) by finding the existence of aggravating factors—since "only a jury may determine if an aggravating factor is present"—the error was not automatically reversible because it was subject to harmless error analysis (i.e., whether the trial judge's actions prejudiced defendant). The decision of the Court of Appeals determining that the statute violation mandated resentencing—and that harmless error review was inapplicable—was reversed, and the matter was remanded for application of the correct standard of review.

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, 288 N.C. App. 459 (2023), vacating a judgment entered on 18 November 2021 by Judge Karen Eady-Williams in Superior Court, Buncombe County, and remanding the case for a new sentencing hearing. Heard in the Supreme Court on 13 February 2024.

Joshua H. Stein, Attorney General, by Kathryne E. Hathcock, Special Deputy Attorney General, and Christopher W. Brooks, Special Deputy Attorney General, for the State-appellant.

Caryn Strickland for defendant-appellee.

ALLEN, Justice.

A divided panel of the Court of Appeals interpreted the sentencing statute for impaired driving offenses to require that defendant Jason

William King receive a new sentencing hearing because the trial judge found aggravating factors instead of submitting them to the jury. We do not read the statute to require resentencing if the trial judge's error did not prejudice defendant. We therefore reverse the decision of the Court of Appeals as it pertains to defendant's impaired driving offense and remand this case to that court for a harmless error determination.

On 30 August 2021, the District Court, Buncombe County, convicted defendant of driving while impaired (DWI), reckless driving, possession of marijuana, and possession of marijuana paraphernalia. The district court found the existence of an aggravating factor but concluded that it was substantially counterbalanced by a mitigating factor. Proceeding under N.C.G.S. § 20-179, the sentencing statute for DWI offenses, the district court imposed Level IV punishment. Specifically, the court sentenced defendant to 120 days of imprisonment but suspended the punishment and placed defendant on twelve months of supervised probation. The district court also sentenced defendant to an active term of seven days in custody and ordered defendant to pay a $100 fine and court costs.

Defendant appealed to the Superior Court, Buncombe County, where on 18 November 2021, a jury found him guilty of DWI and reckless driving but acquitted him of the remaining charges. Prior to sentencing defendant, the superior court judge found the existence of three aggravating factors: (1) "[t]he driving of the defendant was especially reckless;" (2) "[t]he driving of the defendant was especially dangerous;" and (3) "defendant was convicted . . . of [misdemeanor] death by motor vehicle" in August 2015. Unlike the district court, the superior court judge did not find the existence of any mitigating factors. Based on the three aggravating factors and the absence of any mitigating factors, the superior court judge imposed Level III punishment: six months of imprisonment, suspended pending defendant's completion of thirty-six months of supervised probation; an active sentence of three days in custody; and payment of a $500 fine and court costs.

Defendant filed a notice of appeal from the judgment of the superior court. He subsequently filed a petition for writ of certiorari asking the Court of Appeals to review his case even if it concluded "that his right to appeal was waived because of failure to comply with the technical requirements of [Rule 4 of the North Carolina Rules of Appellate Procedure]." The Court of Appeals allowed the petition for writ of certiorari.

On appeal, defendant argued that the trial court erred by finding aggravating factors because "such factors must be decided by a

jury."[1] *State v. King*, 288 N.C. App. 459, 464 (2023). The Court of Appeals agreed. Citing the decision of the United States Supreme Court in *Blakely v. Washington*, 542 U.S. 296 (2004), the Court of Appeals explained that a defendant's right to a jury trial under the Sixth Amendment to the United States Constitution is violated when a trial judge inflicts punishment beyond what the jury's verdict alone authorizes.[2] *Id.* at 465. The court further noted that the General Assembly amended the DWI sentencing statute in 2006 to remove the statutory authority of trial judges to find contested aggravating factors in DWI sentencing proceedings. *Id.* (citing The Motor Vehicle Driver Protection Act of 2006, S.L. 2006-253, § 23, 2006 N.C. Sess. Laws 1178, 1207). In particular, the legislature added N.C.G.S. § 20-179(a1)(2) to the statute. Subsection 20-179(a1)(2) "took the determination of aggravating factors out of the hands of the trial judge and placed it with the jury." *Id.*

Though unanimous in holding that the trial court erred, the Court of Appeals split over whether defendant should receive a new sentencing hearing. The majority held that resentencing is required whenever a trial judge finds aggravating factors in violation of N.C.G.S. § 20-179(a1)(2). *Id.* at 467. In reaching this conclusion, the majority conceded that both the Supreme Court and this Court have determined that the Sixth Amendment does not require resentencing for *Blakely* errors that are harmless beyond a reasonable doubt. *Id.* at 465 (citing *Washington v. Recuenco*, 548 U.S. 212 (2006); *State v. Blackwell*, 361 N.C. 41 (2006); *State v. Speight*, 186 N.C. App. 93 (2007)). Nonetheless, the majority concluded that N.C.G.S. § 20-179(a1)(2) mandates resentencing when *Blakely* errors occur during DWI sentencing proceedings, regardless of whether the errors prejudiced the defendant. *Id.* at 466–67.

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1. Defendant also argued that (1) the superior court erred by denying his motion to dismiss the charges against him and (2) he was entitled to a new sentencing hearing on his reckless driving conviction. Because the dissenting judge in the Court of Appeals did not disagree with the majority on those issues, they are not properly before this Court. *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 . . . .").

2. The Sixth Amendment to the United States Constitution provides in part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . ." U.S. Const. amend. VI. Although the Sixth Amendment right to a jury trial did not originally extend to criminal trials in state courts, the Due Process Clause of the Fourteenth Amendment made it applicable to such proceedings. *Ramos v. Louisiana*, 140 S. Ct. 1390, 1397 (2020).

Observing that the General Assembly "is free to provide [criminal defendants with] more protection than constitutionally required," the majority concluded that the legislature deliberately provided extra protection to persons convicted of DWI offenses when it added N.C.G.S. § 20-179(a1)(2) to the DWI sentencing statute in 2006. *Id.* at 466. Given the wording of N.C.G.S. § 20-179(a1)(2) and the timing of its enactment, the majority reasoned that the legislature did not intend for violations of N.C.G.S. § 20-179(a1)(2) to receive harmless error review. *Id.* at 466.

> Since the relevant federal cases provide the bare minimum, and all relevant state cases are distinguishable because they were decided prior to the modification of the statute where it is clear from the timing and language of the statute that the legislature intended to change the standards adopted by our courts, we hold aggravating factors must be decided by the jury or the case must be remanded for a new sentencing hearing.

Id. at 467.

The dissenting judge disagreed with the majority's interpretation of N.C.G.S. § 20-179(a1)(2). In his view, the General Assembly enacted the provision to comply with *Blakely*, not to create extra sentencing protections for persons convicted of DWI. *Id.* at 469 (Gore, J., dissenting). Consequently, he maintained that "[t]he trial court's failure to abide by [N.C.G.S. § 20-179(a1)(2)] leads to harmless error review, not reversible error." *Id.* The dissenting judge further opined that the superior court judge's error in this case was harmless because the evidence supporting the aggravating factors "was so overwhelming and uncontroverted that any rational fact-finder would have found the disputed aggravating factor[s] beyond a reasonable doubt." *Id.* (quoting *Blackwell*, 362 N.C. at 49).

On 5 May 2023, the State appealed to this Court. At the time, N.C.G.S. § 7A-30(2) afforded the State an appeal of right based on the dissent in the Court of Appeals. *See* Current Operations Appropriations Act of 2023, S.L. 2023-134, § 16.21(d)–(e), https://www.ncleg.gov/Sessions/2023/Bills/House/PDF/H259v7.pdf (eliminating right of appeal based on dissents for cases filed in the Court of Appeals on or after 3 October 2023).

"We review a lower court's interpretation of statutes de novo." *Morris v. Rodeberg*, 385 N.C. 405, 409 (2023) (emphasis omitted). "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) (internal quotation marks omitted) (emphasis omitted).

This case asks us to decide whether a trial judge's finding of aggravating factors in violation of the DWI sentencing statute automatically entitles a defendant to a new sentencing hearing. In urging us to affirm the decision of the Court of Appeals, defendant argues that the plain language of N.C.G.S. § 20-179(a1)(2) requires juries to find any contested aggravating factors and thus trial courts have no discretion to deviate from this procedure. He asserts that reviewing violations of N.C.G.S. § 20-179(a1)(2) for harmlessness contradicts the provision's unambiguous text and renders the provision essentially meaningless. Defendant further contends that harmless error review does not extend to violations of N.C.G.S. § 20-179(a1)(2) because the General Assembly intended the provision to "expand[ ] on the minimum constitutional protections" set out in *Blakely* and related cases.

Notwithstanding defendant's arguments, we hold that the Court of Appeals erred in refusing to apply harmless error review to the superior court judge's finding of aggravating factors. The finding of aggravating factors by a trial judge contrary to N.C.G.S. § 20-179(a1)(2) does not constitute reversible error if the error was harmless.

To explain why we so hold, we turn first to the text of N.C.G.S. § 20-179(a1)(2). *See N.C. Farm Bureau Mut. Ins. Co. v. Hebert*, 385 N.C. 705, 711 (2024) ("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. . . . 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.").

> The defendant may admit to the existence of an aggravating factor, and the factor so admitted shall be treated as though it were found by a jury . . . . If the defendant does not so admit, *only a jury may determine if an aggravating factor is present*. . . . The State bears the burden of proving beyond a reasonable doubt that an aggravating factor exists . . . .

N.C.G.S. § 20-179(a1)(2) (2023) (emphasis added).

Without question, this provision requires a jury—not a judge—to decide whether the State has established the existence of contested aggravating factors beyond a reasonable doubt. On the other hand, the

provision nowhere states that a violation automatically entitles a defendant to a new sentencing hearing.

According to defendant, the "unequivocal" nature of the wording used in N.C.G.S. § 20-179(a1)(2) implicitly mandates that our appellate courts vacate sentences imposed in contravention of its terms. We do not believe this inference is justified. The *Blakely* decision itself employs similarly categorial language: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum *must* be submitted to a jury, and proved beyond a reasonable doubt." 542 U.S. at 301 (emphasis added) (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000)). Yet, as noted above, the Supreme Court has ruled that *Blakely* errors do not constitute reversible error if they are harmless beyond a reasonable doubt. *Recuenco*, 548 U.S. at 222.

For defendant to prevail, we would have to conclude that the General Assembly meant for N.C.G.S. § 20-179(a1)(2) to provide protection beyond what the Sixth Amendment requires for *Blakely* errors. Interestingly, the Court of Appeals majority conceded that the legislature "likely" added N.C.G.S. § 20-179(a1)(2) to the DWI sentencing statute "to provide defendants [convicted of DWI] the protections articulated in *Blakely*." *King*, 288 N.C. App. at 466–67. In our view, there is no "likely" about it. The legislature enacted N.C.G.S. § 20-179(a1)(2) to bring DWI sentencing into compliance with *Blakely*; it did not mean to require resentencing for *Blakely* errors that do not prejudice defendants.

The legislative intent behind N.C.G.S. § 20-179(a1)(2) seems clear when we consider the subsection together with an earlier and nearly identical provision in the Structured Sentencing Act.

> The defendant may admit to the existence of an aggravating factor, and the factor so admitted shall be treated as though it were found by a jury . . . . If the defendant does not so admit, *only a jury may determine if an aggravating factor is present in an offense.*

N.C.G.S. § 15A-1340.16(a1) (2023) (emphasis added) (originally enacted as Act to Amend State Law Regarding the Determination of Aggravating Factors in a Criminal Case to Conform with the United States Supreme Court Decision in Blakely v. Washington, S.L. 2005-145, § 1, 2005 N.C. Sess. Laws 253, 253).

The Structured Sentencing Act governs sentencing for most non-DWI offenses. *See* N.C.G.S. § 15A-1340.10 (2023). Originally, it entrusted

trial judges with the responsibility of determining the existence of aggravating factors. An Act to Provide for Structured Sentencing in North Carolina Consistent with the Standard Operating Capacity of the Department of Correction and Local Confinement Facilities and to Redefine State and County Responsibilities for the Confinement of Misdemeanants, ch. 538, § 1, 1993 N.C. Sess. Laws 2298, 2304–06.

Subsection 15A-1340.16(a1) is one in a series of amendments that the legislature made to the Structured Sentencing Act in 2005. *See* S.L. 2005-145, § 1, 2005 N.C. Sess. Laws at 253–57. By enacting N.C.G.S. § 15A-1340.16(a1), the legislature transferred the responsibility for finding contested aggravating factors from judges to juries.

It appears obvious to us that the General Assembly regarded this change to the Structured Sentencing Act as a codification of *Blakely*. No great powers of deduction are needed to reach this conclusion. For one thing, the title of the 2005 legislation unambiguously states that the legislation's main purpose was to incorporate *Blakely* into the Structured Sentencing Act. *See* S.L. 2005-145, 2005 N.C. Sess. Laws 253. Not surprisingly, then, we have referred to the 2005 legislation as "the *Blakely* Act." *Blackwell*, 361 N.C. at 49; *see also Smith Chapel Baptist Church v. City of Durham*, 350 N.C. 805, 812 (1999) ("[T]his Court has stated that the title of an act should be considered in ascertaining the intent of the legislature."). Likewise, N.C.G.S. § 15A-1340.16(a1) achieves the *Blakely* Act's stated purpose by prohibiting trial judges from determining the existence of disputed aggravating factors.[3] Trial judges who proceed in accordance with the statute will not commit *Blakely* errors.

The *Blakely* Act does not expressly address whether the impermissible finding of aggravating factors by trial judges in violation of N.C.G.S. § 15A-1340.16(a1) always constitutes reversible error. Moreover, when the General Assembly passed the *Blakely* Act, neither the Supreme Court nor this Court had yet said whether *Blakely* errors could be reviewed for harmlessness.[4] There was good reason to anticipate, however, that *Blakely* errors would be subject to harmless error review.

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3. The *Blakely* Act did impose some requirements not mandated by *Blakely* itself. For example, the *Blakely* Act requires the State to give written notice of any aggravating factors it intends to use at least thirty days before trial or plea of guilty or no contest unless the defendant waives notice. N.C.G.S. § 15A-1340.16(a6). We express no opinion regarding the impact of violations of those provisions.

4. Although this Court initially held that *Blakely* errors were not subject to harmless error review, we did so in an opinion that was not issued until the day after the *Blakely* Act went into effect. *See State v. Allen*, 359 N.C. 425, 448 (2005), *withdrawn*, 360 N.C. 569

Like everyone else, judges make mistakes. With this reality in mind, "this Court has said on numerous occasions . . . [that] litigants are not entitled to receive 'perfect' trials; instead, they are entitled to receive 'a fair trial, free of prejudicial error.' " *State v. Malachi*, 371 N.C. 719, 733 (2018) (quoting *State v. Ligon*, 332 N.C. 224, 243 (1992)). This principle holds true even for constitutional errors in criminal trials. "[I]f the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other [constitutional] errors that may have occurred are subject to harmless-error analysis."[5] *Rose v. Clark*, 478 U.S. 570, 579 (1986). Put differently, constitutional errors that do not prevent defendants from receiving fair trials are not grounds for reversal. *See id.* (remarking that most constitutional errors are subject to harmless error analysis because "[t]he thrust of the many constitutional rules governing the conduct of criminal trials is to ensure that those trials lead to fair and correct judgments"). The General Assembly codified this understanding in N.C.G.S. § 15A-1443(b), which declares that a constitutional error in a criminal trial is not prejudicial if the State can "demonstrate, beyond a reasonable doubt, that the error was harmless." N.C.G.S. § 15A-1443(b) (2023).

Since the default rule is that constitutional errors are subject to review for harmlessness, the General Assembly undoubtedly realized that the courts could end up applying harmless error analysis to *Blakely* errors. *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."). Thus, if it had intended the *Blakely* Act to go beyond the constitutional minimum and mandate automatic reversal for *Blakely* errors, the legislature would have said so somewhere in the legislation. Finding no such statement, we perceive no such legislative intent. It follows that a trial judge's finding of a contested aggravating factor in violation of the

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(2006). We reversed our position after the Supreme Court clarified that resentencing is not necessary when *Blakely* errors are harmless beyond a reasonable doubt. *Recuenco*, 548 U.S. at 221–22; *Blackwell*, 361 N.C. at 44–45.

5. Some constitutional errors are "structural, and thus subject to automatic reversal." *Neder v. United States*, 527 U.S. 1, 8 (1999) (internal quotation marks omitted). However, the Supreme Court "ha[s] found structural errors only in a very limited class of cases." *Johnson v. United States*, 520 U.S. 461, 468 (1997) (citing *Gideon v. Wainwright*, 372 U.S. 335 (1963)) (complete denial of right to counsel); *see also Tumey v. Ohio*, 273 U.S. 510 (1927) (biased trial judge); *Vasquez v. Hillery*, 474 U.S. 254 (1986) (racial discrimination in grand jury selection); *McKaskle v. Wiggins*, 465 U.S. 168 (1984) (denial of right to self-representation); *Waller v. Georgia*, 467 U.S. 39 (1984) (denial of right to public trial); *Sullivan v. Louisiana*, 508 U.S. 275 (1993) (erroneous reasonable doubt instruction).

Blakely Act does not entitle a defendant to relief unless the error prejudiced the defendant.

This brings us back to the DWI sentencing statute. The General Assembly copied the key language in N.C.G.S. § 20-179(a1)(2) nearly verbatim from N.C.G.S. § 15A-1340.16(a1). This fact alone strongly indicates that the legislature expected *Blakely* errors to receive the same treatment under either provision. Additionally, we do not know of any obvious policy reason why the General Assembly would want individuals convicted of DWI to enjoy more protection from *Blakely* errors than persons convicted of other offenses. In short, the legislature intended harmless error review to apply to aggravating factors found by trial judges in violation of either N.C.G.S. § 15A-1340.16(a1) or N.C.G.S. § 20-179(a1)(2).

Consistent with our view of the legislative intent behind N.C.G.S. § 20-179(a1)(2), the trial judge's finding of aggravating factors in this case is subject to review for harmlessness. In other words, resentencing is not necessary unless the violation of N.C.G.S. § 20-179(a1)(2) prejudiced defendant.

The rules for determining harmless error vary depending on whether a defendant has asserted the denial of a constitutional right or a statutory right. As explained above, when a defendant seeks relief for the denial of a constitutional right, the burden is on the State to prove harmlessness beyond a reasonable doubt. N.C.G.S. § 15A-1443(b). Here, however, defendant opted against pursuing a *Blakely* claim directly under the Sixth Amendment; rather, he based his request for a new sentencing hearing solely on the trial judge's violation of N.C.G.S. § 20-179(a1)(2).

When a defendant requests relief for the denial of a statutory right, N.C.G.S. § 15A-1443(a) places the burden of demonstrating prejudice squarely on the defendant. N.C.G.S. § 15A-1443(a). In most circumstances, satisfying this burden requires the defendant to show "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."[6] *Id.* Hence, defendant cannot establish grounds for resentencing in this case absent a reasonable possibility that, but for the

6. Subsection 15A-1443(a) further provides that prejudice "exists in any instance in which it is deemed to exist as a matter of law or error is deemed reversible per se." N.C.G.S. § 15A-1443(a). Since we conclude that violations of N.C.G.S. § 20-179(a1)(2) do not create prejudice as a matter of law and are not reversible error per se, this standard does not apply here.

trial judge's violation of N.C.G.S. § 20-179(a1)(2), he would have been sentenced at a lower level.[7]

We see no merit in defendant's contention that applying harmless error review to violations of N.C.G.S. § 20-179(a1)(2) will render the provision meaningless. It is true that most trial court errors are not prejudicial; however, it is also true that our appellate courts often find prejudicial error pursuant to N.C.G.S. § 15A-1443(a). *See, e.g.*, *State v. Aguilar*, 292 N.C. App. 596, 606 (2024) (holding the trial court's erroneous admission of testimony prejudiced the defendant).

Finally, in ruling for defendant, the Court of Appeals majority relied on *State v. Geisslercrain*, 233 N.C. App. 186 (2014). According to the majority, *Geisslercrain* "did not apply harmless error and evaluate whether . . . [an aggravating] factor existed but decided the finding of that factor placed the defendant at another DWI Level punishment, violating *Blakely*, and therefore vacated the sentence."[8] *King*, 288 N.C. App. at 466 (citing *Geisslercrain*, 233 N.C. App. at 191). To the extent that it conflicts with this opinion, *Geisslercrain* is overruled.

The Court of Appeals majority incorrectly construed N.C.G.S. § 20-179(a1)(2) to require resentencing whenever a trial judge in a DWI sentencing proceeding finds contested aggravating factors. It should have examined whether the superior court judge's finding of aggravating factors prejudiced defendant. Accordingly, we reverse the decision

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7. Our dissenting colleagues argue that, if harmless error analysis applies to violations of N.C.G.S. § 20-179(a1)(2), then the test for prejudice should be whether "a trial court's error affects the level of punishment imposed." Under that approach, prejudice would exist here merely because the trial judge's finding of aggravating factors resulted in a Level III sentence rather than a Level IV sentence.

The prejudice test proposed by our dissenting colleagues conflicts with our conclusion that the legislature enacted N.C.G.S. § 20-179(a1)(2) to comply with *Blakely*. To have a valid *Blakely* claim, a defendant must show both (1) that the trial judge found a contested aggravating factor *and* (2) that the trial judge relied on the factor to inflict a greater punishment than the jury's verdict alone would allow. *State v. Norris*, 360 N.C. 507, 516 (2006). Thus, if prejudice could be shown simply by the imposition of enhanced punishment, then every *Blakely* error would necessarily amount to reversible error under the Sixth Amendment. Of course, the Supreme Court and this Court have said that is not so. *See, e.g.*, *Recuenco*, 548 U.S. at 221–22 (holding that *Blakely* errors receive harmless error review). In effect, then, our dissenting colleagues' proposed prejudice test is just another way of interpreting N.C.G.S. § 20-179(a1)(2) to go beyond *Blakely*.

8. The Court of Appeals majority declined to follow the pre-*Geisslercrain* case of *State v. McQueen*, 181 N.C. App. 417 (2007), partly on the ground that "*McQueen* was decided prior to the 1 December 2006 amendment to [N.C.G.S.] § 20-179(a1)(2)." *King*, 288 N.C. App. at 466. In fact, the *McQueen* decision was not published until 16 January 2007.

of the Court of Appeals as to defendant's DWI offense and remand this case to that court for a harmless error determination.

REVERSED AND REMANDED.

Justice EARLS dissenting.

This case involves Mr. King's sentence pursuant to N.C.G.S. § 20-179 (DWI statute or DWI sentencing statute), which provides the procedure for determining aggravating factors following a conviction for impaired driving. There are two questions before this Court. The first is whether a harmless error analysis applies to violations of subsection 20-179(a1)(2). Next, if the harmless error standard does apply, then the question is whether the error in this case was harmless. I disagree with my colleagues that the harmless error standard applies to violations of subsection 20-179(a1)(2) because I read the terms of the statute to provide greater protection than that required by the United States Constitution under *Blakely v. Washington*, 542 U.S. 296 (2004), and *Washington v. Recuenco*, 548 U.S. 212 (2006). Further, even if harmless error were the standard, I disagree with the majority that remand to the Court of Appeals for its assessment of harmful error is the appropriate relief in this case. Rather I would hold that where, as here, the trial court's statutory violation affected the level at which the defendant was sentenced and where the facts support that a jury could have come to a different conclusion as to the aggravating factor, prejudice is established and the defendant is entitled to a new sentencing hearing. Therefore, I respectfully dissent.

The text of the statute is clear, in cases where a defendant declines to admit an aggravating factor exists, "only a jury may determine if an aggravating factor is present." N.C.G.S. § 20-179(a1)(2) (2023). In this case, the parties have not argued that Mr. King admitted to the presence of an aggravating factor and no aggravating factors were submitted to the jury. Despite this, the trial court concluded, on its own, that three aggravating factors were present: (1) Mr. King had a previous misdemeanor conviction for death by motor vehicle; (2) Mr. King's driving was "especially reckless"; and (3) Mr. King's driving was "especially dangerous." Mr. King was sentenced to six months in custody, suspended for thirty-six months of supervised probation. This sentence is the statutory maximum for a Level Three offender. *See* N.C.G.S. § 20-179(i). As a special condition of probation, the court also imposed a seventy-two-hour active sentence, with credit for time served. Pursuant to Mr. King's

reckless driving conviction, the trial court further imposed a sentence of forty-five days in custody, which it suspended for thirty-six months of supervised probation.

The trial court's reliance on these aggravating factors during sentencing was problematic for at least three reasons: (1) it misapplies the clear and unambiguous text of subsection 20-179(a1)(2), which states that only a jury may find aggravating factors; (2) due to this misapplication, Mr. King was incorrectly sentenced at a higher offender level; and (3) based on the facts of this case, it is unknown whether a jury would have found the presence of the "especially reckless" aggravating factor at all.

I. N.C.G.S. § 20-179(a1)(2)

A. Statutory Background

Before 2006, the applicable version of the DWI sentencing statute required the trial judge to hold a sentencing hearing "to determine whether there [were] aggravating or mitigating factors" present. Act of Oct. 14, 1998, S.L. 1998-182, § 25, 1998 N.C. Sess. Laws 592, 618. This statute was amended in 2006, and now provides that "only a jury may determine if an aggravating factor is present." N.C.G.S. § 20-179(a1)(2); *see also* The Motor Vehicle Driver Protection Act of 2006, S.L. 2006-253, § 23, 2006 N.C. Sess. Laws 1178, 1207. Similarly, in 2005, the General Assembly passed An Act to Amend State Law Regarding the Determination of Aggravating Factors in a Criminal Case to Conform with the United States Supreme Court Decision in Blakely v. Washington, S.L. 2005-145, 2005 N.C. Sess. Laws 253 (the Blakely Act). The changes made by the Blakely Act applied in part to N.C.G.S. § 15A-1340.16, which addresses the finding of aggravating and mitigating factors in criminal cases. *Id.* § 1, 2005 N.C. Sess. Laws at 253–57. Following the Blakely Act, under section 15A-1340.16, "only a jury may determine if an aggravating factor is present in an offense." N.C.G.S. § 15A-1340.16(a1) (2023).

The General Assembly's amendment of subsection 20-179(a1)(2), as well as its passing of the Blakely Act, followed the United States Supreme Court's decision in *Blakely*, 542 U.S. 296. *See* S.L. 2005-145, 2005 N.C. Sess. Laws at 253; S.L. 1998-182, § 25, 1998 N.C. Sess. Laws at 618. In *Blakely*, the Court determined that "[w]hen a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts which the law makes essential to the punishment, and the judge exceeds his proper authority." 542 U.S. at 304 (cleaned up). This results in a Sixth Amendment violation. *Id.* at 305. Later, in *Recuenco*, the Court held that a trial court's failure to submit a sentencing factor to the jury is not structural error. 548 U.S. at 222.

Following *Blakely*, *Recuenco*, and amendments to section 15A-1340.16, this Court issued its opinion in *State v. Blackwell*, 361 N.C. 41 (2006), which although governed by *Blakely*, was not governed by the statutory changes made under the Blakely Act. *See State v. Ward*, 364 N.C. 157, 170 (2010) (Brady, J., concurring in the result only). Likewise, while the Court of Appeals' decision in *State v. McQueen* also occurred after the 2006 amendments to subsection 20-179(a1)(2), the court applied the prior version of the statute, which allowed the judge to find an aggravating factor. 181 N.C. App. 417, 422 (2007). Thus, while *Blackwell* and *McQueen* may comport with the United States Constitution's requirements arising under *Blakely*, they did not address the subsequent statutory changes at issue here in subsection 20-179(a1)(2).

Instead, the unique requirements of the 2006 amendments to the DWI statute were first recognized in *State v. Geisslercrain*, 233 N.C. App. 186 (2014). There, a trial court sentenced a defendant to a Level Four punishment after erroneously finding, for itself, that an aggravating factor was present. *Id.* at 191. Had the trial court not erroneously found such a factor, it would have been required under the statute to sentence the defendant to a lesser Level Five punishment. *Id.* (citing N.C.G.S. § 20-179(f)(3)). Because "the aggravating factor in this case, which was improperly found by the judge, 'increase[d] the penalty for [the] crime beyond the prescribed maximum,' " *id.* at 191 (quoting *Blakely*, 542 U.S. at 301), the court vacated the sentence and remanded for an entry of a Level Five punishment, *id.* at 194.

B. Mr. King's Case

1. Section 20-179 precludes harmless error review where a jury does not find that an aggravating factor is present.

Since the precedents from this Court are distinguishable, the proper standard of error review when a trial court violates the current version of subsection 20-179(a1)(2) is a matter of first impression. I would hold that a faithful reading of the plain text of the statute requires that such a violation is reversible error that entitles a defendant to a new sentencing hearing.

The language of the DWI statute is plain. It provides that "only a jury may determine if an aggravating factor is present." N.C.G.S. § 20-179(a1)(2). Our Court has long held 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." *State v. White*, 372 N.C. 248, 251 (2019) (quoting *Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 209 (1990)).

Our General Assembly can amend state law to grant greater protections than the United States Constitution requires. *State v. Carter*, 322 N.C. 709, 713 (1988); *see also State v. King*, 288 N.C. App. 459, 466 (2023). It did so here. By stating that "only a jury may determine" the presence of an aggravating factor, N.C.G.S. § 20-179(a1)(2), the legislature expanded the procedural protections for defendants subject to sentencing under the DWI statute—a proper use of its statutory authority, *see Carter*, 322 N.C. at 713 (reinforcing that North Carolina can provide its citizens with more protection than the United States Constitution requires).

The majority concedes in a footnote that the statute goes beyond *Blakely*'s constitutional floor with other mandates, like requiring the State to give written notice to the defendant of any aggravating factors it intends to use. Yet it reasons the General Assembly "would have said so" if it meant to mandate more than harmless error review for statutory violations. This reasoning does not give proper credit to the General Assembly's clear and unambiguous language and our presumption that "the Legislature chose its words with due care" when enacting legislation. *See C Invs. 2, LLC v. Auger*, 383 N.C. 1, 10 (2022) (citing *Sellers v. Friedrich Refrigerators, Inc.*, 283 N.C. 79, 85 (1973)).

Importantly, the majority's reading of the statute contradicts its plain text. It allows a judge to find for herself any aggravating factors, only to be overturned if a different judge guesses that a jury would have reached a different result. *See State v. Lawrence*, 365 N.C. 506, 513 (2012) (explaining the harmless error standard for federal constitutional and other legal errors). That system of review sidelines any role for the jury in a statutory scheme where the General Assembly gave the essential task to "only" the jury. *See* N.C.G.S. § 20-179(a1)(2). Such a holding contradicts the "basic rule" of statutory interpretation to "ascertain and effectuate the intent of the legislat[ure]." *See Coastal Ready-Mix Concrete Co. v. Bd. of Comm'rs*, 299 N.C. 620, 629 (1980).

Moreover, section 20-179's sentencing scheme and overall structure reaffirms that harmless error review is not the right test. The provision details extensive, special instructions for convening, selecting, and impaneling the jury to find any aggravating factors, and instructs trial courts on how to impanel a new jury if the jury from the guilt phase is unable to reconvene to hear evidence on the aggravating factors issue. N.C.G.S. § 20-179(a1)(2)–(3). Once factors are found by the jury, the judge then has the responsibility to weigh them to determine the correct level of punishment. N.C.G.S. § 20-179(a1)(2), (d)–(f). That distinctive role for the judge regarding the jury's findings reaffirms that the only proper remedy where a jury failed to find aggravating factors in

the first place is to remand for a new sentencing hearing for a jury to find those factors. Otherwise, the judge is improperly supplanting the jury's role and transgressing its otherwise circumscribed role. A new sentencing hearing for such statutory errors better comports with the statute's structure which assigns different actors to different decision-making roles, in addition to being consistent with the plain, clear language of the text.

2. Even if harmless error were the correct standard, the error in Mr. King's case is prejudicial because it affected his punishment level, and resentencing is the correct remedy.

Mr. King further argues that if harmless error is the correct standard, then the lower court's error was prejudicial because it affected the level of punishment imposed on him. I agree and would hold that, at the very least, a trial court's error prejudices a defendant where it affects the defendant's sentencing level.

In DWI cases, correct application of the statute is essential to determine the level at which a defendant is sentenced. Section 20-179's sentencing scheme is "systematic and tiered" and does not afford trial judges discretion in sentencing. *Geisslercrain*, 233 N.C. App. at 190 (cleaned up). This is in contrast to a provision in the Structured Sentencing Act, N.C.G.S. § 15A-1340.16(a), which grants the trial court discretion to sentence in the presumptive range, even when aggravating factors are present, and discretion to depart from the presumptive range, even when only mitigating factors are properly found, *id.* (noting that "the decision to depart from the presumptive range is in the discretion of the court"); *see also Geisslercrain*, 233 N.C. App. at 192 ("Under the Structured Sentencing Act the trial court has the discretion to sentence a defendant within the presumptive range even where only mitigating factors are properly found."); *accord State v. Norris*, 360 N.C. 507, 514 (2006).

No similar discretion applies under section 20-179. For example, if there are no aggravating or mitigating factors present, then the trial court must impose a Level Four punishment. *Geisslercrain*, 233 N.C. App. at 191; *see also* N.C.G.S. § 20-179(f)(2). The court must impose a Level Three punishment if aggravating factors substantially outweigh any mitigating factors, *id.* at (f)(1), and it must impose Level Five punishment if mitigating factors substantially outweigh any aggravating factors, *id.* at (f)(3). Punishment corresponds with these different tiers: Level Three punishment imposes a fine of up to $1,000 and up to six months of imprisonment, *id.* at (i), while a Level Five punishment

imposes a fine of up to $200 and a maximum term of sixty days of imprisonment, *id*. at (k). Put simply, the finding of aggravating and mitigating factors directly dictates the mandatory punishment level, which directly affects how the defendant is penalized.

In this case, but for the trial court's reliance on the three aggravating factors, which were not found by a jury, the trial court would have been required to impose a lesser Level Four punishment, not the harsher Level Three punishment it imposed on Mr. King. *See Geisslercrain*, 233 N.C. App. at 190. Mr. King suffered prejudicial error from the trial court's improper finding of aggravating factors because his punishment was more severe than it otherwise would have been had the trial court stayed within its constitutional and statutory lane. *Cf. Glover v. United States*, 531 U.S. 198, 200 (2001) (holding that a showing of an increased prison sentence can establish prejudice for a Sixth Amendment ineffective assistance of counsel claim).

Importantly, under this approach, not every case in which the trial court erroneously finds an aggravating factor for itself will require reversal. For example, if the State had provided notice to Mr. King of any other aggravating factor in his case and proven it to the jury, then the trial court's error in finding the "especially reckless" aggravating factor would not have been prejudicial because it would not have affected Mr. King's sentencing level. That is because the Superior Court found no mitigating factors in his case. And in the absence of any mitigating factors, the aggravating factors would necessarily "substantially outweigh any mitigating factors," and the court would be required to impose a Level Three punishment. N.C.G.S. § 20-179(f)(1); *see also Geisslercrain*, 233 N.C. App. at 191 ("[I]f there are only aggravating factors present—and no mitigating factors present—then the aggravating factors 'substantially outweigh' the mitigating factors . . . as a matter of law . . . ."). Thus, it follows that whether an error is prejudicial is based on whether there are other properly found mitigating or aggravating factors, and accordingly, not every case will result in a per se reversal. Put another way, under this reading, prejudice is not automatically presumed. Instead, prejudice is present when a trial court's error affects the level of punishment imposed. *See* N.C.G.S. § 20-179(f); *Geisslercrain*, 233 N.C. App. at 191.[1]

1. Related to this point, it is unclear how *Geisslercrain* is inconsistent with the majority's holding today such that it stands to be "overruled" at all. *Geisslercrain* did not announce a reversible error standard for section 20-179. Instead, it held that because the trial court found for itself an aggravating factor, it improperly sentenced the defendant to a harsher punishment (i.e., the defendant was prejudiced), and it remanded for the trial court to resentence the defendant at the less harsh punishment level. *Geisslercrain*, 233

Such prejudice occurred here, when the trial court in Mr. King's case incorrectly found, for itself, the presence of three aggravating factors. The subject of this appeal relates specifically to the "especially reckless" aggravating factor, the only factor the State gave notice to Mr. King that it intended to prove. *See* N.C.G.S. § 20-179(a1)(1). Under harmless error review for a federal constitutional violation, this Court is tasked with determining if the evidence in the record "against the defendant was so 'overwhelming' and 'uncontroverted' that any rational fact-finder would have found the disputed aggravating factor beyond a reasonable doubt." *Blackwell*, 361 N.C. at 49. Simply put, "[b]efore a court can find a Constitutional error to be harmless it must be able to declare a belief that such error was harmless beyond a reasonable doubt." *Id.* at 49–50 (quoting *State v. Heard*, 285 N.C. 167, 172 (1974)).[2]

Assuming that the harmless error standard applies to the DWI sentencing statute, the error in Mr. King's case was not harmless. Our courts have stated that "[i]mpaired driving is in and of itself reckless and dangerous." *State v. Mack*, 81 N.C. App. 578, 585 (1986) (cleaned up). "Therefore, to determine whether there [is] enough evidence to prove the defendant's driving was . . . especially reckless[,] . . . [the court] must focus on whether the facts of [the] case disclose excessive aspects of recklessness . . . not normally present in the offense of impaired driving . . . ." *Id.* (cleaned up). The evidence in Mr. King's case does not conclusively reach this standard.

While the State argues that the evidence in Mr. King's case was "uncontroverted" such that the trial judge could substitute its own

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N.C. App. at 192, 194. *Geisslercrain* thus fits neatly within a harmless error approach to violations of subsection 20-179(a1)(2).

To the extent the majority does see itself as overruling *Geisslercrain*, it appears to adopt a rule that a defendant cannot establish prejudice by showing that the trial judge's statutory violation led it to impose an enhanced punishment. Such a definition of prejudice makes it nearly impossible to show prejudice. While the majority dismisses this concern as simply a re-litigation of the issue of whether the statute goes beyond *Blakely*, its conflation of the statute with the constitutional rule sows confusion as to what exactly a defendant must show to win a resentencing when a trial judge violates subsection 20-179(a1)(2).

2. In a curious maneuver, the majority goes from vigorously insisting that subsection 20-179(a1)(2) only "codifi[ed] . . . *Blakely*" to asserting that a defendant's challenge under that provision is not, in fact, a challenge of constitutional error. Instead, it holds that the stricter harmless error standard for nonconstitutional challenges applies, which places the burden on the defendant, since the majority says Mr. King sought relief on the basis of the statute. I cannot make sense of this double standard, which seems designed only to implement procedural hurdles that make it harder for criminal defendants to vindicate their constitutional rights.

judgment for that of the jury, the factual nuances present here do not support that conclusion. The evidence in Mr. King's case did not show the signs of especially reckless driving often present. Namely, it did not show that he drove at an excessive speed, drove off the road, or that he hit anyone. There is also testimony from Deputy Martin that Mr. King stopped at a red light and complied with Deputy Martin's instructions pulling over "very quickly" and without any problem. Contradictory testimony was also offered by Trooper Onderdonk and Deputy Martin. While Trooper Onderdonk testified that Mr. King was driving between two lanes and almost hit another car, Deputy Martin testified that when he pulled Mr. King over, "[t]here was nobody around . . . other than the off-duty . . . trooper behind me" and that he did not recall the incident Trooper Onderdonk referenced. Moreover, at trial Deputy Martin testified that he pulled Mr. King over based on the information he received from the dispatch officer and that without that information he could not say if he would have stopped Mr. King at all.[3] Accordingly, it is possible that based on the evidence the jury received at trial, it would not have found the "especially reckless" driving aggravating factor.

Moreover, although some of the aggravating factors listed in subsection 20-179(d) are based entirely on objective factors (e.g., driving with a revoked driver's license), the "especially reckless" driving aggravating factor depends on discretionary judgments about all of the circumstances. Based on this alone, it is questionable whether a jury would have found that Mr. King was "especially reckless" in his driving. In light of the facts of this case, which are not so " 'overwhelming' and 'uncontroverted,' " it is truly unknown whether "any rational fact-finder would have found the disputed aggravating factor beyond a reasonable doubt." *See Blackwell*, 361 N.C. at 49.

The majority may agree with many of these points. Because it only remands this case to the Court of Appeals for a harmless error determination, the Court of Appeals is seemingly free to adopt parts of the approach I outline here. But that raises another question: why does the majority remand this case to the Court of Appeals in the first place? This Court is equally as capable of assessing prejudicial error based on the record before us as the intermediate appellate court. It does not serve the interests of judicial economy and the expeditious resolution of cases to subject this matter to yet further appellate review.

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3. Although it is true that Deputy Martin stated that Mr. King was driving in the middle of the roadway "[p]retty much the whole time," this statement was made during the suppression hearing and was not presented to the jury.

With that in mind, I would hold that if the harmless error standard applies, prejudice occurs when the evidence shows that a trial court's error affected the defendant's sentencing level, and I would remand this case to the trial court for a new sentencing hearing.

II. Conclusion

Accordingly, I would affirm the Court of Appeals decision and hold that subsection 20-179(a1)(2) should be applied as written and thus, the harmless error standard does not apply. Additionally, because the aggravating factors in Mr. King's case should have been found by a jury and because the trial court's misapplication of the statute impacted the level Mr. King was sentenced at, his case should be remanded for resentencing. Alternatively, even under the harmless error standard this Court has chosen to import into the statute, a policy choice different from that made by the General Assembly, I would hold that the trial court finding—rather than the jury finding—that Mr. King's driving was "especially reckless" was not harmless beyond a reasonable doubt. This is because based on these facts, the jury could find that Mr. King's driving was not especially reckless, which in turn affected the level at which Mr. King was sentenced.

Justice RIGGS joins in this dissenting opinion.

ROBERT F. KENNEDY, JR.

v.

NORTH CAROLINA STATE BOARD OF ELECTIONS; KAREN BRINSON BELL, IN HER OFFICIAL CAPACITY AS EXECUTIVE DIRECTOR OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS; ALAN HIRSCH, IN HIS OFFICIAL CAPACITY AS CHAIR OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS; JEFF CARMON, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS; STACY EGGERS IV, KEVIN N. LEWIS, AND SIOBHAN O'DUFFY MILLEN, IN THEIR OFFICIAL CAPACITIES AS MEMBERS OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS

From N.C. Court of Appeals
P24-624

From Wake
24CVS27757

No. 235P24

ORDER

"[O]ur state constitution 'declare[s]' our rights so that 'the great, general, and essential principles of liberty and free government may be recognized and established.' " *Bouvier v. Porter*, 386 N.C. 1, 2, 900 S.E.2d 838, 842 (2024) (alteration in original) (quoting N.C. Const. art. I). The text recognizes that "[a]ll political power is vested in and derived from the people," N.C. Const. art. I, § 2, and that the people "have the inherent, sole, and exclusive right of regulating the internal government," *id.* art. I, § 3. "The people exercise this 'exclusive right' through one of our most fundamental political processes—elections." *Bouvier*, 386 N.C. at 3, 900 S.E.2d at 842.

"Since 1776 the state constitution has recognized the importance of elections and their integrity in the Declaration of Rights." *Id.* The Free Elections Clause requires that "[a]ll elections shall be free." N.C. Const. art. I, § 10. This language is plain: "it protects voters from interference and intimidation in the voting process," *Harper v. Hall*, 384 N.C. 292, 361, 886 S.E.2d 393, 438 (2023), and guarantees that "(1) each voter is able to vote according to his or her judgment, and (2) the votes are . . . accurately counted." *Bouvier*, 386 N.C. at 3, 900 S.E.2d at 842. "This Court has consistently interpreted the North Carolina Constitution to provide the utmost protection for the foundational democratic freedom[ ]

of . . . voting." *Libertarian Party of N.C. v. State*, 365 N.C. 41, 55, 707 S.E.2d 199, 208–09 (2011) (Newby, J., dissenting).

To protect this important right, the elections process should ensure that voters are presented with accurate information regarding the candidates running for an elected office. *See McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 346–47, 115 S. Ct. 1511, 1519 (1995) (quoting *Buckley v. Valeo*, 424 U.S. 1, 14–15, 96 S. Ct. 612 (1976)) ("In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those who are elected will inevitably shape the course that we follow as a nation."). Where a ballot contains misleading information or inaccurately lists the candidates, it risks interfering with the right to vote according to one's conscience.

Defendants filed a petition for writ of supersedeas seeking to stay enforcement of the Court of Appeals' 6 September 2024 interlocutory order and simultaneously filed a petition for discretionary review seeking review of the same order.

> Interlocutory determinations by the Court of Appeals, including orders remanding the cause for . . . other proceedings, shall be certified for review by the Supreme Court only upon a determination by the Supreme Court that failure to certify would cause a delay in final adjudication which would probably result in substantial harm.

N.C.G.S. § 7A-31(c) (2023). We conclude that defendants have not met their heavy burden under this standard, and accordingly we deny their petition for discretionary review and also deny their petition for writ of supersedeas.

Neither party in this case disputes that plaintiff submitted a resignation of candidacy. N.C.G.S. § 163-113 (2023). Therefore, by law, a vote for plaintiff in this election will not count. *Id.* But if plaintiff's name appears on the ballot, it could disenfranchise countless voters who mistakenly believe that plaintiff remains a candidate for office. The trial court did not appropriately weigh this consideration in its ruling, instead focusing on the minimal harm to plaintiff himself and the significant resources the State would need to expend to create an accurate ballot for this election.

Moreover, although N.C.G.S. § 163-165.3(c) requires the State Board to promulgate rules for the reprinting of ballots "where practical" in

response to replacement candidates or other late changes, we are unpersuaded by the practical objections defendants raise in their submissions to this Court. To a large extent, any harm suffered by defendants in light of the Court of Appeals' order is of their own making. Indeed, defendant Bell candidly admitted that she was aware on Friday, 23 August 2024, that plaintiff had suspended his campaign and intended to remove his name from ballots in battleground states. Additionally, a representative of plaintiff's presidential campaign emailed the State Board on 23 August 2024 to inquire about removing plaintiff's name from ballots, putting the State Board on notice that plaintiff intended to remove his name. Rather than following up with plaintiff or the We The People Party, defendant Bell instructed the County Boards of Election to continue the ballot preparation process, which they did over the weekend. By Monday, 26 August 2024, plaintiff contacted the State Board regarding the process for withdrawing. Nevertheless, the State Board did not instruct the County Boards to pause ballot preparation. On Tuesday, 27 August 2024, the State Board received plaintiff's formal withdrawal request but gave no further instructions other than stating that the We The People Party needed to submit a formal withdrawal request. And perhaps most strikingly, after the State Board received the We The People Party's formal withdrawal request on Wednesday, 28 August 2024, and scheduled an emergency board meeting, director Bell instructed the County Boards to continue printing ballots. When the State Board held its emergency meeting on Thursday, 29 August 2024, it voted 3-2 that removing plaintiff's name would not be practical in light of the current state of ballot production.

Thus, despite being on notice of plaintiff's intention to withdraw his name from the ballot for nearly a week, the State Board directed the County Boards to continue ballot production, including over the weekend, rather than communicating and cooperating forthrightly with plaintiff and the We The People Party. We decline to grant defendants extraordinary relief when they are responsible for their own predicament. *Cf.*, *e.g.*, *Creech v. Melnik*, 347 N.C. 520, 529, 495 S.E.2d 907, 913 (1998) ("One who seeks equity must do equity. The fundamental maxim, 'He who comes into equity must come with clean hands,' is a well-established foundation[al] principle upon which the equity powers of the courts of North Carolina rest.").

We also note that defendant Bell indicated in her affidavit that ballot content was not "finalized" until, at the earliest, 21 August 2024. She stated that for a "handful" of ballot styles, parties had until 22 August 2024 to fill nomination vacancies. Therefore, by the time plaintiff announced

the suspension of his campaign and his intention to remove his name from ballots in battleground states, the ballot preparation was in its infant stages. At this time, the State Board could have communicated with plaintiff or the We The People Party to clarify plaintiff's intentions before ballot production had progressed too far. Yet, as noted, defendant Bell and the State Board forged ahead and directed County Boards to continue ballot preparation. The State Board's substantial harm arguments thus ring hollow.

We acknowledge that expediting the process of printing new ballots will require considerable time and effort by our election officials and significant expense to the State. But that is a price the North Carolina Constitution expects us to incur to protect voters' fundamental right to vote their conscience and have that vote count. N.C. Const. art. I, § 10; *Bouvier*, 386 N.C. at 3, 900 S.E.2d at 842.

For all these reasons, the Court of Appeals properly issued its writ of supersedeas to prevent the dissemination of inaccurate ballots and to ensure that voters in our state are able to vote their conscience and have those votes counted. Accordingly, defendant's petition for writ of supersedeas and petition for discretionary review are denied.

By order of the Court in Conference, this the 9th day of September 2024.

/s/ Allen, J.
For the Court

Justices Earls, Dietz, and Riggs, dissent.

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 9th day of September 2024.

s/Grant E. Buckner

Grant E. Buckner
Clerk of the Supreme Court

Justice BERGER concurring.

I concur with the Special Order entered by the Court today denying the State's petition for writ of supersedeas and petition for discretionary review. To the extent there is substantial harm or the potential for substantial harm, it is to the voters of North Carolina, not the State Board of Elections.

I write separately to emphasize that, if we were to reach the merits of this case, more should be done to uphold and preserve the integrity of the upcoming election. There are now hundreds of thousands of invalid ballots in existence, if not more. Thus, there is the potential, however slight, that North Carolina voters could acquire both versions of seemingly legitimate ballots during the 2024 election. Whether by unintentional acts or by those who would deliberately inject chaos into the election, the substantial confusion that could result would appear to warrant attention.

A fair counting of official ballots must be defended, *see Swaringen v. Poplin*, 211 N.C. 700, 191 S.E. 746, 747 (1937), and invalid ballots could "sow confusion and ultimately dampen confidence in the integrity and fairness of elections." *Rep. Party of Penn. v. Degraffenreid*, 141 S. Ct. 732, 734 (2021) (Thomas, J., *dissenting*). Because elections are free when "vote[s are] accurately counted," *Harper v. Hall*, 384 N.C. at 364 (2023), we should not leave open the possibility that these invalid ballots could be commingled with official ballots.

Thus, one could argue that the order entered by the Court of Appeals enjoining the State Board of Elections "from disseminating ballots listing petitioner as a candidate for President of the United States," and also directing that the Board "disseminate ballots without the name" of petitioner does not go far enough. All previously printed ballots listing Robert F. Kennedy, Jr.'s name should be destroyed, and the director of the State Board of Elections and the director of each county Board of Elections should be required to certify destruction of these invalid ballots to maintain public confidence in the upcoming election.

Justice EARLS dissenting.

I fully join my colleague Justice Riggs in her comprehensive dissent. I write separately to emphasize a couple of additional considerations that underlie my concern that contravening state and federal laws to

satisfy the shifting desires of a particular political candidate and his political party erodes the rule of law and contributes to a loss of faith in the impartiality of the state judiciary.

The Constitution of the State of North Carolina declares in Article I that "all persons are created equal" (Section 1); that "All power of suspending laws or the execution of laws by any authority, without the consent of the representatives of the people, is injurious to their rights and shall not be exercised" (Section 7); that "all elections shall be free" (Section 10); and that "No person shall be denied the equal protection of the laws" (Section 19). Given the unequivocal state law mandate that absentee ballots in a general election must be mailed 60 days before election day (this year, September 6),[1] N.C.G.S. § 163-227.10(a) (for a statewide general election); N.C.G.S. § 163-258.9(a) (for military and overseas voters), and the federal law mandate that absentee ballots for federal offices must be mailed to overseas voters 45 days before election day (this year, September 21), 52 U.S.C. § 20302(a)(8); N.C.G.S. § 163-258.9(a), this Court's decision to allow the Court of Appeals unexplained mandatory injunction contravening those laws is unjustified.[2] It amounts to a suspension of state law not mandated by the representatives of the people, and grants a favor to one candidate not extended to other candidates, namely, additional time to decide whether to stand for office.

The right to vote is sacred, and fundamental to our system of democracy. *E.g.*, *Burdick v. Takushi*, 504 U.S. 428, 433 (1992) ("It is beyond cavil that 'voting is of the most fundamental significance under our constitutional structure.' " (quoting *Illinois Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979))); *Reynolds v. Sims*, 377 U.S. 533, 561–62 (1964) ("Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society."). Abridging that right for voters who vote absentee by mail, and particularly overseas voters, in order to satisfy a particular candidate, no matter what party or what political office they seek, is not consistent with free elections and equal protection of the

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1. There is evidence in the record from an affidavit of Wake County Board of Elections member Gerry Cohen, attached to Defendants' Petition for Writ of Supersedeas, that the State Board of Elections has never deviated from that deadline absent a separate and express statutory authorization to do so. *See* Cohen Aff., ¶ 3.

2. Highlighting the importance of the timely mailing of absentee ballots, North Carolina law also provides that "[i]n every instance the board of elections shall exert every effort to provide absentee ballots, of the kinds needed by the date on which absentee voting is authorized to commence." N.C.G.S. § 163-227.10(a).

laws. *See, e.g.*, *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 665 (1966) (noting that election laws may not be "inconsistent with the Equal Protection Clause of the Fourteenth Amendment"); *Burdick*, 504 U.S. at 441 (upholding reasonable, nondiscriminatory restrictions in the election process as necessary "to maintain the integrity of the democratic system"). The rules governing elections should be the same for everyone and the courts should enforce those rules equally.

With regard to the equal protection concern, it is worth noting that other offices on the ballot in certain jurisdictions were provided notice that they had until a date certain to correct issues with who might be a candidate for those offices. There is evidence in the record, from an affidavit submitted by Board executive director Karen Brinson Bell, that Board officials contacted political party officials in mid-August to inform them of vacancies and withdrawals on the ballot. Ex. B, C, D (communications from Board general counsel Paul Cox to Democratic Party, Republican Party, and Libertarian Party officials) [hereinafter Bell Aff.]. Party officials were told in those same notices that any replacement nominees *must be certified by 22 August* in order for those names to appear on printed absentee ballots. *Id.* But it was days after that deadline, applicable to all other candidates, that Mr. Kennedy submitted his request to withdraw.[3] Mr. Kennedy does not explain why he is entitled to such special treatment.

And nor could he. His request, if tolerated, opens the door to candidates and parties of all stripes demanding last-minute changes to already printed ballots. Importantly, the 100 county boards of election, not the state, bear the cost and responsibility of printing and distributing ballots. Bell Aff. ¶ 23; N.C.G.S. §§ 163-33(6), -165.3. Were county boards required to accommodate such late-breaking requests, the toll on budgets and limited staff capacity could be profound. If that door is not made open to other candidates, Mr. Kennedy receives the special treatment he demands. Such special treatment undermines our system of fair elections—where every candidate abides by the same set of rules. *Cf. Comm. to Elect Dan Forest v. Emps. Pol. Action Comm.*, 376 N.C.

3. The majority reasons that the Board should have acted sooner based on Mr. Kennedy's public announcement that he intended to remove his name from ballots in battleground states. The majority neglects to mention that North Carolina was not mentioned by name in that announcement. The announcement also stated that Kennedy was "suspending" his presidential campaign "but not terminating it." CNN Politics, Hear the Moment RFK Jr. Suspends his Presidential Campaign, at 1:15 (August 23, 2024), https://www.cnn.com/2024/08/23/politics/video/rfk-jr-robert-kennedy-suspends-campaign-announcement-arizona-digvid.

558, 610 (2021) (Newby, J. concurring in result) (noting the General Assembly's "constitutional mandate to protect fair play in elections").

If this case seems like much ado about nothing, it bears considering that 2,348 different ballot styles are in use in this state for this election. Bell Aff. ¶ 7. That figure reflects all of the contests and referenda on which voters in North Carolina's 100 counties have a say in November, from contests for the office of US president to the local soil and water conservation district supervisor, and everything in between.[4] More than 2,910,000 general election ballots have already been printed to facilitate our sacred exercise of the franchise. Bell Aff. ¶ 56.

We know that ballot layout matters enormously for an accurate count of the voters' will. *See generally Bush v. Gore*, 531 U.S. 98 (2000). That's why North Carolina statutorily mandates that all ballots are "readily understandable by voters" and designed to "facilitate an accurate vote count." N.C.G.S. § 163-165.4(1), (4). They must "[p]resent all candidates and questions in a fair and nondiscriminatory manner." *Id.* at (2). And it's why "the work of preparing and proofing the ballots" takes weeks, and this year began in early August. Bell Aff. ¶ 9.

Why such a lengthy process? Consider the steps in finalizing a ballot. First, obviously, officials have to know what goes on the ballots. Bell Aff. ¶ 9. Then the ballot itself must be prepared. When a voter fills in an oval next to a candidate's name, that mark must be translated to the correct contest, candidate, or referenda in official tallies. Bell Aff. ¶ 11. State and county boards take careful steps to ensure that a voter's ballot selection is accurately read by tabulators and voting machines. Bell Aff. ¶ 11–12. Which requires the uniform and accurate coding of those machines. Proofreading all of the ballots across the state, as required by law, takes roughly a full calendar week. Bell Aff. ¶ 12; N.C.G.S. § 163-165.3(a)(4)–(5). Only after these steps can the approved ballots be disseminated, by the sixty-day deadline required by state law: this year September 6. N.C.G.S. § 163-227.10.

As the sample ballots—that election officials had already made publicly available—show, presidential contenders are at the top. Bell Aff. ¶ 16. Deleting an entire political party from the presidential ballot item thus potentially requires reconfiguring the layout for the entire contest,

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4. *Candidate Filing Period: Soil & Water Districts, 2024 General Election*, North Carolina State Board of Elections, https://www.ncsbe.gov/news/events/candidate-filing-period-soil-water-districts-2024-general-election (accessed 9 September 2024).

possibly the entire first ballot column, and potentially the other columns and page breaks too. Bell Aff. ¶ 51.

This brief recitation serves to underscore that, since the Court of Appeals has issued an "extraordinary remedy" to require state and county boards to re-prepare, re-print, and disseminate ballots *without* Mr. Kennedy's name, on the very day state law requires them to be sent out, depriving voters of their statutorily guaranteed voting period and at a substantial cost of money and time resources, it must be for a very, very good reason. *AEP Industries v. McClure*, 308 N.C. 393, 401 (1983). And likelihood of success on the merits is certainly an important part of the calculus. Indeed, without such likelihood of success, the courts have no legal authority to otherwise disregard state and federal law. We as a Court are not free to simply balance the equities and decide who gets harmed more if, in the first place, there is no valid legal claim to justify our intervention. That is, in fact, policymaking at its best, something this Court previously has expressed a reluctance to countenance. *See*, *e.g.*, *Rhyne v. K-Mart Corp.*, 358 N.C. 160, 169 (2004) ("The General Assembly is the 'policy-making agency' because it is a far more appropriate forum than the courts for implementing policy-based changes to our laws."); *Harper v. Hall*, 384 N.C. 292, 322–23 (2023) (same).

Here there is no valid reason justifying intervening in the election contrary to state law and established election rules for North Carolina. Mr. Kennedy filed his motion for emergency relief on 3 September 2024, a week before ballots were to be disseminated, wanting his name removed from all of North Carolina's 2,348 ballots. The superior court denied his request. After reviewing all the evidence and the arguments of counsel, the court found that Mr. Kennedy "will suffer no practical, personal, or pecuniary harm should his name remain on the ballot." By contrast, it found the harm to North Carolina's election officials and voters "would be substantial." Because Mr. Kennedy failed to show irreparable harm that outweighed the harm to the public, he was not entitled to his injunction as a matter of law. *See A.E.P. Industries*, *Inc. v. McClure*, 308 N.C. 393, 401 (1983); *State ex rel. Edmisten v. Fayetteville St. Christian Sch.*, 299 N.C. 351, 357 (1980). That means the superior court *did not examine* the credibility of Mr. Kennedy's underlying claims—alleged statutory and constitutional rights to have his name removed at this late stage. No valid claim, no injunction.

Mr. Kennedy appealed. Below, the Court of Appeals issued an unexplained order reversing the superior court. It directed the Board to "disseminate ballots without the name of petitioner Robert F. Kennedy, Jr. appearing as a candidate for President of the United States."

Today, the majority in its order likewise declines to explain what entitles Mr. Kennedy to this extraordinary measure. The North Carolina judicial system has not adequately explained to the public why their ballots are to be reprinted, *after* they were already ready to be mailed, after the statutory deadline.

That fact should give grave pause. In a democracy, "government should be by 'settled, standing laws,' not by 'absolute arbitrary power.' " Margaret Radin, *Can the Rule of Law Survive* Bush v. Gore*?*, *in* Bush v. Gore, *the Question of Legitimacy*, 110, 111 (Bruce Ackerman, ed. 2002) (quoting John Locke, *Of the Extent of Legislative Power*, *in Two Treatises of Government* (3d ed. 1698)). Giving reasons for decisions that transcend the immediate case outcome not only limits the independent will of the judiciary, but it also informs citizens and empowers their constitutional role in our democracy. William Haltom & Mark Silverstein, *The Scholarly Tradition Revisited: Alexander Bickel*, *Herbert Wechsler*, *and the Legitimacy of Judicial Review*, 4 Constitutional Commentary 25, 26 (1987) (summarizing scholarship on the necessity of reasoned judicial decisions). Finally, it is the way our judicial system guarantees the equal protection of the laws, so that future cases and future litigants are governed by the same principles and treated equally. *See Blankenship v. Bartlett*, 363 N.C. 518, 521–22, 525–26 (2009); *Hoke Cnty. Bd. of Educ. v. State*, 385 N.C. 380, 387 (2023) (order) (Earls, J., dissenting) ("A court's legitimacy is earned over time. But it can be destroyed much more quickly. That is because our authority largely depends on the public's willingness to respect and follow our decisions." (cleaned up)).

Our precedent holds that an appellate court is not bound by superior court findings of fact on appeals from an order of a superior court granting or denying a preliminary injunction. *A.E.P. Indus.*, *Inc.*, 308 N.C. at 402; *see also Pruitt v. Williams*, 288 N.C. 368, 372–73; *Telephone Co. v. Plastics*, *Inc.*, 287 N.C. 232, 235 (1975); *Huskins v. Hospital*, 238 N.C. 357, 362 (1953). But the appellate court is still required to "review and weigh the evidence and find facts for itself." *A.E.P. Indus.*, *Inc.*, 308 N.C. at 402. That review ought to include the "considerations specific to election cases" and take into account the risk of voter confusion from late-coming court orders that change election rules. *See Purcell v. Gonzalez*, 549 U.S. 1, 4–5 (2006).

The specific facts of this case cast serious doubt that Mr. Kennedy would succeed on the merits were the merits ever given serious consideration. A political party that weeks ago fought to be recognized as a political party in this state, now, literally days before ballots will be distributed, apparently decides that its presidential candidate should

be removed from the ballot in certain swing states while remaining on the ballot in other states,[5] even though doing so would mean that the party is no longer recognized for future elections as a political party in North Carolina. N.C.G.S. §§ 163-96(a)(1), -97. Voters across the state expecting to receive their absentee ballots and seeking to participate in elections for multiple state and federal offices, are denied the benefit of state law, local governments must expend hundreds of thousands of dollars, and election workers in every county of the state must redo their ballots to allow this late-devised political strategy to be carried out. The rules of our elections allow such attempted gaming of the presidential election system when done far enough in advance, but it is not fair to the rest of the state to disregard state election laws to accommodate a late-breaking political strategy. Even a second grader knows it is not fair to change the rules in the middle of the game just because you fear you are not winning.

On the merits of the statutory argument, in addition to the points made in Justice Riggs' dissent, I would note that N.C.G.S., § 163-113, relied on by Mr. Kennedy to justify relief, actually does not apply to him. This statute governs the withdrawal of candidates who have been nominated through a primary process, as the statutes referenced in that provision make clear. *See* N.C.G.S. §§ 163-182.15, 163-110. Mr. Kennedy is a presidential candidate, nominated through a convention process. Thus, by its express terms, the statute does not apply to Mr. Kennedy at all. It cannot be a basis for granting the relief he seeks. Put another way, Mr. Kennedy cannot use a law that does not apply to him to justify setting aside state law requirements concerning when absentee ballots must be mailed to voters.[6]

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5. For example, Mr. Kennedy has filed a brief in New York arguing that he would be irreparably harmed if he were omitted from that state's ballot. See Team Kennedy, et al., vs. Berger, et al., No. 1:24-cv-3897-ALC, Docket No. 54, Pln's Reply Memo. Supporting PI, p. 9 and 9 n.5.

6. Presidential elections are unique and the processes for nominating and electing presidential candidates are governed by an entirely different article of the election code than the laws governing other elections. *See* N.C.G.S. § 163, Article 18. Notably, under state law, when a duly recognized political party decides to place a presidential candidate on the state's ballot, the party, not the candidate, controls who that candidate is and what happens in the event of a vacancy. *See* N.C.G.S. § 163-209(a). In fact, when voting for president during a general election, voters are voting for electors. N.C.G.S. § 163-209(a) ("A vote for the [presidential] candidates named on the ballot shall be a vote for the electors of the party or unaffiliated candidate by which those candidates were nominated . . . .") And the electors themselves are chosen by political parties. N.C.G.S. § 163-1(c).

Next, Mr. Kennedy's constitutional argument on the merits is borderline frivolous. There is no precedent for the notion that a candidate's or a party's right to not have their speech compelled is implicated by the orderly application of state election laws. There are rules under state law for how and when previously identified candidates can be removed from a ballot and those rules should be fairly applied to all candidates. Nothing about them compels speech, perhaps most significantly because a ballot is not the candidate's speech. "Ballots serve primarily to elect candidates, not as forums for political expression." *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 363 (1997) (rejecting the notion that there is "a right to use the ballot itself to send a particularized message").

Ultimately, without an explanation or adequate justification for this mandatory injunction, the public is left in the dark about why voting laws requiring the mailing of absentee ballots are being violated; it is impossible to guarantee that future candidates will be treated equally, and consequently impossible to guarantee the rule of law. *See generally* Erwin Chemerinsky, Bush v. Gore *Was Not Justiciable*, 76 Notre Dame L. Rev. 1093 (2001) (arguing the case was a "self-inflicted wound"). Therefore, I respectfully dissent.

Justice RIGGS joins in this dissent.

Justice DIETZ dissenting.

I respectfully dissent. As explained below, I believe our election laws support the State Board of Elections' determination. I would therefore issue a writ of supersedeas staying the Court of Appeals order.

This point raises further procedural concerns about whether an individual candidate, Mr. Kennedy, is even the proper party to bring a suit for the relief he wants—to withdraw entirely from the ballot without a replacement. Presumably he seeks to eliminate the presidential ballot line item of the party he represents, We The People, altogether. Bell Aff. Ex. K. But the political party, not the candidate, is the proper party to seek that relief. That party is not before us today.

The Court of Appeals Order muddles this distinction: It orders ballots disseminated "without the name of petitioner Robert F. Kennedy, Jr." but says nothing of the status of Kennedy's vice-presidential running-mate or We The People's presidential ballot line. Such confusion further supports that this Court should allow the Defendant's Petition for Writ of Supersedeas. Pointedly Mr. Kennedy identifies no statute authorizing a presidential nominee of a party to authorize a change to a party's nominee.

Having said that, I want to emphasize that the majority's thoughtful analysis is entirely reasonable. As the majority observes, the single most important goal of our election process is to ensure that every vote counts. Had the State used the earlier ballots, an untold number of voters would have voted for Robert F. Kennedy, Jr. without knowing that he formally resigned as a candidate and, as a result, their vote in the presidential race would not count. Our election officials must do everything in their power to avoid that outcome.

Still, I believe this Court's role is to follow the law as it is written. In my view, our election laws permitted the State Board of Elections to decline to reprint new ballots but also compelled the Board to take other steps, explained in more detail below, to inform voters that Kennedy resigned and that a vote for him would not count.

To begin, a bit about the applicable election laws. State law unquestionably gives the nominee of a political party the right to "resign as a candidate" at any time before the State sends out absentee ballots to military and overseas voters. N.C.G.S. § 163-113. But "resigning as a candidate" is not the same as having the candidate's name removed from the ballot. We know this for several reasons.

First, when the nominee of a political party resigns in this way, the same series of state laws provides a process for that political party to choose a replacement candidate. N.C.G.S. § 163-114. When this occurs, the law expressly states that the new nominee does not have an absolute right to have her name added to the ballot in place of the candidate who resigned. Instead, if the new nominee is chosen after the "general election ballots have already been printed," then the State Board of Elections must assess whether it is "practical" to make the change. N.C.G.S. § 163-165.3(c). If it is not practical, the candidate who resigned remains on the ballot. *Id.*

This shows that the law governing resignation of a candidate does not *impliedly* include an absolute right to be removed from the ballot because, if it did, it would conflict with the language in this accompanying provision that *expressly* says the opposite.

Second, the plain language of the resignation provision in N.C.G.S. § 163-113 simply does not address changes to the ballot. But it certainly could have. The General Assembly understands how to include this language because another withdrawal statute, dealing with the primary election, includes express instructions about how the withdrawal impacts whether the candidate's name will be "printed on the primary ballot." N.C.G.S. § 163-106.4.

Finally, as a matter of general election law, a provision permitting a candidate to resign is not the same as a provision requiring the ballot to be changed or reprinted. We know this not just from the plain meaning of these words and their use in our own election laws, but by examining the laws of other states.

Many of our sister states have similar election laws that permit candidates to withdraw up until ballots are sent out, but leave it to election officials to determine whether it is feasible to reprint ballots. *See*, *e.g.*, S.C. Code Ann. § 7-13-380 (after ballots have been printed, withdrawal does not require reprinting, but the appropriate authority may do so if it determines it is "feasible"); Ga. Code Ann. § 21-2-134(a)(1) (providing that withdrawal of candidacy voids votes for that candidate but leaving it to election officials' discretion whether ballots should be reprinted); Utah Code Ann. § 20A-9-207(3)(d) (providing that, where a candidate for state or local office withdraws within 65 days of an election, notice should be included in the ballot "if practicable"); Col. Rev. Stat. § 31-10-903 (providing that when a candidate resigns or withdraws, the name "shall be erased or canceled, if possible, before the ballots are delivered to the voters").

All of this is to say, I do not believe Kennedy's right to be removed from the ballot is governed by the "resign as a candidate" provision in N.C.G.S. § 163-113. Instead, it is governed by the separate "Late Changes in Ballots" provision in N.C.G.S. § 163-165.3. That provision permits the Board of Elections to authorize "reprinting, where practical, of official ballots" as a result of "late changes." *Id.* § 163-165.3(c).

Here, the State Board of Elections properly determined that it would not be practical to reprint the ballots. Why? Because another state law, the Uniform Military and Overseas Voters Act, required absentee ballots to be sent to military and overseas voters no later than September 6. *See* N.C.G.S. § 163-258.9(a). This uniform law, enacted in a number of states, is designed to ensure that military personnel and overseas civilians can overcome "logistical obstacles to participating in American elections." *Uniform Military and Overseas Voter Act*, *Prefatory Note*, National Conference of Commissioners on Uniform State Laws, at 1 (2010).

In testimony given under oath in an affidavit to this Court, State Elections Director Karen Brinson Bell testified that it would take a minimum of 18 to 23 days to generate, print, proof, and assemble new ballot packets. Bell Aff. ¶ 50. Taking this testimony as true, even if the Board of Elections had started the process as soon as Kennedy's press conference announcing his withdrawal, there would not have been time to

prepare new ballots before the September 6 deadline in the Uniform Military and Overseas Voters Act.

In my view, the inability to comply with this legal deadline was a valid basis for the Board's determination of impracticality. The General Assembly created that state deadline (which provides even more time than a corresponding federal deadline) to ensure that the brave servicemembers defending our nation have time to vote in the elections of the democracy they are defending.

Having said that, I have questions about Karen Brinson Bell's affidavit. First, according to State Board of Elections records, the Board gave political parties until August 22 to make additions or changes to the ballot and the Board received changes or additions up to at least August 21. Bell Aff. ¶ 50, Ex. B, C, D. Thus, under the 18-day to 23-day timeframe asserted in Bell's affidavit, even the existing ballots would not be ready by the September 6 deadline.

Likewise, the affidavit states that the bulk of the preparation time is the 12 to 13 days it would take for a third-party vendor to print the ballots. But according to the same affidavit, the county boards of elections sent their original printing requests between August 24 and August 26 and by August 28 most counties had received their printed ballots from the vendor and the rest were near completion. Bell Aff. ¶¶ 37–38, 50.

Why would it take *more* time to redo these ballots than it did to create the first set of ballots two weeks ago, when elections workers presumably would work longer and harder because of the emergency nature of this ballot change? And why would reprinting ballots to remove Kennedy's name—with the Board presumably requesting expedited service from the vendor because of the looming deadline—take more than twice as long as printing the original ballots two weeks ago when there was no exigency?

Simply put, I question whether the State Board of Elections and its staff were sufficiently vigorous in assessing how long it truly would take to prepare new ballots on an expedited basis. Moreover, as the majority points out, the State Board of Elections received valid, written notice of Kennedy's resignation yet waited days before acting on it. In any event, these questions are beyond this Court's time-constrained review of an emergency petition for an extraordinary writ. *See State v. Jordan*, 385 N.C. 753, 757 (2024) (noting that appellate courts only review legal questions and "cannot find facts"). Thus, I must accept the sworn testimony in the affidavit as true. Doing so, I conclude that it was impractical to

prepare new ballots without Kennedy's name before the September 6 deadline set by law.

Nevertheless, I acknowledge the majority's concern that we must protect the fundamental right of voters to vote and then have that vote counted. Ballots listing Kennedy's name as a candidate for president will likely confuse voters and, worse yet, lead them to wrongly believe their vote for Kennedy will count. It will not.

But there are ways to minimize harm to voters while adhering to our existing election law provisions. Many states address last-minute withdrawals after ballots are printed by posting notices at polling places. *See*, *e.g.*, Ga. Code Ann. § 21-2-134(a)(1); La. Stat. Ann. § 18:503; Wyo. Stat. Ann. § 22-5-401(e). In Georgia, for example, the law provides that if a candidate resigns after ballots are printed, "prominent notices shall be posted in all polling places in which the name of the withdrawn candidate appears on the ballot stating that such candidate has withdrawn and that all votes cast for such withdrawn candidate shall be void and shall not be counted." Ga. Code Ann. § 21-2-134(a)(1).

I see nothing in our State's election laws that would prohibit a similar notice at polling locations. These notices also could be sent to voters who requested absentee ballots. Indeed, I think our constitutional protections of voting rights would *compel* the State Board of Elections to take these steps. Even if the Board was unwilling to do so—due to partisanship on the Board or any other reason—interested parties could bring suit to compel it, or the General Assembly could intervene and enact a law requiring it.

In sum, I view my role as enforcing the law as it is written and, as explained above, I believe our election laws support the Board's determination. Thus, while I respect the majority's well-reasoned decision, I would allow the petition for a writ of supersedeas and stay the order of the Court of Appeals.

Justice RIGGS dissenting.

The magnitude of the harm wrought by the Court of Appeals' order, both to voters of the state who have been guaranteed by their elected legislature sixty days in which to receive and cast absentee ballots and to the overworked and underpaid public servants working as election administrators in a time when such service has subjected those public servants to harassment and peril, *see* Linda So & Jason Szep, *U.S.*

Election Workers Get Little Help from Law Enforcement as Terror Threats Mount, Reuters (Sept. 8, 2021) (identifying more than 100 threats of death or violence received by forty election workers in highly contested battleground states during the 2020 elections),[1] is egregious and unjustified. A currently anonymous panel of three intermediate state appellate judges have taken into their hands the power to significantly shorten the absentee voting period and to throw into disarray preparations for a presidential election in this state.

Elections—the cornerstone of our democracy—are not games or exercises in ego-stroking. With a disturbing disregard for the impact on millions of North Carolina voters, plaintiff Robert F. Kennedy, Jr., (Mr. Kennedy) seeks to have his cake and eat it, too. Forcing the state to put his name on the ballot, creating for the state costs both practical and legal, he now wants to reprint millions of ballots because he has decided to suspend his campaign without actually ending it or foreclosing the possibility of his election. *Hear the Moment RFK Jr. Suspends his Presidential Campaign*, CNN Politics at 1:07 (August 23, 2024), https://www.cnn.com/2024/08/23/politics/video/rfk-jr-robert-kennedy-suspends-campaign-announcement-arizona-digvid. Here, the whims of one man have been elevated above the constitutional interests of tens of thousands of North Carolina voters who have requested an absentee ballot and seek to exercise their right, under North Carolina law, to cast their ballot as soon as possible after the statutory deadline required to distribute absentee ballots.

The Court of Appeals' gross overstep of its powers, in disregard of the duly-enacted law of this state and of the federal and state constitutions, has and will cause further irreparable harm to this state, magnifying the harm of Mr. Kennedy's apparent gamesmanship. This Court's failure to intervene to uphold the rule of law and the well-defined constitutional and statutory norms underpinning our election machinery makes this a dark day in the history of the state's judiciary. North Carolina voters deserve better.

The North Carolina State Board of Elections (the Board) seeks from this Court a writ of supersedeas to allow the Board—in accordance with state law—to mail absentee ballots to the more than 125,500

1. *See also* Ruby Edlin & Lawrence Norden, *Poll of Election Officials Shows High Turnover Amid Safety Threats and Political Interference*, Brennan Ctr. for Just., (Apr. 25, 2023) (highlighting that threats, abuse, and harassment have led to resignations of experienced election administration professionals).

military, overseas, and absentee voters who have already exercised their right under North Carolina law to request and cast an absentee ballot. Instead, with only a cursory explanation, this Court denies the request of the Board and effectively truncates, by at least two weeks, the absentee period for the voters of North Carolina. This ruling guarantees the maximum detrimental effect of an impetuous decision from the Court of Appeals requiring the Board to remove a candidate's name from the ballots—creating substantial work for election administrators and reduced access to the franchise for no appreciable benefit to the electorate or to the trustworthiness of our electoral system. Because the failure of this Court to allow the writ of supersedeas irreparably harms the voters of North Carolina and detrimentally affects the Board's ability to administer the election process in an orderly and efficient manner, I dissent.

The purpose of a writ of supersedeas is "to preserve the status quo pending the exercise of the appellate court's jurisdiction." *City of New Bern v. Walker*, 255 N.C. 355, 356 (1961) (per curiam). To determine whether this Court should order a writ of supersedeas, the Court considers whether the party requesting the writ has shown a likelihood of success on the merits and whether irreparable harm will occur absent a stay. *See* N.C. R. App. P. App'x D (providing guidance that a party requesting a writ of supersedeas should provide a factual and legal argument "that irreparable harm will result to petitioner if it is required to obey decree pending its review; [and] that petitioner has meritorious basis for seeking review"). In this case, both criteria are amply satisfied. The Board has demonstrated the likelihood of success on the merits and that the Board and, significantly, the voters of North Carolina will suffer irreparable harm if this Court fails to allow the writ.

The Board Has Shown It is Likely to be Successful on the Merits.

Mr. Kennedy challenged the Board's decision denying the request to remove his name from printed ballots because, in his view, N.C.G.S. § 163-113 provides him with the statutory right to be removed from the ballot. However, N.C.G.S. § 163-113 does not provide a statutory right for a candidate to remove his name from already-printed ballots. Thus, the Board is likely to be successful on the merits.

In its entirety, N.C.G.S. § 163-113 states that:

> A person who has been declared the nominee of a political party for a specified office under the provisions of G.S. 163-182.15 or G.S. 163-110, *shall not be permitted* to resign as a candidate unless, prior to the first day on which military and overseas absentee

> ballots are transmitted to voters under Article 21A of this Chapter, that [the] person submits to the board of elections which certified the nomination a written *request that person be permitted to withdraw*.

N.C.G.S. § 163-113 (2023) (emphases added). The first clause issues a mandatory directive: Candidates nominated under the specified provision "shall not be permitted to resign as a candidate." *Id.*; *see also* Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 112 (1st ed. 2012) (noting that shall is mandatory). The second clause enumerates conditions under which a nominated candidate may request permission to withdraw. *See* N.C.G.S. § 163-113. The statute does *not* say a nominated candidate has a right to withdraw. Nor can the indeterminate title of the provision, *see id.* ("Nominee's right to withdraw as candidate."), contradict the statute's clear language. *Carter v. United States*, 530 U.S. 255, 267 (2000) (Thomas, J.) ("[T]he title of a statute is of use only when it sheds light on some ambiguous word or phrase in the statute itself." (cleaned up)).

Further, when a candidate *does* have a statutory right to withdraw, the State election code says so explicitly. *See*, *e.g.*, N.C.G.S. § 163-106.4 (2023) (granting any person who has filed a notice of candidacy "the right to withdraw it at any time" prior to a specific deadline). Such meaningful variation shows the legislature knows how to give candidates a statutory right to withdraw and did not do so here. Scalia & Garner, *Reading Law* at 170 (recognizing that a material variation in terms suggest a variation in meaning).

Not only is there no statutory right to withdraw, but Mr. Kennedy conflates withdrawal under section 163-113 with the relief he seeks: removal from already-printed ballots. That conflation is erroneous. The same words are generally presumed to carry the same meaning when they appear in different but related sections of the code. *Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. 519, 536 (2013). In contrast, "different words used in the same statute should be assigned different meanings." *Ferrell v. Express Check Advance of SC LLC*, 591 F.3d 698, 704 (4th Cir. 2010). Here, the General Assembly chose different words for a reason: it repeatedly distinguishes between withdrawing from an electoral contest and removing a candidate's name from the ballot in the General Statutes. *See*, *e.g.*, N.C.G.S. § 163-106.4 (contemplating a candidate who has withdrawn yet whose name remains printed on the primary ballot); N.C.G.S. § 163-165.3 (2023) (addressing a scenario where a candidate withdraws, yet the withdrawn candidate's name appears on the ballots and votes cast for the withdrawn candidate are assigned to

the replacement candidate not named on the ballot). Presuming intentional word usage further affirms that section 163-113 has nothing to do with having one's name removed from a ballot.

Furthermore, interpreting "withdrawal" in section 163-113 to be synonymous with "removal" from the ballot creates a conflict with the Board's statutory obligation to ready ballots for mail exactly sixty days ahead of the election—the exact conflict presented in this case. *See* N.C.G.S. § 163-227.10 (2023). Such an interpretation would also conflict with the Board's statutory obligations to "certify that the content and arrangement of the official ballot are in substantial compliance" with state law and to "proofread the official ballot of every county, if practical, prior to final production." N.C.G.S. § 163-165.3(a)(4)–(5). Reading these two words to have distinct meanings avoids this conflict and brings coherence to the state's election laws. *See Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 222 (2008) (Thomas, J.) (recognizing that the construction of statutory terms "must, to the extent possible, ensure that the statutory scheme is coherent and consistent").

Mr. Kennedy argues that his statutory construction must be correct because he sees no benefit to being allowed to withdraw from the electoral contest if he nonetheless is forced to keep his name on the ballot. That is demonstrably inaccurate. His argument ignores the fact that he also represents his party, the We The People (WTP) party, on the ballot. A political party in North Carolina is "[a]ny group of voters which, at the last preceding general State election, polled for its candidate for Governor, or for presidential electors, at least two percent (2%) of the entire vote cast in the State for Governor or for presidential electors." N.C.G.S. § 163-96(a)(1) (2023). Currently, the WTP party does not have a candidate for Governor on the ballot. Therefore, if Mr. Kennedy's name as presidential candidate for the WTP party is removed from North Carolina ballots, the party, which was only recognized as a political party in North Carolina on 16 July 2024, will no longer be recognized as a political party here. *See* N.C. State Bd. of Elections, *State Board Recognizes We The People as Official NC Political Party*, (July 16, 2024), https://www.ncsbe.gov/news/press-releases/2024/07/16/state-board-recognizes-we-people-official-nc-political-party. Thus, in future elections, the WTP party would have to submit anew petitions for the formulation of a new political party to the Board. *See* N.C.G.S. § 163-96(a)(2) (requiring "signatures of registered and qualified voters in this State equal in number to one-quarter of one percent [ ] of the total number of voters who voted in the most recent general election for Governor" for the Board to recognize a new political party). Thus, the allowance of withdrawal without

removal creates another pathway for the WTP party to retain party recognition and North Carolina WTP voters can still accrue benefit from Mr. Kennedy's name remaining on the ballot. The legislature plainly understood this, even if Mr. Kennedy does not.

Indeed, this explanation is consistent with the rule that the party must withdraw presidential candidates from the election—it is not just up to a presidential candidate to unilaterally remove their name from the ballot in the run-up to an election. On Monday, 26 August 2024, three days after Mr. Kennedy suspended his campaign, the vice-chair of the WTP party emailed the Board about the suspension. The vice-chair inquired about the possibility of removing Mr. Kennedy's name from the ballot and "the repercussions for the party should the nominee be withdrawn." Ultimately, on Wednesday, 28 August 2024, the WTP party sent a request to remove Mr. Kennedy, as its presidential nominee, from the North Carolina ballots but did not present an alternate representative for the party. *See* N.C.G.S. § 163-114 (2023) (providing a procedure for filling vacancies among party nominees occurring after nomination and before elections). The Board called an emergency meeting on Thursday, 29 August 2024, and voted to allow the WTP party to remove its presidential candidate, but due to the status of the ballot preparation across the state, voted to keep his name on the ballot.

Finally, the General Assembly unambiguously afforded the Board discretion to determine how to respond to late ballot changes. *See* N.C.G.S. § 163-165.3(c) ("The State Board shall promulgate rules for late changes in ballots. The rules shall provide for the reprinting, *where practical*, of official ballots as a result of replacement candidates to fill vacancies in accordance with G.S. 163-114 or other late changes." (emphasis added)). The Board published a procedure to address late changes in ballots. *See* Late Changes to Ballots, 08 N.C. Admin Code 06B.0104 ("If the vacancy occurs before the absentee voting period begins, the responsible county board of elections, or State Board of Elections if the contest spans more than one county, may determine whether it is practical to have the ballots reprinted with the name of the replacement nominee as authorized by G.S. 163-114."). In accordance with this policy, the Board determined it was impractical to print new ballots and comply with the state law requiring absentee ballots to be mailed one week later, on 6 September 2024.

In sum, the plain language of N.C.G.S. § 163-113 and a fair reading of the statute within its broader statutory context contradicts Mr. Kennedy's assertion of a statutory right to be removed from the ballot at this stage of the election process. The statute does not grant Mr. Kennedy a "right"

to be removed from the ballot. This straightforward statutory analysis should end the judicial branch's role in Mr. Kennedy's quest. "Where the language of a statute is clear and unambiguous, there is no room for judicial construction, and the courts must construe the statute using its plain meaning." *State v. Borum*, 384 N.C. 118, 124 (2023) (internal quotations omitted) (quoting *Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 209 (1990)). The Board did not violate N.C.G.S. § 163-113, and the Board is likely to be successful on the merits. Thus, this Court should grant the Board's petition for writ of supersedeas to stay the order of the Court of Appeals before it causes any additional harm to the voters of North Carolina.

Mr. Kennedy's Claim of Compelled Speech is Unsupported.

Mr. Kennedy's constitutional arguments are no more availing than his statutory arguments, and the Board is likely to succeed on the merits of these claims as well. Mr. Kennedy argues that the Board's refusal to remove his name from the North Carolina ballots amounts to compelled speech in violation of his free speech rights. We disagree with Mr. Kennedy's interpretation, and even if this were compelled speech (and it is not), the burden imposed on voters and election administrators greatly outweighs any burden on the free speech of a candidate required to keep his name on the ballot when he explicitly is still running for the office of President of the United States. *Hear the Moment RFK Jr. Suspends his Presidential Campaign*, CNN Politics at 1:07.

In cases such as this one, inquiries into the propriety of a state election law depend upon whether the law severely burdens a parties free speech rights or only "reasonabl[y], nondiscriminator[ily] restrict[s]" those rights. *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (cleaned up) (recognizing that the mere fact a state's system limits the field of candidates from which voters might choose does not of itself compel close scrutiny from a court). The Supreme Court of the United States' guidance on this front is well-settled: Courts consider the "character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate" and balances that against the "precise interest put forward by the State as justifications for the burden imposed by its rule." *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983) (citations omitted).

Neither the trial court nor the Court of Appeals analyzed this issue. The parties have not fully briefed the issue, and Mr. Kennedy provides no legal citation for the proposition that a candidate's name on a government-issued ballot is protected speech. Mr. Kennedy's name remains

on the ballot in twenty states other than North Carolina, and he has filed lawsuits to add his name to the ballot in at least two additional states.[2] Mr. Kennedy still seeks the office of the presidency: in his words, he "could conceivably still end up in the White House in a contingent election." *Hear the Moment RFK Jr. Suspends his Presidential Campaign*, CNN Politics at 1:07. Mr. Kennedy does not reconcile his desire to remain a candidate in the majority of states with his position that keeping his name on the ballot in North Carolina would irreparably injure his free speech rights. In *Anderson*, the Supreme Court of the United States concluded that constitutional challenges such as this should be resolved through "an analytical process that parallels its work in ordinary litigation." 460 U.S. at 789. This issue should not be resolved without any analysis in a single-page order entered by an intermediate court on the day ballots are ready and required to be mailed to voters. *See Reynolds v. Sims*, 377 U.S. 533, 585 (1964) ("In awarding or withholding immediate relief, a court is entitled to and should consider the proximity of a forthcoming election and the mechanics and complexities of state election laws and should act and rely upon general equitable principles.").

Even if this issue was properly before the Court, we know of no case where a court, federal or state, has treated the declination to remove a name from a government ballot, this close to an election, as compelled speech or a constitutional free speech injury. Rather the Supreme Court has said "[b]allots serve primarily to elect candidates, not as forums for political expression." *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 363 (1997) (citation omitted).

And even if the Board's decision, in its discretion under state law, to leave Mr. Kennedy's name on the ballot when the burden of repreparing and reprinting ballots would be so costly and difficult did qualify as the government compelling Mr. Kennedy's speech, such a burden on his free speech rights would not outweigh the harms wrought on election administrators and voters. Keeping one man's name on the ballot when he still wants the office and fought to have his name put on that ballot cannot be of more constitutional significance than the ability of thousands of eligible voters to access the franchise via absentee voting. Nor do Mr. Kennedy's free speech rights outweigh the risks of creating disarray in a statewide election. "States may, and inevitably must, enact reasonable regulations of parties, elections, and ballots to reduce

2. Caitlin Yilek & Allison Novelo, *Map Shows Where RFK Jr. Is on the Ballot in the 2024 Election*, CBS News (Sept. 6, 2024), https://www.cbsnews.com/news/rfk-jr-map-on-the-ballot-states/.

election- and campaign-related disorder." *Libertarian Party of N.C. v. State*, 365 N.C. 41, 49 (2011) (quoting *Timmons*, 520 U.S. at 358). In this case, any burden to Mr. Kennedy of keeping his name on the ballots in North Carolina pales in comparison to the State's interest in affording military, overseas, and other absentee voters the statutorily-mandated voting period.

This Court Should Act to Avoid Irreparable Harm to the Voters of North Carolina.

On the day the Board was required by duly-enacted state law to mail absentee ballots to voters, the Court of Appeals ordered the Board to modify prepared, printed, and ready-to-mail ballots. The Court of Appeals' order essentially modified state election law—without any legal analysis—in a manner that irreparably harms the Board and the voters of North Carolina. This directive has the irrefutable effect of shortening the statutory voting window for absentee voters. *See* N.C.G.S. § 163-227 (requiring absentee ballots to be mailed sixty days before the election). Further, barring intervention by this Court, the Board estimates that North Carolina taxpayers will pay upwards of a million dollars to remove Mr. Kennedy's name from our ballots. We should have acted promptly to avoid both of these unjustified outcomes.

Voting is a fundamental right ranking "among our most precious freedoms," *Anderson*, 460 U.S. at 787 (quoting *Williams v. Rhodes*, 393 U.S. 23, 30 (1969)), and our Court should preciously respect and defend that freedom. We should be clear with the public about the impact of this ruling on the franchise: we have effectively rubberstamped the Court of Appeals' decision to eliminate one-quarter of the absentee voting period established by the North Carolina General Assembly. Any examination of irreparable harms should certainly look at the burdens on the Board and election administrators; even more significantly, though, we must also address the burden on the right to vote.

Removing a candidate's name from a ballot is not simple after the ballot preparation process is complete. For the upcoming general election, North Carolina has already created, proofed, coded, and printed almost three million ballots; these ballots include 2,348 different ballot styles reflecting "the version of a ballot within a jurisdiction that an individual voter is eligible to vote." N.C.G.S. § 163-165(3). Each ballot style has been proofed to ensure it meets the statutory criteria for official ballots. N.C.G.S. §§ 163-165.4 to -165.6. Each ballot style has also been coded to ensure that the vote tabulators correctly read the contest and candidate on the ballot. Changes made at the top of the ballot create

a likelihood that candidates and contests further down the ballot may not be coded properly. *Id.* Thus, once Mr. Kennedy's name, currently in the second position on the ballot, is removed from the 2,348 different ballot styles, all contests and candidates below his name will require re-proofing, re-coding, and quality control testing before reprinting. The Board estimates that this entire revisited process will take at least two weeks to complete. Under the Court of Appeals' order, the statutorily required sixty-day absentee voting period will be reduced by at least two weeks. *See* N.C.G.S. § 163-227.10(a); N.C.G.S. § 163-258.9(a) (2023) (deadline for military and overseas voters). Additionally, because the Board explains that complying with the Court of Appeals' order will take approximately two weeks, there is a risk of reducing the federally mandated absentee voting to less than the minimum time required under federal law. 52 U.S.C. § 20303(a)(8) (requiring states to mail absentee ballots to absent uniformed service voters and overseas voters "not later than 45 days before the election"). Not insignificantly, this work must be done by state and county election officials when they should be focused on preparations for early voting and other election-related tasks.

The concept of judicial restraint flew out the window when the Court of Appeals required, outside the normal course of appeal litigation, the Board of Elections to modify 2,348 ballot styles on the day that the first 125,500 of those ballots were printed, packaged, and ready to be mailed to military, overseas, and absentee voters. *See Democratic Nat'l Comm. v. Wis. State Legislature*, 141 S. Ct. 28, 31 (2020) (Kavanaugh, J., concurring) (highlighting an important principle of judicial restraint protects the state's interest in running an orderly, efficient election, preventing voter confusion, and giving citizens confidence in the fairness of the election). And that intermediate appellate court order also required non-compliance with state law requiring absentee ballots to be mailed out sixty days before an election. The Court of Appeals sits inappropriately as a policy-making body when it unilaterally decides to deprive voters of fully one-quarter of the absentee voting period. This should evoke constitutional and institutional outrage in any reasonable high court. Not only does the lower appellate court's order offend every traditional sense of judicial restraint, it also stands in stark contrast to repeated guidance from the Supreme Court of the United States counseling against last-minute judicial alteration to state election law. *See Purcell v. Gonzalez*, 549 U.S. 1, 5–6 (2006) (per curiam) (holding that because of the impending election and the necessity for clear guidance for voters and election administrators, courts should not alter election law right before elections).

When confronted with requests to modify election law in the run-up to an election, the Supreme Court of the United States has repeatedly emphasized that appellate courts should not modify election law in the period close to an election. *See Merrill v. Milligan*, 142 S. Ct. 879, 879 (2022) (Kavanaugh, J., concurring) (explaining that the Supreme Court's election-law precedent establishes that "federal district courts ordinarily should not enjoin state election laws in the period close to an election, and [ ] that federal appellate courts should stay injunction when . . . lower federal courts contravene that principle"). Even amid a national pandemic, the Supreme Court has rebuffed efforts to modify election law on the eve of an election. *See, e.g.*, *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 589 U.S. 423, 424 (2020) (staying a district court order that allowed ballots mailed and postmarked after election day to be counted). The Supreme Court has even denied an emergency application for a stay of a state election law when the Court believed "that both sides have advanced serious arguments on the merits." *Moore v. Harper*, 142 S. Ct. 1089, 1089 (2022) (emphasizing that "this Court has repeatedly ruled that federal courts ordinarily should not alter state election laws in the period close to an election"). This Court also has followed suit and avoided changing election law just before an election. *See Pender County v. Bartlett*, 361 N.C. 491, 510 (2007) (declining to enforce a required change in districting until after the 2008 election because the decision, issued on 24 August 2007, was too close to the upcoming election).

Finally, in balancing the equities of potential harm wrought in this matter, it should be noted that Mr. Kennedy waited until 3 September 2024 to file for a temporary restraining order after filing suit seeking the removal of his name from the ballot—only three days before absentee ballots must be mailed out under state law. Given the date of Mr. Kennedy's decision to "suspend" his campaign on 23 August 2024 and seek alteration of ballots on 28 August 2024, the delay in filing for an injunction cuts against the alleged irreparable harm to which Mr. Kennedy describes himself as subject. In many other election law cases, even where litigants seek relief that would affect a much broader class of individuals, this kind of delay has been deemed fatal. *See, e.g.*, *Lucas v. Townsend*, 486 U.S. 1301, 1305 (1988) (Kennedy, J., in chambers) (enjoining a bond referendum election for school maintenance funding because the Board of Education waited too long to set the date of the special election); *Spencer v. Pugh*, 543 U.S. 1301 (2004) (Stevens, J., in chambers) (declining to enter injunctive relief to keep parties planning to "mount indiscriminate challenges at polling places" out of polling places because the short time until voting began limited the Court's

ability to fully evaluate the filings of the parties); *Kishore v. Whitmer*, No. 20-11605, 2020 WL 3819125 (E.D. Mich. July 8, 2020), *aff'd*, 972 F.3d 745 (6th Cir. 2020) (denying plaintiffs' request for injunctive relief from state law requiring them to collect signatures to add a presidential candidate to the ballot where plaintiffs did not act diligently to obtain the required signatures); *see also Perry v. Judd*, 471 F. App'x 219, 220 (4th 2012) (denying candidate's emergency motion to be added to the ballot because of candidate's lack of diligence in challenging election rules and the affect on timely mailing of absentee ballots) (unpublished).

Today, any public aspersions cast on the impartiality, independence, and dignity of our state courts are well-earned. I despair of this Court's current failure to engage in plain reading of the law and its failure to forcefully defend the rights of the people, particularly when it comes to participation in the political process. I dissent.

Justice EARLS joins in this dissent.

STATE v. LESTER

[386 N.C. 647 (2024)]

STATE OF NORTH CAROLINA	From N.C. Court of Appeals 23-115
v.	
ANDRE EUGENE LESTER	From Wake 19CRS223407

No. 293PA23-2

ORDER

Defendant's Motion for Determination Without Oral Argument is denied. Defendant's Motion in the Alternative to Reschedule Oral Arguments is allowed as follows: oral argument in this case will be rescheduled to Thursday, 31 October 2024.

By order of the Court in Conference, this the 27th day of September 2024.

/s/ Riggs, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 27th day of September 2024.

s/Grant E. Buckner

Grant E. Buckner
Clerk of the Supreme Court

DURBIN v. DURBIN

[386 N.C. 648 (2024)]

JENNIFER C. DURBIN v. MATTHEW L. DURBIN	From N.C. Court of Appeals 23-308 From Wake 17CVD164

No. 78A24

ORDER

This Court, on its own motion, will dispose of this case on the record and briefs without oral argument pursuant to Rule 30(f)(1) of the Rules of Appellate Procedure. Accordingly, plaintiff's motion to continue oral argument is dismissed as moot.

By order of the Court in Conference, this the 4th day of October 2024.

/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 2024.

s/Grant E. Buckner

Grant E. Buckner
Clerk of the Supreme Court

AYERS v. CURRITUCK CNTY. DEP'T OF SOC. SERVS.

[386 N.C. 649 (2024)]

JUDITH M. AYERS

v.

CURRITUCK COUNTY DEPARTMENT OF SOCIAL SERVICES

From N.C. Court of Appeals
23-420

From Office of Admin. Hearings
17OSP08518

No. 110A24

ORDER

On 5 May 2024, respondent filed a petition in the alternative for discretionary review of the decision of the North Carolina Court of Appeals pursuant to N.C.G.S. § 7A-31. By this order, the petition is denied as to Issue III. The petition is otherwise dismissed as moot as to Issues I and II that are before us to the extent that they are encompassed by the Court of Appeals dissent.

By order of the Court in Conference, this the 16th day of October 2024.

/s/ Riggs, J.
For the Court

Dietz, J., recused.

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 18th day of October 2024.

s/Grant E. Buckner

Grant E. Buckner
Clerk of the Supreme Court

LISA BIGGS FORE

v.

THE WESTERN NORTH CAROLINA CONFERENCE OF THE UNITED METHODIST CHURCH (A/K/A WESTERN NORTH CAROLINA CONFERENCE); AND THE CHILDREN'S HOME, INCORPORATED (A/K/A THE CHILDREN'S HOME, A/K/A THE CROSSNORE SCHOOL & CHILDREN'S HOME, A/K/A CROSSNORE CHILDREN'S HOME)

From N.C. Court of Appeals
21-546

From Mecklenburg
21CVS767

No. 217A22

ORDER

Plaintiff's motion to dismiss is denied. Under this Court's inherent supervisory authority over the lower courts, we vacate the Court of Appeals decision and remand this matter to the Court of Appeals for further remand to the trial court to conduct a hearing on plaintiff's motion after providing notice and opportunity to be heard to all parties entitled to notice by rule or statute.

By order of the Court in Conference, this the 16th day of October 2024.

/s/ Riggs, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 18th day of October 2024.

s/Grant E. Buckner

Grant E. Buckner
Clerk of the Supreme Court

IN RE A.G.J.

[386 N.C. 651 (2024)]

IN THE MATTER OF A.G.J.	From N.C. Court of Appeals 23-323 From Rockingham 19JB109

No. 332A23

ORDER

Juvenile-Appellee's motion to dismiss appeal is allowed. *See In re Swindell*, 326 N.C. 473, 474–75 (1990) (dismissing appeal of juvenile commitment order as moot after "juvenile was conditionally released from custody"); *In re Doe*, 329 N.C. 743, 748 n.7 (1991) (noting that appeal of commitment order became moot when juvenile turned eighteen because "[a]t that age the Juvenile Court no longer has jurisdiction, and a final release from DYS custody is available" (cleaned up)). The decision of the Court of Appeals is vacated.

By order of the Court in Conference, this the 16th day of October 2024.

/s/ Riggs, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 18th day of October 2024.

s/Grant E. Buckner

Grant E. Buckner
Clerk of the Supreme Court

STATE v. FORD

[386 N.C. 652 (2024)]

STATE OF NORTH CAROLINA	From N.C. Court of Appeals 23-374
v.	
SCOTT EVERETT FORD	From Buncombe 21CRS84572 21CRS87417-19

No. 31A24

ORDER

The petition for discretionary review as to additional issues filed by defendant on 2 February 2024 is allowed as to the second issue only.

By order of the Court in Conference, this the 16th day of October 2024.

/s/ Riggs, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 18th day of October 2024.

s/Grant E. Buckner

Grant E. Buckner
Clerk of the Supreme Court

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

18 OCTOBER 2024

14P24	State v. Hector Zapata	Def's PDR Under N.C.G.S. § 7A-31	Denied
24P23-5	SCGVIII-Lakepointe, LLC v. Vibha Men's Clothing, LLC; Kalishwar Das	1. Def's Pro Se Motion for New Order 2. Def's Pro Se Motion for Urgent Humanitarian Plea for Immediate Protection and Expedited Order to Stay	1. Dismissed 2. Dismissed **10/14/2024** **Dietz, J., recused** **Riggs, J., recused**
25P23-5	Kalishwar Das v. SCGVIII Lakepointe, LLC in c/o Mr. John F. Morgan, Jr.	1. Plt's Pro Se Motion for New Order (COA21-806) 2. Plt's Pro Se Motion for Urgent Humanitarian Plea for Immediate Protection and Expedited Order to Stay	1. Dismissed 2. Dismissed **10/14/2024** **Dietz, J., recused** **Riggs, J. recused**
26P24	State v. Cedric Alden Burnett	Def's PDR Under N.C.G.S. § 7A-31 (COA23-246)	Denied
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. Special Order
34P24	Linda F. Johnson, as Successor Trustee of the Shirley T. Warner Revocable Trust v. Jeffrey C. Butler and Blaire Butler	Defs' PDR Under N.C.G.S. § 7A-31 (COA23-692)	Denied
35P24	Linda F. Johnson, as Successor Trustee of the Luther D. Warner Revocable Trust v. Jeffrey C. Butler	Def's PDR Under N.C.G.S. § 7A-31 (COA23-693)	Denied

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

18 OCTOBER 2024

36P24	Linda F. Johnson, as Successor Trustee of the Luther and Shirley Warner Charitable Trust v. Jeffrey C. Butler	Def's PDR Under N.C.G.S. § 7A-31 (COA23-694)	Denied
39A22-2	State v. Robin Applewhite	Def's Pro Se Motion to Preserve/Stop Destruction of Evidence	Dismissed **Dietz, J., recused**
39A24-3	Chauncey Peele v. Melba Hodges Peele	Def's Pro Se Motion for Order to Comply to Dismissal	Dismissed
47P24-3	In re M.M., E.M., J.M., S.M., C.M.	Respondent-Father's Pro Se Petition for Writ of Certiorari	Denied
64A22-2	Howard, et al. v. MAXISIQ, Inc. et al.	1. Plts' Motion to Dismiss Appeal 2. Def's Motion for Extension of Time to File Reply Brief and Response to Motion to Dismiss Appeal	1. Allowed **09/04/2024** 2. Dismissed as moot **09/05/2024**
65P24	State v. Francisco Alvarado	Def's PDR Under N.C.G.S. § 7A-31 (COA23-385) Denied	
66A12-2	State v. Marcus Devan Hunter	Def's Pro Se Petition for Writ of Certiorari to Review Order of the COA (COAP23-278)	Denied **09/18/2024**
67P24	State v. James Dia'Shawn Robinson	Def's PDR Under N.C.G.S. § 7A-31 (COA23-365)	Denied
78A24	Durbin v. Durbin	1. Plt's Notice of Appeal Based Upon a Dissent (COA23-308) 2. Plt's Motion to Continue Oral Arguments	1. --- 2. Special Order **10/04/2024**
82P24	Cape Homeowners Association, Inc., Desmond P. McHugh and Wife, Geraldine McHugh, Michael L. Bodnar and Wife, Patricia L. Bodnar, Donna J. Martin and Spouse, Peter Martin v. Southern Destiny, LLC	Proposed Intervenor-Def's (Bill Clark Homes of Wilmington, LLC) PDR Under N.C.G.S. § 7A-31 (COA23-593)	Denied

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

18 OCTOBER 2024

102P22-2	State v. Marcus A. Satterfield	Def's Pro Se Motion to Appeal Findings of Three Judge Panel	Dismissed *ex mero motu*
105PA23	Dieckhaus, et al. v. Board of Governors of the University of N.C.	Def's Motion to Hold Oral Argument Contemporaneously with Lannan v. Board of Governors of the University of North Carolina, No. 316PA22	Dismissed as moot **08/27/2024** **Barringer, J., recused**
109P01-4	State v. William Dawson	1. State's Motion to Seal Petition for Writ of Supersedeas and Subsequent Filings (COA99-1268) 2. State's Motion for Temporary Stay 3. State's Petition for Writ of Supersedeas 4. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **08/27/2024** 2. Allowed **08/27/2024** 3. 4. **Riggs, J., recused**
110A24	Judith M. Ayers v. Currituck County Department of Social Services	1. Respondent's Notice of Appeal Based Upon a Dissent (COA23-420) 2. Respondent's Petition in the Alternative for Discretionary Review Under N.C.G.S. § 7A-31	1. --- 2. Special Order **Dietz, J., recused**
114P15-2	State v. Slade Weston Hicks, Jr.	Def's Pro Se Motion for Belated Appeal Constitutional Questions	Denied
124A24	Atlantic Coast Conference v. Board of Trustees of Florida State University	1. Plt's Consent Motion to Amend Briefing Schedule 2. Parties' Joint Motion for Oral Argument to Occur at the Same Session of Court	1. Allowed **09/04/2024** 2.
128P22-3	Leilei Zhang v. Wen Zhang	Plt's Pro Se Motion for Notice of Appeal (COAP24-470)	Dismissed
131P16-33	State v. Somchai Noonsab	Def's Pro Se Motion for Relief	Dismissed
135PA12-2	State v. Jamie Daquan Lowery	Def's Pro Se Motion for PDR (COA11-673)	Denied
145P24	State v. Peter Michael Frank	Def's PDR Under N.C.G.S. § 7A-31 (COA23-695)	Denied

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

18 OCTOBER 2024

146P23-2	In re Timothy Omar Hankins, Sr.	1. Petitioner's Pro Se Petition for Writ of Certiorari for Review 2. Petitioner's Pro Se Petition for Writ of Certiorari	1. Denied 2. Denied
150P24	State v. My'Ka El	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA23-745) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed
163P24-2	State v. Tramella Tineak Hinton	Def's Pro Se Motion to Reconsider (COA23-673)	Dismissed
165P23-3	In re Drew Hartley v. State of North Carolina, et al., Sheriff of Onslow County	1. Def's Pro Se Motion for Temporary Stay (COAP23-293) 2. Def's Pro Se Petition for Writ of Supersedeas	1. Dismissed **09/11/2024** 2. Dismissed **09/11/2024**
171P24	State v. William Anthony Brown	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA23-393) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed
175P24	State v. Demistrus McKinley Ingram	1. State's Motion for Temporary Stay (COA23-748) 2. State's Petition for Writ of Supersedeas 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **07/01/2024** 2. Allowed 3. Allowed
188P24	In re E.H. & R.H.	1. Petitioner's Motion for Temporary Stay (COA23-864) 2. Petitioner's Petition for Writ of Supersedeas 3. Petitioner's PDR Under N.C.G.S. § 7A-31 4. Respondent-Parents' PDR Under N.C.G.S. § 7A-31	1. Allowed **07/15/2024** 2. Allowed 3. Allowed 4. Denied
189P24	State v. Wenchiann Holly Yeh	Def's Pro Se Petition for Writ of Certiorari to Review Order of the COA (COA24-220)	Dismissed
195P24	State v. Mark Anthony Burnette	Def's Pro Se PDR Under N.C.G.S. § 7A-31 (COA23-162)	Dismissed
198P24	State v. Terrell Aaron Saddler a/k/a Aaron Terrell Saddler	1. Def's PDR Under N.C.G.S. § 7A-31 (COA22-989) 2. Def's Motion to Amend PDR	1. Dismissed 2. Allowed

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

18 OCTOBER 2024

199P24	State v. Jimmie Sinclair	1. Def's Pro Se Petition for Writ of Certiorari to Review Decision of the COA (COA24-85) 2. Def's Pro Se Motion to Proceed *In Forma Pauperis*	1. Denied 2. Allowed
202P24	Julius William Woody and Shannon Chad Gaines, Plaintiffs v. Randy Lynn Vickrey, individually and in his capacities as Trustee of the Julius William Woody Trust and as Attorney-In-Fact for Julius William Woody, Defendant and Third-Party Plaintiff v. Carrie F. Vickrey and Donald G. Ayscue, Third-Party Defendants	1. Plt and Third-Party Defs' Motion for Temporary Stay (COA22-776) 2. Plt and Third-Party Defs' Petition for Writ of Supersedeas 3. Plt and Third-Party Defs' Notice of Appeal Based Upon a Constitutional Question 4. Def's (Randy Lynn Vickrey) Motion to Dismiss Appeal	1. Allowed **07/25/2024** Dissolved 2. Denied 3. --- 4. Allowed
205P24	H.D. Rodgers, Executor of the Estate of Ruth Rodgers, Deceased v. Nash Hospitals, Inc., SC Surgicalists of North Carolina, P.C., Providence Anesthesiology Associates PA, Marcus Lynn Wever, M.D., and Andrea Kay Fuller, M.D.	1. Defs' Motion for Temporary Stay (COA24-125) 2. Defs' Petition for Writ of Supersedeas 3. Defs' Petition for Writ of Certiorari to Review Order of the COA	1. Special Order **08/07/2024** 2. Dismissed as moot **09/11/2024** 3. Dismissed as moot **09/11/2024**
208P23-2	Kalishwar Das v. State of North Carolina	1. Plt's Pro Se Petition for Writ of Mandamus (COA24-491) 2. Plt's Pro Se Supplemental Petition for Writ of Mandamus	1. Denied 2. Denied **Dietz, J., recused** **Riggs, J., recused**
212A24	Elior, Inc. v. Dennis Thomas	Parties' Joint Motion for Withdrawal of Appeal	Allowed **10/07/2024**

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

18 OCTOBER 2024

217A22	Fore v. The Western N.C. Conference of the United Methodist Church, et al.	Plt's Motion to Dismiss Appeal	Special Order
218P24	Universal Life Insurance Company v. Greg E. Lindberg	1. Def's Motion for Temporary Stay (COAP24-546) 2. Def's Petition for Writ of Supersedeas	1. Dismissed **08/28/2024** 2. Dismissed **08/28/2024**
221A24	Atlantic Coast Conference v. Clemson University	1. Def's Motion to Admit David Eidson Dukes Pro Hac Vice 2. Plt's Consent Motion to Amend Briefing Schedule 3. Parties' Joint Motion for Oral Argument to Occur at the Same Session of Court	1. Allowed 2. Allowed **09/04/2024** 3.
224P24	TKAB Investments LLC v. Hair Insanity LLC	1. Def's Pro Se Motion for Temporary Stay (COAP24-294) 2. Def's Pro Se Petition for Writ of Supersedeas 3. Def's Pro Se Petition for Writ of Certiorari to Review Order of District Court, Wake County	1. Dismissed **09/18/2024** 2. Dismissed **09/18/2024** 3. Dismissed **09/18/2024**
225A24	State v. Blaine Dale Hague	1. State's Motion for Temporary Stay (COA23-734) 2. State's Petition for Writ of Supersedeas 3. State's Notice of Appeal Based Upon a Dissent 4. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed **08/27/2024** 2. Allowed **09/23/2024** 3. --- 4.
225PA21-2	North State Deli, LLC, et al. v. The Cincinnati Insurance Company, et al.	1. Amicus Curiae's (North Carolina Restaurant & Lodging Association and Restaurant Law Center) Motion for Leave to Participate in Oral Argument (COA21-293) 2. Amicus Curiae's (State of NC) Motion for Leave to Participate in Oral Argument 3. Defs' Motion for Additional Argument Time	1. Allowed **09/05/2024** 2. Allowed **09/05/2024** 3. Allowed **09/16/2024**
227P24	State v. Sheldon T. Maynor	Def's Pro Se Motion for PDR (COAP23-847)	Dismissed

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230P24	State v. David Allen Patterson	1. Def's Pro Se Motion for Temporary Stay (COA22-606) 2. Def's Pro Se Petition for Writ of Supersedeas	1. Dismissed **09/05/2024** 2. Dismissed **09/05/2024** **Riggs, J., recused**
232P24	Solomon Butler v. North Carolina Department of Adult Corrections	Plt's Pro Se Petition for Writ of Certiorari	Dismissed
233P24	State of North Carolina v. Frederick Plotz	1. Def's Motion for Temporary Stay (COA23-749) 2. Def's Petition for Writ of Supersedeas 3. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed **09/09/2024** 2. 3.
235P24	Robert F. Kennedy, Jr. v. North Carolina State Board of Election, et al.	1. Defs' Petition for Writ of Supersedeas (COAP24-624) 2. Defs' PDR Under N.C.G.S. § 7A-31	1. Special Order **09/09/2024** 2. Special Order **09/09/2024**
239P24	State v. Michael Earl Lewis	Def's Pro Se Petition for Writ of Certiorari to Review Order of the COA (COAP24-469)	Denied **09/11/2024**
246P24	State v. Jerico Shamon Givens, Jr.	1. Def's Motion for Temporary Stay (COA23-500) 2. Def's Petition for Writ of Supersedeas 3. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed **09/20/2024** 2. 3.
247P24	Remnant Management d/b/a Johnson Court Housing Partners, LP v. Tiffany Love	1. Def's Pro Se Motion for Temporary Stay (COAP24-583) 2. Def's Pro Se Petition for Writ of Supersedeas 3. Def's Pro Se Petition for Writ of Certiorari to Review Order of the COA	1. Dismissed **09/20/2024** 2. Dismissed **09/20/2024** 3. Dismissed **09/20/2024**
248P24	State v. Kedrick Daquane Thomas	1. State's Motion for Temporary Stay (COA23-210) 2. State's Petition for Writ of Supersedeas 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **09/23/2024** 2. 3.
250P24	Shelly G. Tolbert v. Qushawn Dennard Bristol	Plt's Pro Se Petition for Writ of Certiorari to Review Decision of District Court, Forsyth County	Dismissed

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251P24	State v. Adam Shawn Maness	Def's Pro Se Petition for Writ of Habeas Corpus	Denied **09/24/2024**
253A24	2120 Arlington Place Trust Dated 10/28/21 v. Jeffrey Jones and Rachel Holbert	1. Defs' Pro Se Notice of Appeal Based Upon a Constitutional Question (COA24-39) 2. Plt's Motion to Dismiss Appeal	1. --- 2. Allowed **10/17/2024**
254P24	State v. Christopher L. Galbreath	Def's Pro Se PDR Under N.C.G.S. § 7A-31 (COA24-48)	Denied
257P24	State v. John Maurice Robinson, Jr.	Def's Pro Se PDR Under N.C.G.S. § 7A-31 (COA24-290)	Denied
258P24	State v. Brian Christopher Legette	1. Def's Motion for Temporary Stay (COA23-1153) 2. Def's Petition for Writ of Supersedeas 3. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed **10/01/2024** 2. 3.
258PA23	State v. Eric Wayne Wright	1. Def's Motion to Strike Portions of the State's Brief (COA22-996) 2. Def's Motion to Temporarily Stay the Parties' Briefing Schedule Until the State Files its Response to the Motion to Strike 3. Def's Motion to Stay the Briefing Schedule Pending Entry of an Order Disposing of the Motion to Strike 4. Def's Motion to Grant Counsel 23 Days from the Disposition of the Motion to Strike to File New Brief	1. 2. Dismissed as moot **09/11/2024** 3. Denied **09/11/2024** 4. Denied **09/11/2024** **Riggs, J., recused**
263P24	State v. Brindell Wilkins	1. State's Motion for Temporary Stay (COA23-839) 2. State's Petition for Writ of Supersedeas	1. Allowed **10/07/2024** 2.
264A23	Daniel Jones v. J. Kim Hatcher Insurance Agencies Inc., et al.	1. Def's (J. Kim Hatcher Insurance Agencies Inc.) Motion to Dismiss Appeal (COA22-1030) 2. Plt's Motion to Deem New Brief Timely Filed	1. Denied 2. Allowed
264P24	State v. Chauncey Jamal Slade	1. State's Motion for Temporary Stay 2. State's Petition for Writ of Supersedeas (COA23-1157)	1. Allowed **10/09/2024** 2.

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278A23	Gregory Cohane v. The Home Missioners of America d/b/a Glenmary Home Missioners, Roman Catholic Diocese of Charlotte, NC, and Al Behm	Amicus Curiae's (State of NC) Motion for Leave to Participate in Oral Argument (COA22-143)	Allowed **09/04/2024** **Riggs, J., recused**
281P06-19	Joseph E. Teague, Jr., P.E., C.M. v. NC Department of Transportation, J.E. Boyette, Secretary	Plt's Pro Se Motion to Vacate Firing and Dismiss Charges with Prejudice (COA05-522)	Dismissed
289PA23	State v. Kaylore Fenner	Def's Motion to Modify Oral Argument Calendar	Denied **09/05/2024**
293PA23-2	State v. Andre Eugene Lester	1. Def's Motion for Determination Without Oral Argument 2. Def's Motion in the Alternative to Reschedule Oral Arguments	1. Special Order **09/27/2024** 2. Special Order **09/27/2024**
295P10-2	State v. Terrence Wayne Lytle	1. Def's Pro Se Motion for PDR 2. Def's Pro Se Motion for Notice of Appeal 3. Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Wake County	1. Dismissed 2. Dismissed 3. Dismissed
299P23	State v. Casey Starling	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA23-156) 2. Def's PDR Under N.C.G.S. § 7A-31 3. Def's Petition in the Alternative for Writ of Certiorari to Review Order of the COA 4. Def's Petition in the Alternative for Writ of Certiorari to Review Order of Superior Court, Pender County 5. State's Motion to Dismiss Appeal	1. --- 2. Denied 3. Denied 4. Denied 5. Allowed

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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 4. Plts' Consent Motion to Withdraw Petition for Writ of Certiorari	1. Special Order **11/15/2023** Dissolved 2. Dismissed as moot 3. --- 4. Allowed
312P22	Bartlett v. Burke, et al.	1. Defs' (Estate of Jeffrey L. Burke and Air Methods Corporation) Notice of Appeal Based Upon a Constitutional Question (COA22-95) 2. Defs' (Estate of Jeffrey L. Burke and Air Methods Corporation) PDR Under N.C.G.S. § 7A-31 3. Plts' Notice of Appeal Based Upon a Constitutional Question 4. Plts' PDR Under N.C.G.S. § 7A-31 5. North Carolina Advocates for Justice's Motion for Leave to File Amicus Brief in Support of PDR 6. Defs' (Estate of Jeffrey L. Burke and Air Methods Corporation) Motion to Seal Document 7. Intervenor's (Robert Sollinger) Notice of Appeal Based Upon a Constitutional Question 8. Intervenor's (Robert Sollinger) PDR Under N.C.G.S. § 7A-31 9. Plts' Motion to Seal Document 10. Plts' Motion to Admit Gary C. Robb, Anita Porte Robb, and Brittany Sanders Robb Pro Hac Vice 11. Plts' Motion to Admit Deepak Gupta, Neil K. Sawhney, and Robert D. Friedman Pro Hac Vice	1. --- 2. Denied **09/11/2024** 3. --- 4. Denied **09/11/2024** 5. Allowed **09/11/2024** 6. Allowed **10/18/2022** 7. --- 8. Dismissed **09/11/2024** 9. Allowed **10/18/2022** 10. Dismissed as moot **09/11/2024** 11. Dismissed as moot **09/11/2024**

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		12. Def's (Estate of Jeffrey L. Burke) Notice of Appeal Based Upon a Constitutional Question	12. ---
		13. Def's (Estate of Jeffrey L. Burke) PDR Under N.C.G.S. § 7A-31	13. Denied **09/11/2024**
		14. Def's (Safran Helicopter Engines) Motion to Dismiss Appeals	14. Allowed **09/11/2024**
		15. Def's (Airbus Helicopters Deutschland, GmbH) Motion to Dismiss Appeals	15. Allowed **09/11/2024**
		16. Def's (Airbus Helicopters Deutschland, GmbH) Motion to Seal and File Redacted Filing of Response and Motion to Dismiss	16. Allowed **11/21/2022**
		17. Def's (Airbus Helicopters Deutschland, GmbH) Motion to Admit Paul E. Stinson Pro Hac Vice	17. Dismissed as moot **09/11/2024**
		18. Def's (Airbus Helicopters Deutschland, GmbH) Motion to Admit Eric C. Strain Pro Hac Vice	18. Dismissed as moot **09/11/2024**
		19. Def's (Airbus Helicopters Deutschland, GmbH) Motion to Admit Hoa T. Nguyen Pro Hac Vice	19. Dismissed as moot **09/11/2024**
317P23-2	Jamaal Gittens v. Department of Transportation	Petitioner's Pro Se Petition for Writ of Mandamus	Dismissed
327P02-14	State v. Guy Tobias LeGrande	Def's Pro Se Petition for Writ of Habeas Corpus	Denied **10/02/2024**
332A23	In re A.G.J.	Def's Motion to Dismiss Appeal	Special Order

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334A23	Jackson, et al. v. Home Depot U.S.A., Inc., et al.	1. Third-Party Def's (Home Depot U.S.A., Inc.) Motion to Admit Elliott Foote Pro Hac Vice	1. Dismissed as moot
		2. Third-Party Def's (Home Depot U.S.A., Inc.) Motion to Admit J. Andrew Pratt Pro Hac Vice	2. Dismissed as moot
		3. Third-Party Def's (Home Depot U.S.A., Inc.) Motion to Admit Sidney Stewart Haskins, II Pro Hac Vice	3. Dismissed as moot
		4. Third-Party Def's (Home Depot U.S.A., Inc.) Amended Motion to Admit Elliott Foote Pro Hac Vice	4. Allowed
		5. Third-Party Def's (Home Depot U.S.A., Inc.) Amended Motion to Admit J. Andrew Pratt Pro Hac Vice	5. Allowed
		6. Third-Party Def's (Home Depot U.S.A., Inc.) Amended Motion to Admit Sidney Stewart Haskins, II Pro Hac Vice	6. Allowed
338P23	NC Department of Environmental Quality, Division of Water Resources, Petitioner v. N.C. Farm Bureau Federation, Inc., Respondent ——————— North Carolina Environmental Justice Network and North Carolina State Conference of the National Association for the Advancement of Colored People, Petitioners v. N.C. Farm Bureau Federation, Inc. and NC Department of Environmental Quality, Division of Water Resources, Respondents	1. Petitioner's (North Carolina Department of Environmental Quality, Division of Water Resources) PDR Under N.C.G.S. § 7A-31 (COA22-1072)	1. Allowed
		2. Petitioners' (N.C. Environmental Justice Network and N.C. State Conference of the National Association for the Advancement of Colored People) Motion to Admit Sophia B. Jayanty Pro Hac Vice	2. Allowed

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353PA23	Cato Corporation, et al. v. Zurich American Insurance Company	1. Plts' Motion to Admit Gail A. McQuilkin Pro Hac Vice (COA23-305) 2. Plts' Motion to Admit Benjamin J. Widlanski Pro Hac Vice 3. Plts' Motion to Admit Dwayne A. Robinson Pro Hac Vice 4. Def's Motion to Admit Lauren S. Kuley Pro Hac Vice	1. Allowed **08/21/2024** 2. Allowed **08/21/2024** 3. Allowed **08/21/2024** 4. Allowed **09/18/2024**
374P13-8	State v. Marvin Wade Millsaps	Def's Pro Se Petition for Writ of Habeas Corpus	Denied **10/08/2024**
387P18-4	State v. Jashawn Arnez Summers	Def's Pro Se Motion for Ineffective Assistance of Counsel	Dismissed **Riggs, J., recused**
416P15-6	State v. Nijel Lee	Def's Pro Se Motion for Notice of Appeal	Dismissed
442PA20-2	State v. James Ryan Kelliher	1. State's Motion for Temporary Stay (COA23-691) 2. State's Petition for Writ of Supersedeas 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **06/14/2024** 2. Allowed 3. Allowed
449P11-30	In re Charles Everette Hinton	Petitioner's Pro Se Motion for Petition for the Privilege of the Writ of Habeas Corpus and Inquiry into Restraints on Liberty	Denied **09/26/2024**
606P03-2	State v. Shawn Holliman	Def's Pro Se Motion for PDR (COAP24-293)	Dismissed
618P07-3	State v. Alfred William Riley, Jr.	1. Def's Pro Se Motion for PDR (COAP24-182) 2. Def's Pro Se Motion to Appoint Counsel	1. Dismissed 2. Dismissed as moot
719A05-2	State v. Eddie Lamar Taylor	Def's Petition for Writ of Certiorari to Review Order of Superior Court, Harnett County	Denied

BUILDERS MUTUAL INSURANCE COMPANY
v.
DANIEL R. NEIBEL, INDIVIDUALLY AND D/B/A DAN THE MAN CONSTRUCTION

No. 98A24

Filed 13 December 2024

Appeal pursuant to N.C.G.S. § 7A-30(2) (2023) from the decision of a divided panel of the Court of Appeals, 293 N.C. App. 1 (2024), affirming a summary judgment order entered on 22 July 2022 by Judge Margaret P. Eagles in District Court, Wake County. Heard in the Supreme Court on 30 October 2024.

Stuart Law Firm, PLLC, by William A. Piner II, for plaintiff-appellee.

Buckmiller, Boyette & Frost, PLLC, by Joseph Z. Frost and Matthew W. Buckmiller, for defendant-appellant.

PER CURIAM.

AFFIRMED.

CATO CORPORATION, A DELAWARE CORPORATION, ET AL.
v.
ZURICH AMERICAN INSURANCE COMPANY, A NEW YORK CORPORATION

No. 353PA23

Filed 13 December 2024

Insurance—commercial—government-ordered pandemic restrictions—policy interpretation—viral contamination exclusion

A clothing retailer's claim for insurance coverage for loss of business as a result of government-mandated restrictions imposed during the COVID-19 pandemic was properly dismissed for failure to state a claim pursuant to Civil Procedure Rule 12(b)(6). The Supreme Court modified and affirmed the Court of Appeals' decision upholding the trial court's dismissal where, contrary to the lower appellate court's determination, plaintiff did allege a "direct physical loss of or damage to" its property—a definition which did not require a tangible alteration of property—based on the forced closure of its stores and the undertaking of significant remediation before being allowed to reopen. However, coverage was nevertheless precluded because plaintiff's "all-risk" commercial property insurance policy—which defined the scope of covered risks by its exclusions—contained an exclusion for viral contamination.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, No. 23-305 (N.C. Ct. App. Nov. 21, 2023) (unpublished), affirming an order entered on 10 January 2023 by Judge Forrest Donald Bridges in Superior Court, Mecklenburg County. Heard in the Supreme Court on 22 October 2024.

Robinson, Bradshaw & Hinson, P.A., by Matthew W. Sawchak, R. Steven DeGeorge, and Benjamin C. DeCelle; and Kozyak Tropin & Throckmorton LLP, by Benjamin J. Widlanski, pro hac vice, Dwayne A. Robinson, pro hac vice, and Gail A. McQuilkin, pro hac vice, for plaintiff-appellants.

Brooks, Pierce, McLendon, Humphrey & Leonard, LLP, by Gary S. Parsons and Kimberly M. Marston; Squire Patton Boggs (US) LLP, by Lauren S. Kuley, pro hac vice; and Teague Campbell Dennis & Gorham LLP, by William A. Bulfer, Megan N. Silver, and Daniel T. Strong, for defendant-appellee.

EARLS, Justice.

This is a companion case to *North State Deli, LLC v. Cincinnati Insurance Co.*, No. 225PA21-2 (N.C. Dec. 13, 2024), also announced today. There, we held that restaurant policyholders stated a claim for insurance coverage when COVID-19-related government orders caused the restaurants to suspend business operations due to the loss of use of and access to the restaurants' physical property. Such losses amounted to a "direct physical loss" under the terms of that policy, we concluded. We specifically declined to define "direct physical loss" as requiring tangible alteration of property. Here, we address a related issue: whether a clothing store retailer stated a claim for insurance coverage when it alleged that COVID-19 transformed and destroyed its property but where the policy excludes viral contamination as a covered cause of loss.

The plaintiff here, Cato Corporation, is a clothing retailer with more than 1,300 stores across North Carolina and thirty-six other states. In July 2019, it purchased an "all-risk" commercial property insurance policy from defendant Zurich American Insurance Company. That insurance policy was operative in the spring of 2020 when, as Cato alleged in its complaint, the COVID-19 virus and related government orders forced the retailer to "close, severely curtail operations, and remediate and reconfigure their spaces." Zurich refused to cover those alleged losses, and Cato sued. Among other claims, Cato sought a declaratory judgment that its policy with Zurich covered its alleged losses. The trial court dismissed Cato's claims on a Rule 12(b)(6) motion, and the Court of Appeals affirmed—both relying on the now-reversed Court of Appeals decision in *North State Deli, LLC v. Cincinnati Ins. Co.*, 284 N.C. App. 330 (2022).

On review, we agree with the Court of Appeals' ultimate decision to affirm the dismissal of Cato's claims. But we disagree with the Court of Appeals' reasoning. Under *North State Deli*, No. 225PA21-2, we conclude that Cato failed to allege facts sufficient to state a claim for insurance coverage due to direct physical loss of or damage to property because the contamination exclusion precludes coverage for direct physical losses caused by viruses. Therefore, we affirm the Court of Appeals' judgment.

I. Background

In reviewing a trial court's grant of a Rule 12(b)(6) motion, we examine "whether the allegations of the complaint, if treated as true, are sufficient to state a claim upon which relief can be granted under some legal theory." *State ex rel. Stein v. Kinston Charter Acad.*, 379 N.C. 560,

572 (2021) (quoting *Bridges v. Parrish*, 366 N.C. 539, 541 (2013)). The summary below follows from the factual allegations in Cato's complaint and subsequent judicial proceedings.

A. Cato purchases an "all-risk" commercial property insurance policy from Zurich.

In July 2019, Cato purchased an "all-risk" commercial property insurance policy from Zurich American Insurance Company. That policy provides $250 million in coverage for the benefit of Cato and its named subsidiaries in exchange for substantial premiums. A copy of the policy was attached as an exhibit to Cato's initial complaint and incorporated therein by reference.

Like the policy at issue in *North State Deli*, No. 225PA21-2, Cato's policy is an "all-risk" commercial property insurance policy. That means the policy defines the scope of covered risks by its exclusions. *See N. State Deli*, No. 225PA21-2, slip op. at 5–7. Section 1.01 of the policy reads, "This Policy Insures against direct physical loss of or damage caused by a **Covered Cause of Loss** to Covered Property, at an Insured Location . . . all subject to the terms, conditions and exclusions stated in this Policy." The bold lettering connotes a defined policy term. In turn, Covered Cause of Loss is defined as "All risks of direct physical loss of or damage from any cause unless excluded." The policy does not define "direct physical loss of or damage," or any constituent term in that phrase.

One such excluded risk is "contamination." Specifically, the policy excludes "**Contamination**, and any cost due to **Contamination** including the inability to use or occupy property or any cost of making property safe or suitable for use or occupancy." In turn, "contamination" means "any condition of property due to the actual presence of any . . . virus."

The policy also provides coverage for lost business income due to direct physical loss of or damage to property. Specifically, under the "time element" coverage provision, Zurich must pay for

> the actual Time Element loss the Insured sustains, as provided in the Time Element Coverages, during the Period of Liability. The Time Element loss must result from the necessary **Suspension** of the insured's business activities at an Insured Location. The **Suspension** must be due to direct physical loss of or damage to Property (of the type insurable under this Policy other than **Finished Stock**) caused by a **Covered Cause of Loss** at the **Location** . . . .

This insurance contract was in effect when the pandemic struck in the spring of 2020.

B. Cato alleges that the COVID-19 virus caused "direct physical loss of or damage" to property.

As Cato alleges, beginning in March 2020, the COVID-19 virus "physically inundated" Cato's stores.[1] The virus's "physical impacts . . . damaged [Cato's] properties" and rendered them "uninhabitable, unfit, unsafe and unusable." Government orders forced Cato's stores to close and set limits and conditions on how they could later reopen. Cato had to "remediate and reconfigure" its physical spaces "because of the pervasiveness of the COVID Virus, including its direct physical impacts on property." Cato incurred significant revenue losses because of the virus's impairment of its property and related government mandates. It also incurred great expense in attempting to remove the virus "and otherwise remediate, reconfigure and restore the physical damage to its properties," including by altering "the physical structures to comply with governmental safety guidelines and best practices."

Cato sought coverage for losses sustained due to the virus's impairment of the safety, use, and functionality of its stores in March of 2020. Zurich neither affirmed nor denied coverage for Cato's claim, instead issuing a reservation of rights letter pointing to various policy provisions. Cato then sued before the expiration of the one-year contractual limit, seeking a declaratory judgment that its losses were covered under its policy with Zurich, and requesting damages for breach of contract as well as treble damages and attorneys' fees for violations of North Carolina's Unfair and Deceptive Trade Practices Act.

C. Court of Appeals affirms dismissal of Cato's claims.

Zurich moved to dismiss all of Cato's claims under North Carolina Rule of Civil Procedure 12(b)(6) for failure to state a claim. *See* N.C.G.S. § 1A-1, Rule 12(b)(6) (2023). After a hearing, the trial court concluded that the decision of the Court of Appeals in *North State Deli*, 284 N.C. App. 330, was "authoritative and warrants dismissal" of Cato's claims. In particular, it observed that "in order for a loss to be covered by the policy, the loss must have resulted from physical harm to the property of the insured." Cato's allegations that the COVID-19 virus physically damaged the covered property were "not sufficient to overcome" that caselaw.

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1. Consistent with Cato's complaint, we use "COVID-19 virus" in this opinion to refer to the SARS-CoV-2 virus which causes the COVID-19 respiratory illness.

Cato appealed, and on review, the Court of Appeals held that "tangible alteration to the property is necessary to" recover for a "direct physical loss of or damage" to property. *Cato Corp. v. Zurich Am. Ins. Co.*, No. 23-305, slip op. at 9 (N.C. Ct. App. Nov. 21, 2023) (unpublished). Cato failed to allege such losses in its complaint, the court concluded, because "the record does not indicate any 'physical transformation' of plaintiffs' property." *Id.* at 10 (citing *Uncork & Create LLC v. Cincinnati Ins. Co.*, 498 F. Supp. 3d 878, 883 (S.D.W. Va. 2020), *aff'd*, 27 F.4th 926 (4th Cir. 2022)). Although Cato alleged that the virus causes "tangible physical transformation of the air and surfaces" of its property, "adhered to all objects and surfaces" in the property, and "transformed Covered Properties into dangerous vectors of illness and disease . . . requir[ing] ongoing remediation," *id.* at 9–10, those allegations were, in the view of the Court of Appeals, "unwarranted deductions of fact" not entitled to the presumption of truth at the motion to dismiss stage, *id.* at 10 (quoting *Sutton v. Duke*, 277 N.C. 94, 98 (1970)). The Court of Appeals did not reach the issue of whether coverage was barred by a policy exclusion, reasoning that an insurer has no burden to prove a policy exclusion until a prima facie case of coverage is shown. *Id.* at 14 (citing *Fortune Ins. Co. v. Owens*, 351 N.C. 424, 430 (2000)). The Court of Appeals affirmed the trial court's order dismissing Cato's complaint, and Cato again appealed. We allowed Cato's petition for discretionary review on 21 May 2024.

II. Analysis

We conclude that Cato sufficiently alleged a "direct physical loss of or damage" to property under the approach we articulated in *North State Deli*, No. 225PA21-2. However, Zurich met its burden to prove the contamination exclusion applies, and therefore, Cato's claims were properly dismissed. We address each issue in turn.

A. Standard of review.

North Carolina is a notice pleading state, meaning that a complaint need only give "sufficient notice of the events or transactions which produced the claim to enable the adverse party to understand its nature and basis and to file a responsive pleading." *Pyco Supply Co. v. Am. Centennial Ins. Co.*, 321 N.C. 435, 442 (1988); *see also* N.C.G.S. § 1A-1, Rule 8(a)(1) (2023). It is not appropriate to dismiss a complaint unless "it appears to a certainty that [the] plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim." *Est. of Graham v. Lambert*, 385 N.C. 644, 656 (2024) (quoting *Sutton*, 277 N.C. at 103).

A Rule 12(b)(6) motion to dismiss tests the legal sufficiency of a claim. *Id.* The motion is properly granted "(1) when the complaint on its face reveals that no law supports plaintiff's claim; (2) when the complaint on its face reveals the absence of fact sufficient to make a good claim; [or] (3) when some fact disclosed in the complaint necessarily defeats plaintiff's claim." *Jackson v. Bumgardner*, 318 N.C. 172, 175 (1986). On a Rule 12(b)(6) motion, well-pleaded allegations of fact in the complaint are treated as true, but conclusions of law are not. *Id.* at 174–75. Factual inferences should be viewed "in the light most favorable to the nonmoving party." *See CommScope Credit Union v. Butler & Burke, LLP*, 369 N.C. 48, 51 (2016) (quoting *Daniels v. Montgomery Mut. Ins. Co.*, 320 N.C. 669, 682 (1987)).

"Questions concerning the meaning of contractual provisions in an insurance policy are reviewed *de novo* on appeal." *Register v. White*, 358 N.C. 691, 693 (2004). As we explained in *North State Deli*, when interpreting a contract for insurance, the plain language and ordinary meaning of the policy control unless the contract specifically defines certain terms or the context suggests otherwise. No. 225PA21-2, slip op. at 11–12. The contract "should be given that construction which a reasonable person in the position of the insured would have understood it to mean." *Id.* at 12 (quoting *Grant v. Emmco Ins. Co.*, 295 N.C. 39, 43 (1978)). Where the language of a contract is reasonably susceptible to either construction offered by the parties, the ambiguity should be construed in the policyholder's favor. *Id.* at 12–14 (citing *Accardi v. Hartford Underwriters Ins. Co.*, 373 N.C. 292, 295 (2020)).

B. Cato's complaint sufficiently alleged a "direct physical loss of or damage" to property.

North State Deli, No. 225PA21-2, controls here on the question of whether, absent an exclusion, the policy covers this loss. Applying that precedent, Cato did sufficiently allege a "direct physical loss of or damage" to property.

The parts of Cato's policy that grant coverage are functionally the same as the parts of North State Deli's policy that grant coverage. Both policies rely on the operative phrase "direct physical loss" without defining that term, so it must be given its ordinary meaning. *Id.* at 14–15; *see also Accardi*, 373 N.C. at 295. Both make use of the conjunctive "or," as in the phrase "direct physical loss of or damage" to property, so direct physical loss must have a distinct and possibly broader meaning than physical damage in order to give effect to both phrases. *See N. State Deli*, No. 225PA21-2, slip op. at 16–17; *C.D. Spangler Constr. Co.*

v. Indus. Crankshaft & Eng'g Co., 326 N.C. 133, 142 (1990). And both contain a set of exclusions that suggest a broader meaning of "direct physical loss" of property. *See N. State Deli*, No. 225PA21-2, slip op. at 19. Here, for example, Cato's policy excludes unexplained disappearances, seizure or other governmental destruction, the cumulative effects of dust, and "delay, loss of market, or loss of use." Those exclusions suggest the scope of "direct physical loss" of property is broader than physical tangible alteration to property, or else they need not be mentioned as exclusions to begin with.

In its complaint, Cato alleged specific facts to show that "The COVID Virus caused tangible physical transformation of the air and surfaces at the Cato's Covered Properties [sic], and rendered them dangerous transmission sources for the COVID Virus, making the Covered Properties unsafe, unfit, non-functional and uninhabitable for their intended uses." That physical destruction, "along with the government orders that recognized these physical effects, shuttered Cato's Covered Properties and caused physical loss of Cato's use of the Covered Properties."

Thus, accepting these factual allegations as true and taking factual inferences in the light most favorable to the nonmoving party, as we must at the motion to dismiss stage, Cato met its burden to show coverage due to a "direct physical loss of or damage" to property. *See Jackson*, 318 N.C. at 174–75; *CommScope Credit Union*, 369 N.C. at 51.

C. The contamination exclusion applies to Cato's alleged losses.

Once a prima facie case of coverage is shown, the insurer has the burden to prove a policy exclusion precludes coverage. *See Fortune Ins. Co.*, 351 N.C. at 430. We conclude that Zurich has met its burden here and that the contamination exclusion in Cato's policy precludes coverage for Cato's alleged losses.

To assess whether any exclusion applies, we review the full text of Cato's policy. Such a review is appropriate at the motion to dismiss stage without converting the motion to one for summary judgment, because the policy was attached as an exhibit to Cato's initial complaint and explicitly incorporated therein. *See* N.C.G.S. § 1A-1, Rule 12(b) (2023). One part of the policy explicitly excludes coverage for losses resulting from "contamination." Specifically, contamination and "any cost" associated with it, "including the inability to use or occupy property or any cost of making property safe or suitable for use or occupancy" is excluded by the policy. In turn, "contamination" is defined as "[a]ny condition of property due to the actual presence of any foreign substance, impurity, pollutant, hazardous material, poison, toxin, pathogen or

pathogenic organism, bacteria, *virus*, disease causing or illness causing agent, Fungus, mold or mildew." (Emphasis in original omitted; italicized emphasis added.)

Viral contamination is essentially what Cato alleges. It alleges that the COVID-19 virus's "physical transformation of the air and surfaces" rendered its properties "dangerous transmission sources" and made them unsafe and non-functional for their intended uses. "[B]ecause of the pervasiveness of the COVID Virus," Cato's stores "were compelled by government orders to close, severely curtail operations, and remediate and reconfigure their spaces." A "reasonable person in the position of the insured," *see Grant*, 295 N.C. at 43, would understand such allegations to qualify as "condition[s] of property due to the actual presence of any . . . virus."[2]

Cato responds that this is not the operative definition of "contamination" or "contaminant" in its policy. Instead, it says that it alleged it paid a higher premium for a different definition of "contamination." That revised definition is located in a series of "amendatory endorsements" at the end of the policy, which appear with labels corresponding to specific states—thirty-one states, in fact. Cato argues that the "Amendatory Endorsement – Louisiana" policy provision amended Cato's coverage by deleting the definition of "contamination" listed in the main body of the policy and described above, replacing it with one that excludes viruses. Thus, it contends, viral contamination is covered.

Cato's argument that its North Carolina policy incorporates the Louisiana amendatory endorsement is unpersuasive. To start, Cato's complaint does not allege, as a factual matter, that it bargained for the Louisiana endorsement to apply to its policy covering properties not in Louisiana. The complaint makes a general allegation that not having a *virus exclusion* in an "all-risk" policy means Cato paid a higher premium for virus coverage. It specifically defines that *virus exclusion* as a standalone "Exclusion Of Loss Due To Virus or Bacteria" that it alleges is "contained in most of [Zurich's] other all risks property insurance policies."[3] Then, in a footnote, the complaint alleges that the separate

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2. Cato seems to concede as much in its brief to this Court, when it explained in a footnote how the virus physically damages surfaces: "When *contaminated* with the Covid Virus or another infectious organism, . . . the surface or object to which the virus or organism adheres is transformed into a 'fomite.' " (Emphasis added.)

3. That separate virus exclusion allegedly states that Zurich "will not pay for loss or damage caused by or resulting from any virus."

contamination exclusion does not preclude coverage for Cato's losses. But it does not explain why. Nor does it argue that it has any stores or properties in Louisiana. Absent such factual allegations, the effect of the endorsement as it appears in the policy is a question of law not entitled to a presumption of truth. *See Register*, 358 N.C. at 693.

Relying then on the insurance contract itself, Cato alternatively argues that the thirty-one state-specific amendatory endorsements contain contradictions and should therefore be strictly construed in Cato's favor. It points out that two of the thirty-one state-labeled amendatory endorsements (Connecticut and New York) specify that the endorsement "**APPLIES TO THOSE RISKS IN** [state name]." The twenty-nine other amendatory endorsements omit such limiting language, including the one labeled "Louisiana." The Louisiana amendatory endorsement also proclaims: "**THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY**."

Certainly the amendatory endorsements would be clearer if each specified that it applied to risks only in the state corresponding to its label. But that something could be written more clearly does not necessarily make it ambiguous; rather, an ambiguity exists in an insurance contract when its language is "fairly and reasonably susceptible to either of the constructions for which the parties contend." *See Accardi*, 373 N.C. at 295. We think these labels are reasonably susceptible to only one construction: a "reasonable person in the position of the insured" would construe an "Amendatory Endorsement – Louisiana" in the context of thirty other state-specific amendatory endorsements as having some connection to risks or losses only in Louisiana. *See Grant*, 295 N.C. at 43. Thus, it is not applicable here, where Cato does not allege any connection to Louisiana.

This reading also comports with the other interpretive principle that insurance policy provisions should be read in harmony and not to create conflicts. *See C.D. Spangler Constr. Co.*, 326 N.C. at 142. If we look only at the state-specific amendatory endorsements that do *not* have language limiting them to risks in those states (i.e., the twenty-nine other endorsements outside of Connecticut and New York), and read those to affect policies in all states, conflicts abound. For example, the Georgia amendatory endorsement requires legal action to be initiated within twenty-four months of the date of the loss, while Maryland states three years, and Missouri states ten years. The Alaska amendatory endorsement states that if the insured cancels, the refund may be subject to a cancellation fee of 7.5% of any unearned premium, while the Florida amendatory endorsement does not mention a cancellation fee

and instead provides that "the refund may be less than pro rata but no less than 90% of the pro rata unearned premium." Those two amendatory endorsements also specify different timelines by which a refund is to be mailed. Alaska states any premium refund will be mailed within forty-five days after the request for cancellation; Florida states any premium refund will be mailed within fifteen days of the cancellation taking effect. Reading the state-specific amendatory endorsements to apply only to those risks in the respective states avoids these conflicts and harmonizes the provisions consistent with the parties' intent. *See C.D. Spangler Constr. Co.*, 326 N.C. at 142.

Cato makes the final point that a different provision of the policy instructs that "The titles of the various paragraphs *and endorsements* are solely for reference and shall not in any way affect the provisions to which they relate." (Emphasis added.) This limitation must mean that the "Amendatory Endorsement – Louisiana" provision cannot be read in a manner that affects the scope of Cato's coverage, it asserts. But if that were right, the titles of each endorsement would become superfluous. That again contradicts our obligation to give effect to each policy provision. *See C.D. Spangler Constr. Co.*, 326 N.C. at 142. The more harmonious reading is that the titles do serve as a reference to understand *where* coverage applies, but do not change the underlying substance of the applicable policy.

In sum, a "reasonable person in the position of the insured" would understand the viral contamination exclusion in Cato's policy to exclude Cato's alleged losses. *See Grant*, 295 N.C. at 43. That exclusion bars coverage for Cato's alleged losses here.

III. Conclusion

For the foregoing reasons, we conclude that Cato's alleged losses are barred by the viral contamination exclusion in its commercial property insurance policy with Zurich. We modify the Court of Appeals decision below but affirm its judgment dismissing Cato's claims.

MODIFIED AND AFFIRMED.

DIECKHAUS v. BD. OF GOVERNORS OF THE UNIV. OF N.C.

[386 N.C. 677 (2024)]

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

No. 105PA23

Filed 13 December 2024

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 287 N.C. App. 396 (2023), affirming the trial court's dismissal of plaintiffs' claims on 17 June 2021 by Judge Edwin G. Wilson Jr. in Superior Court, Orange County. Heard in the Supreme Court on 22 October 2024.

Eric M. Poulin for plaintiff-appellants.

Dowling PLLC, by Craig D. Schauer and Troy D. Shelton; Joshua H. Stein, Attorney General, by Laura McHenry, Special Deputy Attorney General, and Lindsay Vance Smith, Deputy Solicitor General; and Brooks, Pierce, McLendon, Humphrey & Leonard, LLP, by Jim W. Phillips Jr., Jennifer K. Van Zant, and Katarina Wong, for defendant-appellee.

Ellis & Winters LLP, by Steven A. Scoggan, Kyle A. Medin, and Tyler C. Jameson, for North Carolina Chamber Legal Institute, amicus curiae.

PER CURIAM.

Justice BARRINGER 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).

AFFIRMED.

IN RE CHASTAIN

[386 N.C. 678 (2024)]

IN THE MATTER OF PATRICIA BURNETTE CHASTAIN

No. 283A22-2

Filed 13 December 2024

1. Constitutional Law—clerk of superior court—constitutional officer—removal—authority of a replacement judge appointed by the Chief Justice

Following two trial court proceedings removing a duly elected clerk of superior court—the second of which was conducted on remand from the Court of Appeals—the Supreme Court overruled the lower appellate court's holding in the clerk's first appeal that, upon the recusal of the senior regular resident superior court judge (the official authorized to preside in such cases pursuant to Article IV, Section 17(4) of the North Carolina Constitution), a replacement judge appointed by the Chief Justice lacked authority to preside in the matter. The Chief Justice is authorized by N.C.G.S. § 7A-41.1(e) to appoint an acting senior resident superior court judge when the regular senior resident superior court judge is unable to perform their duties, including to preside in a clerk removal proceeding.

2. Constitutional Law—clerk of superior court—removal—procedural due process

The Supreme Court clarified that, in a proceeding to remove a duly elected clerk of superior court pursuant to Article IV, Section 17(4) of the North Carolina Constitution, due process considerations require that a clerk may be removed only for conduct identified in the charging affidavit that initiated the removal proceeding per N.C.G.S. § 7A-105.

3. Constitutional Law—clerk of superior court—removal standard

The Supreme Court clarified that, in a proceeding to remove a duly elected clerk of superior court pursuant to Article IV, Section 17(4) of the North Carolina Constitution, "misconduct"—wrongful, unlawful, dishonest, or improper conduct—rather than "willful misconduct," is the proper standard to be applied.

Appeal pursuant to N.C.G.S. § 7A-30(2) (2023) from the decision of a divided panel of the Court of Appeals, 289 N.C. App. 271 (2023), affirming an order entered on 5 April 2022 by Judge Thomas H. Lock in Superior Court, Franklin County. On 15 December 2023, the Supreme Court allowed petitioner's and respondent's petitions for

discretionary review as to additional issues. Heard in the Supreme Court on 19 September 2024.

Fox Rothschild LLP, by Kip D. Nelson and Elizabeth Brooks Scherer; and Davis, Sturges & Tomlinson, PLLC, by Conrad B. Sturges III, for petitioner-appellee.

Zaytoun & Ballew, PLLC, by Matthew D. Ballew, Robert E. Zaytoun, and Zachary R. Kaplan, for respondent-appellant.

RIGGS, Justice.

Clerks of the superior court are constitutional officers elected by qualified voters in the county where they serve. N.C. Const. art. IV, § 9(3). The North Carolina Constitution allows for removal of a duly-elected clerk "for misconduct or mental or physical incapacity by the senior regular resident Superior Court Judge serving the county." N.C. Const. art. IV, § 17(4).

In this case, we consider the proper procedure for removal of a clerk in accordance with Article IV of the North Carolina Constitution. We hold that when the senior regular resident superior court judge is recused from the case and a replacement judge is commissioned to serve in that position for the removal proceeding, the replacement judge, serving in the official role of senior regular resident superior court judge in that matter, has the authority to remove the clerk. Further, we hold that procedural due process requires that the clerk only be subject to removal for conduct identified in the sworn affidavit that initiates the removal proceeding under N.C.G.S. § 7A-105. Lastly, we hold that removal of a clerk under Article IV is on the basis of the misconduct standard set forth in the plain language of Article IV, Section 17(4) of the North Carolina Constitution, not under the willful misconduct standard articulated in N.C.G.S. § 7A-105.

For these reasons, we vacate the decision of the Court of Appeals in *In re Chastain* (*Chastain II*), 289 N.C. App. 271 (2023), overrule the holding of *In re Chastain* (*Chastain I*), 281 N.C. App. 520 (2022), and remand the case for reconsideration of removal under Article IV not inconsistent with the standards established in this opinion.

I. Facts & Procedural Background

In May 2013, Patricia Burnette Chastain was appointed to the position of clerk of superior court in Franklin County. In the November 2013

election, the voters in Franklin County elected her to a four-year term as clerk. She was reelected to a second term in 2017.

On 13 July 2020, Jeffrey Thompson, an attorney in Franklin County, requested "an inquiry be commenced by the Senior Resident Judge of the Ninth Judicial District to determine if it is appropriate to remove Ms. Chastain as Clerk of the Franklin County Superior Court."Mr. Thompson filed an affidavit pursuant to N.C.G.S. § 7A-105 (Charging Affidavit) identifying the specific incidents that motivated his desire for an inquiry. The Charging Affidavit accused Ms. Chastain of willful misconduct, willful and persistent failure to perform her duties, habitual intemperance, and conduct prejudicial to the administration of justice. Mr. Thompson alleged[1] in the Charging Affidavit that Ms. Chastain, acting in her official capacity as clerk: (1) distributed gift certificates for smoothies to jurors in a criminal case; (2) allowed a judicial candidate to address a jury venire[2]; (3) acted unprofessionally with correctional officers at the Franklin County Detention Center and demanded access to detainees; (4) injected herself in a property dispute without proper authority and attempted to mediate the dispute outside the presence of the parties' attorneys; (5) attempted to mediate a child custody dispute that she did not have jurisdiction over; (6) requested medical records on official judicial letterhead without authority to request the records; (7) failed to timely and accurately reconcile bank records and report on financial matters within the clerk's office; (8) made inappropriate comments about the chief magistrate to members of the public; and (9) kept irregular work hours and acted erratically while at work.

On the day the Charging Affidavit was filed, Judge John M. Dunlow, Franklin County's senior resident superior court judge, entered an order suspending Ms. Chastain and set the matter for a hearing on 6 August 2020. Ms. Chastain filed a motion to recuse Judge Dunlow and the only other Franklin County superior court judge, Cindy Sturges, from presiding over the removal inquiry because of their involvement in one of the incidents in the Charging Affidavit. Special Superior Court Judge J. Stanley Carmical granted the motion of recusal. Based upon the recusal of these judges, the Chief Justice of the Supreme Court of North

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1. Mr. Thompson acknowledged in his affidavit that he did not have first-hand knowledge of all the allegations; he clarified that the information in the affidavit was based upon information gained in his professional role, from his review of documents, and from information told to him by others.

2. Prior to the removal hearing, District Attorney Michael D. Waters sent a letter to Ms. Chastain advising her of the impropriety of her actions and requesting that she refrain from any contact with jury venires.

Carolina commissioned Superior Court Judge Thomas H. Lock to preside over the removal inquiry.

Judge Lock held an evidentiary hearing on 28 through 30 September 2020. After considering the evidence, Judge Lock entered an order on 16 October 2020 (2020 Removal Order), permanently removing Ms. Chastain from her elected position as clerk based upon the removal procedures found in N.C. Const. art. IV, § 17(4) and N.C.G.S. § 7A-105. In the 2020 Removal Order, Judge Lock made findings of fact regarding the allegations in the Charging Affidavit. Additionally, Judge Lock made findings of fact about two allegations that were not included in the Charging Affidavit. The additional allegations were: (1) Ms. Chastain frequently approached District Attorney Michael D. Waters on "behalf of citizens charged with traffic and minor criminal offenses and ask[ed] him to reduce or dismiss their charges"; and (2) Ms. Chastain frequently asked Chief District Court Judge W. Davis to strike orders for arrest. Judge Lock concluded that "[e]ven if Respondent's acts of misconduct viewed in isolation do not constitute willful misconduct, her knowing and persistently repeated conduct prejudicial to the administration of justice itself rises to the level of willful misconduct" and "warrant[ed] her permanent removal from the office" of Franklin County Clerk of Superior Court. Ms. Chastain appealed.

The Court of Appeals concluded that Article IV "confers on a single individual[ ], the authority to remove the elected Clerk in a county; namely, the senior regular resident Superior Court Judge in that same county." *Chastain I*, 281 N.C. App. at 523. For this reason, the Court of Appeals held that the replacement judge, Judge Lock, lacked authority to consider Ms. Chastain's removal under Article IV. *Id.* at 524. The Court of Appeals then considered "the other constitutional avenue by which a sitting Clerk may be removed," concluding that Ms. Chastain could "be removed from her current term as a consequence of being disqualified from holding any office under Article VI [if] she is adjudged guilty of corruption or malpractice in any office." *Id.* at 524–25 (cleaned up). The court went on to define "corruption and malpractice," ultimately holding that "acts of willful misconduct which are egregious in nature" constitute "corruption or malpractice" under Article VI. *Id.* at 528 (citing *In re Peoples*, 296 N.C. 109 (1978)). The Court of Appeals vacated the order and remanded for reconsideration of whether Ms. Chastain's conduct rose to the level of corruption or malpractice under Article VI. *Id.* at 530.

On remand, Judge Lock entered a new order on 5 April 2022 (2022 Removal Order), concluding Ms. Chastain was "permanently disqualified from serving in the Office as Clerk of Superior Court of Franklin County."

Judge Lock concluded that "[e]ven if Respondent's acts of misconduct viewed in isolation do not constitute willful misconduct, her knowing and persistently repeated conduct prejudicial to the administration of justice itself rises to the level of willful misconduct [and] is equivalent to corruption or malpractice under Article VI of the Constitution of North Carolina and warrants permanent disqualification from office." Ms. Chastain again appealed to the Court of Appeals.

During the second appeal, a divided panel at the Court of Appeals affirmed the 2022 Removal Order, holding that the findings of fact supported the conclusion that Ms. Chastain's conduct rose to the level of corruption or malpractice. *Chastain II*, 289 N.C. App. at 291. The majority, however, went on to note its disagreement with the holding in *Chastain I*. *Id.* at 292. Specifically, the majority in *Chastain II* opined that Article VI, Section 8, "concerns disqualification for office, not removal from office," *id.* at 292, and thus the *Chastain II* majority did not believe removal from office would be proper under Article VI, *id.* at 294. Instead, the majority in *Chastain II* believed that the Court of Appeals in *Chastain I* should have remanded the matter for further proceedings by Judge Dunlow under Article IV. *Id.* 294–95. Notwithstanding that disagreement, the *Chastain II* majority proceeded, consistent with *In re Civil Penalty*, 324 N.C. 373, 384 (1989), and followed the *Chastain I* decision on Article VI. *Id.*

Judge Wood dissented from the holding that Ms. Chastain's conduct rose to the level of corruption or malpractice. *Id.* at 300 (Wood, J., dissenting). In her view, Ms. Chastain's conduct was "not *egregious* as to merit her disqualification and removal from the elected office of Clerk of Superior Court" under Article VI. *Id.*

Ms. Chastain appealed to this Court based on Judge Wood's dissent. We also allowed Ms. Chastain's petition for discretionary review as to additional issues and Mr. Thompson's petition for discretionary review as to additional issues.

II. Analysis

This case addresses the proper procedure for the removal of a duly-elected clerk of superior court. At the outset, we acknowledge that the Court of Appeals in *Chastain II* was bound to consider whether Ms. Chastain's removal was proper under Article VI based upon the earlier Court of Appeals' decision in *Chastain I*, as opposed to revisiting the decision about Article IV removal. *Chastain II*, 289 N.C. App. at 274; *see also In re Civ. Penalty*, 324 N.C. at 384 ("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.").

However, we do not agree with the Court of Appeals' holding in *Chastain I* that the "only individual" with authority under Article IV to remove Ms. Chastain was Judge Dunlow, Franklin County's senior regular resident superior court judge. *Chastain I*, 281 N.C. App. at 523. The Constitution designates the senior regular resident superior court judge as the judicial officer with the authority to preside over a removal proceeding when charges are brought against a clerk. N.C. Const. art. IV, § 17(4). Because that proceeding is judicial in nature, when the senior resident superior court judge has a conflict of interest and cannot fairly conduct that proceeding, the judicial branch may designate another superior court judge to preside. Therefore, when Judge Dunlow was recused from the matter and Judge Lock was commissioned to replace him, Judge Lock had the constitutional authority under Article IV to preside over the removal hearing.

Next, in both *Chastain I* and *Chastain II*, the Court of Appeals recognized that removal of a clerk is only proper based upon allegations put forth in the affidavit that initiates the proceeding. *Chastain I*, 281 N.C. App. at 528–29; *Chastain II*, 289 N.C. at 277–78. We affirm the determination that removal under Article IV is only properly based upon allegations identified in the affidavit that initiates the removal process per N.C.G.S. § 7A-105.

Lastly, neither *Chastain I* nor *Chastain II* laid out the proper standard for removal under Article IV. We clarify that the proper standard for the removal of a clerk under Article IV is misconduct—as stated in the Constitution—rather than the willful misconduct standard identified in N.C.G.S. § 7A-105. *See* N.C.G.S. § 7A-105 (2023). On remand, Judge Lock should consider whether removal is proper based upon the standard for misconduct described below.

A. Article IV Removal Hearing

[1] A clerk of superior court is an elected constitutional and judicial officer with "jurisdiction and powers as the General Assembly shall prescribe by general law uniformly applicable to every county of the State." N.C. Const. art. IV, §§ 9(3), 12(3). The Constitution also sets forth conditions under which an elected clerk may be removed from office; clerks "may be removed from office for misconduct or mental or physical incapacity by the senior regular resident Superior Court Judge serving the county." N.C. Const. art. IV, § 17(4).

In *Chastain I*, the Court of Appeals interpreted the language in Section 17(4) to "confer on a single individual[ ], the authority to remove the elected Clerk in a county" and "no other judge may be conferred with jurisdiction over the subject matter of removing a Clerk for misconduct under Article IV." *Chastain I*, 281 N.C. App. at 523. However, "issues concerning the proper construction and application of . . . the Constitution of North Carolina can only be answered with finality by this Court." *State ex rel. Martin v. Preston*, 325 N.C. 438, 449 (1989). In interpreting our Constitution, where the meaning is clear from the words, there is no need to search for meaning elsewhere. *Id.* When interpreting the "clemency power" granted to the Governor under Article III, Section 5(6) of the Constitution, this Court held that only the Governor, and no other executive branch official, can exercise the power of clemency. *Bacon v. Lee*, 353 N.C. 696, 718 (2001). In *Bacon*, a death row inmate sought to have the Governor—who was involved in prosecuting the inmate's criminal case—delegate the clemency power to the Lieutenant Governor, who had no potential conflict of interest. *Id.* In rejecting this request, this Court held that "only the Governor . . . may exercise the clemency authority established by the people of North Carolina in their Constitution." *Id.*

Following this reasoning, the Court of Appeals in *Chastain I* held that only the senior regular resident superior court judge serving Franklin County could conduct the removal proceeding in this case and, if that judicial official could not do so, no other judge could replace him. However, examining Article IV, Section 17(4), within the structure of Article IV as a whole explains why the analogy to the executive's clemency power does not answer the question here.

The position of "senior regular resident Superior Court Judge"[3] appears three times in Article IV. *See* N.C. Const. art. IV, §§ 9(3), 10, 17(4). The first two provisions grant the senior regular resident superior court judge the power to appoint other public officials: allowing appointment of a temporary clerk, *id.* art. IV, § 9(3); and allowing appointments of magistrates, *id.* art. IV, § 10. The third provision—removal of a clerk of superior court—is at issue in this case. *Id.* art. IV, § 17(4).

In each provision, the constitution provides the senior resident superior court judge with special authority that would not function unless only one person could wield it at any given time. *See id.* But unlike the

3. In Section 17, the position is styled as senior regular resident Superior Court Judge. In Sections 9 and 10, the position is styled as senior regular resident Judge of the Superior Court.

other two provisions—which grant appointment power—the removal proceeding in Section 17(4) of Article IV requires the judge to preside over a hearing and enter a judgment according to law. *Id.* In other words, it requires the judge to wield the judicial power. When adjudicating cases, all superior court judges are judicial officers of the Superior Court Division of our General Court of Justice. *See id.* art. IV, § 2. Thus, in this context, the senior regular resident superior court judge has no unique constitutional power greater than other judges of the superior court. *See also* N.C.G.S. § 7A-41.1(c) (2023) ("Senior resident superior court judges and regular resident superior court judges possess equal judicial jurisdiction, power, authority and status[.]").

Article IV, Section 17 of the Constitution does not limit the authority to preside over a clerk's removal proceeding to a single judge in the same way that Article III, Section 5 limits the clemency power solely to the Governor. Instead, Section 17 of Article IV identified the position of senior regular resident superior court judge serving the county as the default judicial officer who must adjudicate charges brought against a clerk of superior court under Article IV. *Id.* art. IV, § 17(4). But in a circumstance where that superior court judge has a conflict of interest and cannot fairly hear the case, the judicial branch may substitute another superior court judge of the General Court of Justice to preside over the proceeding and enter the judgment of the trial division. *See* N.C. Const. art. IV, § 9(1) (granting the General Assembly the authority to provide by general law for the selection or appointment of special or emergency Superior Court Judges); *see also* N.C.G.S. § 7A-41.1(e) (providing the Chief Justice the authority to appoint an acting senior resident superior court judge when the regular senior resident superior court judge is unable to perform their duties).

That is the scenario in this case. When Judge Dunlow was recused from this case, the Chief Justice exercised her authority to appoint Judge Lock as the superior court judge authorized to preside over the matter. Accordingly, we hold that Judge Lock properly had the constitutional authority to preside over the Article IV removal proceeding in this case.

The Court of Appeals went on to acknowledge that where the disqualification of a judge "would result in a denial of a litigant's constitutional right to have a question properly presented" to a court of last resort, then the Rule of Necessity operates to allow a judge to hear a matter notwithstanding that their participation may violate a judicial ethical canon. *Chastain I*, 281 N.C. App. at 523 (quoting *Lake v. State Health Plan for Tchrs. & State Emps.*, 376 N.C. 661, 664 (2021)). But here Judge Dunlow's recusal would not deny Ms. Chastain her constitutional right

to have the removal question presented to the court. The Chief Justice has authority to appoint a judge to step into the position of senior regular resident superior court judge to preside over the removal hearing. Because Judge Dunlow was recused and Judge Lock was properly appointed, Judge Lock had jurisdiction to preside over the Article IV removal proceeding.

B. Due Process for the Removal Proceeding

[2] Having concluded that Judge Lock had subject matter jurisdiction over the Article IV removal proceeding, we turn our attention to the question of whether removal under Article IV can only be based upon acts identified in the affidavit used to initiate the proceeding. *See* N.C.G.S. § 7A-105 (mandating that "the procedure shall be initiated by the filing of a sworn affidavit with the chief district judge of the district in which the clerk resides"). A proceeding resulting in the removal of an elected public official must afford the individual all the benefits of due process of law. *In re Spivey*, 345 N.C. 404, 413–14 (1997) (concluding that the North Carolina Constitution does not prohibit the General Assembly from enacting a statutory method of removal so long as the removal process provides due process of law). "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *McLean v. McLean*, 233 N.C. 139, 146 (1951) (quoting *Mullane v. Cent. Hanover Bank & Tr., Co.*, 339 U.S. 306, 314 (1950)).

Because a removal proceeding is neither a civil nor criminal proceeding, the only notice a respondent receives of the removal proceeding is the affidavit that initiates the process. *See* N.C.G.S. § 7A-105 (outlining the procedures for removal of a clerk and incorporating by reference the requirements for removal of a district attorney under N.C.G.S. § 7A-66); *see also* N.C.G.S. § 7A-66 (2023) (outlining the procedures for removal of district attorneys). The statutory process designates that the affidavit which initiates the proceeding must state the grounds for removal. N.C.G.S. § 7A-66 ("A proceeding . . . is commenced by filing . . . a sworn affidavit charging . . . one or more grounds for removal."). Additionally, the General Assembly requires "immediate written notice of the proceedings and a true copy of the charges" and that "the matter shall be set for hearing not less than 10 days nor more than 30 days thereafter." *Id.* So long as the statutory language does not conflict with the Constitution, we presume that the procedure set forth in the statute is valid. *See State ex rel. Martin*, 325 N.C. at 448–49 ("All power which is not expressly

limited by the people in our State Constitution remains with the people, and an act of the people through their representatives in the legislature is valid unless prohibited by that Constitution.").

Ms. Chastain argues that the 2020 and the 2022 Removal Orders relied upon acts not identified in the Charging Affidavit as some partial basis for removal. The Court of Appeals in *Chastain I* agreed with Ms. Chastain as to the 2020 Removal Order and concluded that reliance on "acts that were not alleged in [the Charging Affidavit] violated Ms. Chastain's due process rights." *Chastain I*, 281 N.C. App. at 529. The Charging Affidavit contained a long list of alleged misconduct, including nine specific incidents where Mr. Thompson asserted that Ms. Chastain acted in a manner constituting willful misconduct, willful and persistent failure to perform her duties, habitual intemperance, and conduct prejudicial to the administration of justice. As part of the removal proceeding, Judge Lock made more than thirty findings of fact about the allegations identified in the Charging Affidavit.[4]

However, during the removal hearing, Judge Lock also heard testimony and made findings about two additional allegations of misconduct that were not identified in the Charging Affidavit. Those allegations were that Ms. Chastain asked the district attorney to reduce or dismiss charges for traffic and minor criminal offenses and that Ms. Chastain asked the chief district court judge to strike orders for arrest. Relying on allegations not proffered in the Charging Affidavit does not comport with the procedures for removal of a clerk set forth by the General Assembly; specifically, our statutes require that the grounds for removal are identified in the sworn affidavit that initiates the removal proceeding. *See* N.C.G.S. §§ 7A-105, -66.

In a removal proceeding, which by statute must commence within thirty days after the filing of the affidavit, respondents must have notice of all allegations in the affidavit so that they can mount a defense against those allegations. Therefore, on remand, Judge Lock may only consider the allegations in the Charging Affidavit as grounds for removal under Article IV.

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4. The trial court noted in the order that the affiant expressly abandoned the allegation of irregular work hours and intemperance and that the affiant did not provide any evidence in support of the allegations of "interference in a child custody case" and "unauthorized demands for medical records." Therefore, those allegations were not considered as bases for the removal.

C. Standard for Removal Under Article IV

[3] Lastly, we consider the standard for the removal of a clerk of superior court under Article IV. Section 17(4) of Article IV states that a clerk "may be removed from office for *misconduct* or mental or physical incapacity." N.C. Const. art. IV, § 17(4) (emphasis added). Notably, subsection four does not use the "willful misconduct" standard which is used in Section 17(2) of Article IV, addressing removal of judges and justices. *See* N.C. Const. art. IV, § 17(2). The statutory procedure for removal or suspension of a clerk, though, identifies that higher standard for removal—willful misconduct—as the applicable standard. N.C.G.S. § 7A-105. However, when "there is a conflict between a statute and the Constitution, this Court must determine the rights and liabilities or duties of the litigants before it in accordance with the Constitution, because the Constitution is the superior rule of law in that situation." *City of Asheville v. State*, 369 N.C. 80, 88 (2016) (quoting *Adams v. N.C. Dep't of Nat. & Econ. Res.*, 295 N.C. 683, 690 (1978)). The constitutional language controls and, therefore, removal of a clerk under N.C. Const. art. IV, § 17(4) and N.C.G.S. § 7A-105 may be based upon misconduct, even if that conduct would not rise to the level of willful misconduct.

Nevertheless, this Court has not defined "misconduct" in the context of removal of a clerk under Article IV. The Court of Appeals, in the context of the Crime Victims Compensation Act, looking at whether a claimant's own misconduct was a proximate cause of his or her injury, recognized that misconduct is conduct "not within the accepted norm or standard of proper behavior." *Evans v. N.C. Dep't of Crime Control & Pub. Safety*, 101 N.C. App. 108, 117 (1990). "While misconduct includes unlawful conduct as a matter of law, it may be something less than unlawful conduct, though more than an act done in poor taste." *Id.* In the context of the removal of a prosecutor, this Court recognized that misconduct includes the "official doing of a wrongful act, or the official neglect to do an act which ought to have been done" even without a corrupt or malicious motive. *State ex. rel. Hyatt v. Hamme*, 180 N.C. 684, 688 (1920). These definitions align with the definition of misconduct found in Black's Law Dictionary: "dereliction of duty; unlawful, dishonest, or improper behavior, esp. by someone in a position of authority or trust." *Misconduct*, Black's Law Dictionary (12th ed. 2024). Applying these standards to the constitutional office of clerk of superior court, we conclude that misconduct for a clerk is wrongful, unlawful, dishonest, or improper conduct performed under the color of authority for the clerk of superior court as identified in N.C.G.S. § 7A-103. *See* N.C.G.S. § 7A-103 (2023) (outlining the authority of clerk of superior court).

Because the 2020 Removal Order is not before us, we do not simply reinstate that order. Nor do we suggest that the 2020 Removal Order, without factual findings on acts not identified in the Charging Affidavit, is necessarily inconsistent with this opinion. Thus, we remand this case to the Court of Appeals for further remand to Judge Lock to consider, consistent with this opinion, whether the findings of fact demonstrate misconduct sufficient to justify removal.

D. Disqualification of a Clerk Under Article VI

In his petition for discretionary review, Mr. Thompson asked this Court to outline the governing legal and procedural standard for removal under Article IV, Section 17(4), and disqualification under Article VI, Section 8, for a clerk of superior court. *See* N.C. Const. art. IV, § 17(4); N.C. Const. art. VI, § 8. Because we hold that Judge Lock has the authority to consider removal under Article IV, we do not need to consider the question of the proper legal and procedural standard for disqualification of a clerk under Article VI. We decline to reach that question until it is properly presented to this Court. Accordingly, we conclude that the petition for discretionary review as to the issue of the proper procedure for disqualification under N.C. Const. art. VI, § 8, was improvidently allowed.

III. Conclusion

In sum, we hold that after Judge Lock was commissioned to oversee the removal proceeding, he assumed the position of senior regular resident superior court judge for Article IV, Section 17(4) purposes and therefore, had authority to consider the removal of Ms. Chastain under N.C. Const. art. IV, § 17(4). Furthermore, procedural due process requires that removal only be based upon incidents identified in the sworn affidavit that initiates the removal procedure pursuant to N.C.G.S. § 7A-105. Lastly, we affirm that the standard for removal of a clerk under Article IV as set forth in the Constitution is misconduct. For these reasons, we overrule the holding in *Chastain I*, 281 N.C. App. 520, that Judge Lock did not have jurisdiction to remove Ms. Chastain under N.C. Const. art. IV, § 17(4). Additionally, we vacate the Court of Appeals' decision in *Chastain II*, 289 N.C. App. 271.

We remand the case to the Court of Appeals with instructions to further remand to Judge Lock for consideration of whether removal is proper under N.C. Const. art. IV, § 17(4) based upon the incidents identified in the Charging Affidavit and the standard for removal set forth in this opinion. Judge Lock retains the discretion to determine whether an additional hearing is necessary on this matter. Lastly, we note that

discretionary review was improvidently allowed as to the proper procedure and guidelines for disqualification of a clerk of superior court under N.C. Const. art. VI, § 8.

VACATED AND REMANDED IN PART; DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED IN PART.

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

IN THE MATTER OF K.C.

No. 142A23

Filed 13 December 2024

Appeal and Error—preservation of issues—constitutional rights of parent—determined by district court on its own initiative—not challenged in trial court

In a neglect proceeding resulting in the temporary placement of a juvenile with relatives, where the district court on its own initiative determined that the father had acted in a manner inconsistent with his constitutional rights as a parent but the father did not challenge that determination on constitutional grounds, that issue was not preserved for appellate review—a result in conformance with the longstanding precedent that constitutional arguments not raised in a trial court will not be considered for the first time on appeal, in part to ensure that parties have notice and an opportunity to present relevant evidence on the matter. In addition to reversing the lower appellate court's decision in the instant case, the Supreme Court expressly overruled the contrary preservation holding by the Court of Appeals in *In re B.R.W.* and its progeny.

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, 288 N.C. App. 543 (2023), vacating and remanding an order entered on 8 February 2022 by Judge Doretta L. Walker in District Court, Durham County. On 1 September 2023, the

Supreme Court allowed petitioner's petition for discretionary review as to additional issues. Heard in the Supreme Court on 20 February 2024.

Patrick A. Kuchyt for petitioner-appellant Durham County Department of Social Services.

Alston & Bird LLP, by Kelsey L. Kingsbery for appellee Guardian ad Litem.

Richard Croutharmel for respondent-appellee father.

DIETZ, Justice.

Parents have a constitutional right to care for their children and guide their upbringing. Sadly, there are times when the State's own compelling interest in protecting children forces the State to step in and remove children from their parents.

In our juvenile system, a complex series of statutes governs the removal of children from their parents' care. *See* N.C.G.S. § 7B-100 *et seq*. These statutes, known as the Juvenile Code, are designed to ensure that the rights of both parents and children are protected, while also prioritizing the children's need for a safe, permanent home during childhood.

In most juvenile cases, these statutory safeguards also ensure that the State's actions do not violate the parents' constitutional rights. But there can be rare cases in which—although the provisions of the Juvenile Code are satisfied—removing a child from the parent's care would violate the parent's constitutionally protected status. Put another way, there can be rare cases in which, as applied to a particular parent, the Juvenile Code is unconstitutional because its protections of a parent's interests are not strong enough. *See generally In re B.R.W.*, 381 N.C. 61, 77 (2022).

Importantly, this constitutional claim must be preserved for appellate review like any other. *See In re J.N.*, 381 N.C. 131, 133 (2022). To do so, a parent must inform the trial court and the opposing parties that the parent is asserting a challenge *on constitutional grounds* and articulate the basis for that constitutional claim. *Id*. at 133–34. If the parent fails to do so, the claim cannot be reviewed on appeal.

This waiver principle applies even if the trial court addresses the issue on its own initiative in its order. In that circumstance, waiver is compelled not only by the principles articulated in cases such as *In re*

J.N., but also from the doctrinal requirement that trial courts base their rulings on the evidence in the record. If a parent does not raise this constitutional claim, the opposing parties will not have notice that they must present evidence to rebut it—evidence that, by its nature, may be different from what is needed to satisfy the statutory criteria in the Juvenile Code.

In this case, the trial court examined and rejected the constitutional issue on its own initiative in its order. But respondent concedes that he did not raise this constitutional claim in the trial court. Because this unpreserved constitutional issue was the sole basis for respondent's appeal, the Court of Appeals erred by addressing it. We reverse the decision of the Court of Appeals.

Facts and Procedural History

I. Petition, Adjudication, and Disposition

Respondent is the father of four-year-old Katy.[1] Respondent and Katy's mother do not live together and Katy's mother had physical custody of the child, although respondent visited Katy at various times after she was born.

Shortly after Katy was born, the Alamance County Department of Social Services received a report that Katy tested positive for marijuana. During the investigation, Katy's mother also admitted to using cocaine while pregnant. Katy's mother later moved to Durham to reside with Katy's maternal grandmother. The Durham County Department of Social Services then took over the case. DSS attempted to offer services to Katy's mother to address her mental health, drug abuse, and anger management issues, but the mother declined to participate.

While Katy was still an infant, her mother caused an automobile accident while under the influence of alcohol and fled the scene. Following that incident, DSS established a safety plan for Katy and placed Katy with respondent. Several days later, DSS filed a petition alleging that Katy was a neglected juvenile. At the time, DSS believed respondent was a suitable placement for Katy and saw no issue with respondent caring for Katy.

Social workers handling the matter later learned that respondent had a lengthy criminal history which included convictions for driving

1. Pursuant to N.C. R. App. P. 42(b), the parties stipulated to use of this pseudonym to refer to the juvenile.

while license revoked, assault on a female, possession of marijuana, and possession of a firearm.

Before the initial disposition hearing, respondent was arrested again, this time for assault on a female. The assault allegedly occurred outside respondent's home while Katy was nearby. After learning of this arrest, DSS changed its dispositional recommendation and requested that Katy be placed with her paternal aunt and uncle.

The trial court held a disposition hearing and, after hearing evidence, ordered that Katy be placed with her paternal aunt and uncle, with a review hearing scheduled for two weeks later.

In its disposition order, the trial court found that respondent had a "significant criminal history," including charges of assault on a female, and that he had a pending charge for assaulting his ex-girlfriend. The court also found that respondent's "description and downplay of the domestic violence incident" that led to his most recent arrest was not credible. The court further found that a video the trial court viewed of the interior of respondent's home raised concerns about respondent's living environment. The court also found that respondent "would tote his daughter around in the car while delivering his product for his business" in a manner that was "inappropriate" for a child of that age.

Based on these findings, the trial court determined that it was in Katy's best interest to be placed temporarily with the paternal aunt and uncle, at least until the review hearing scheduled for two weeks later.

The trial court's disposition order also contained a statement that both respondent and Katy's mother "acted inconsistent with their constitutional rights as parents." It is undisputed on appeal that neither respondent nor Katy's mother ever asserted a claim on constitutional grounds in the trial court.

II. Court of Appeals review

On appeal to the Court of Appeals, respondent challenged the trial court's determination that he acted inconsistent with his constitutionally protected parental status. In a divided opinion, the Court of Appeals reversed the disposition order and remanded for a new hearing. The Court of Appeals majority reviewed the findings of fact in the disposition order and concluded that there "were no allegations in the petition or findings in the adjudication order that Respondent, the non-offending parent, has neglected the child, is unfit, or has acted inconsistently with his paramount constitutional right to custody of his child." *In re K.C.*, 288 N.C. App. 543, 551 (2023). The majority therefore held that the trial

court lacked authority to place Katy with anyone other than respondent. *Id.* at 550–51.

The majority also held that this issue was properly preserved for appellate review because respondent "opposed DSS's recommendation" to place Katy with the paternal aunt and uncle and instead argued that he had the ability to care for Katy. *Id.* at 545. Importantly, respondent concedes that in the trial court he "did not argue this issue as a violation of a constitutional right." To support its preservation ruling, the Court of Appeals cited its decision in *In re B.R.W.*, 278 N.C. App. 382, 399 (2021), *aff'd on other grounds*, 381 N.C. 61 (2022).

The dissent asserted that the trial court's findings concerning the constitutional standard were "premature and unnecessary to the trial court's dispositional decision awarding temporary custody to relatives." *In re K.C.*, 288 N.C. App. at 552 (Carpenter, J., dissenting). Relying on a series of unpublished Court of Appeals decisions, the dissent reasoned that, during the initial, temporary stages of these juvenile proceedings, the constitutional right was not yet implicated. Thus, the dissent reasoned, the sole appropriate question for appellate review was whether the trial court's best interests analysis was an abuse of discretion. *Id.* at 552–53. The dissent did not address the preservation issue.

DSS filed a notice of appeal based on the dissent and also petitioned for discretionary review of three additional issues that concerned the scope of the constitutional right to parent and the applicable legal test for that right at the initial stages of a juvenile proceeding. We allowed the petition for discretionary review of these additional issues.

We later entered a special order informing the parties that we were allowing discretionary review on an additional issue: "In addition to the issues addressed in this Court's order allowing the petition for discretionary review on additional issues, the Court intends to address the following issue: Whether respondent properly preserved this constitutional issue for appellate review." *In re K.C.*, No. 142A23, 386 N.C. 952 (July 9, 2024).

We also instructed the parties to submit supplemental briefs on this additional issue, including "whether the Court of Appeals' reliance on its decision in *In re B.R.W.*, 278 N.C. App. 382, 399 (2021), conflicts with this Court's holding in *In re J.N.*, 381 N.C. 131, 133 (2022)."

Analysis

I. The constitutionally protected status of a parent

The Supreme Court of the United States has held it "firmly established that freedom of personal choice in matters of family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment." *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978) (cleaned up). Thus, there is "little doubt that the Due Process Clause would be offended if a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest." *Id.* (cleaned up).

This Court, applying this federal precedent, has long acknowledged a parent's "constitutionally protected paramount interest in the companionship, custody, care, and control of his or her child." *Price v. Howard*, 346 N.C. 68, 79 (1997). Because of this right, we held in *Price* that custody can be awarded to a non-parent in a family law proceeding, based on the best interests of the child, only when the parent engages in "conduct inconsistent with the parent's protected status." *Id.* We further held that "unfitness, neglect, and abandonment clearly constitute conduct inconsistent with the protected status parents may enjoy" and that "other types of conduct, which must be viewed on a case-by-case basis, can also rise to this level so as to be inconsistent with the protected status of natural parents." *Id.*

II. Application of this constitutional right in juvenile cases

Because cases like *Quilloin* and *Price* concerned private parties seeking permanent custody or guardianship of a child, they did not address how the constitutional right of parents applies in juvenile cases in which the State seeks to remove a child because of abuse, neglect, or dependency.

Abuse, neglect, and dependency cases are governed by a lengthy set of statutes known as the Juvenile Code. *See* N.C.G.S. §§ 7B-100 *et seq.* One core purpose of these statutes is to "provide procedures for the hearing of juvenile cases that assure fairness and equity and that protect the constitutional rights of juveniles and parents." *Id.* § 7B-100(1).

In nearly all cases in which a trial court adjudicates a child abused, neglected, or dependent, the trial court's resulting disposition, even if it removes the child from the parent, will be constitutional. This is because, as we explained in *Price*, "unfitness, neglect, and abandonment clearly constitute conduct inconsistent with the protected status

parents may enjoy" and many other types of conduct "also rise to this level so as to be inconsistent with the protected status of natural parents." 346 N.C. at 79. Thus, in most juvenile cases, the underlying facts that support the adjudication of abuse, neglect, or dependency also will satisfy the constitutional criteria.

Nevertheless, in the years since we decided *Price*, we have recognized that there might be rare circumstances in which the provisions of the Juvenile Code are insufficient to protect the constitutional rights of parents. *See*, *e.g.*, *In re B.R.W.*, 381 N.C. at 77. In other words, there are rare cases in which, as applied to a particular parent, the Juvenile Code is unconstitutional because it does not provide sufficient protection of the parent's rights. In these rare cases, even if the Juvenile Code authorizes the trial court to remove a child from a parent, the court may not do so because the United States Constitution prohibits it. *Id.*

III. Preservation of the constitutional argument

The recognition that the constitutional right to parent *could* be implicated in these rare juvenile cases created a preservation question that confounded the Court of Appeals for a number of years. Some of our case law observed that "the law presumes parents will perform their obligations to their children" and also "presumes their prior right to custody." *Petersen v. Rogers*, 337 N.C. 397, 403 (1994). Relying on this precedent, parents began to assert that the presumption of parental fitness meant the trial court must assess the constitutionality of a child's removal in every case. As a result, the parents argued, the issue always was preserved for appellate review, even if the parent never raised it.

Ultimately, we rejected this argument and held that *Petersen* did not "negate our rules on the preservation of constitutional issues." *In re J.N.*, 381 N.C. at 133. "Thus, a parent's argument concerning his or her paramount interest to the custody of his or her child, although afforded constitutional protection, may be waived on review if the issue is not first raised in the trial court." *Id.*

At the same time, a line of cases developed in the Court of Appeals holding that this constitutional argument was preserved so long as the parent opposed removal of the child on *any* grounds, even if the parent never expressly asserted a constitutional argument. *See In re B.R.W.*, 278 N.C. App. at 397; *In re X.D.P-S.*, No. COA21-109, slip op. at 4 (N.C. Ct. App. Oct. 19, 2021) (unpublished) (citing *In re B.R.W.* for the proposition that "when a parent presents evidence opposing a recommendation of guardianship, the parent sufficiently preserves the constitutional issue"); *In re A.N.*, No. 22-498, slip op. at 8 (N.C. Ct. App. June 6, 2023)

(unpublished) (citing *In re B.R.W.* for the proposition that the constitutional issue was preserved because the parent "requested the trial court reject the recommendation of guardianship").

This line of cases began with *In re B.R.W.*, in which the Court of Appeals acknowledged that the parent did not expressly raise an argument on constitutional grounds. Nevertheless, the trial court made a finding that the parent was "unfit" and "acted in a manner inconsistent with [the parent's] constitutionally protected status." 278 N.C. App. at 395. In the lead opinion, a single Court of Appeals judge stated that the parent had preserved the issue because she "presented evidence regarding her ability to care for the children, opposed the recommendation of guardianship, and requested that the trial court reject the recommendation of guardianship and allow a trial home placement." *Id.* at 399.

A second judge concurred in the judgment but questioned the preservation discussion, noting that it appeared to conflict with other Court of Appeals case law "concerning when and how the constitutional issue of whether parents have acted inconsistently with their constitutionally protected rights must be raised and preserved in the trial court." *Id.* at 410 (Dietz, J., concurring). A third judge dissented on other issues and did not address the preservation issue. *Id.* at 410–16 (Carpenter, J., dissenting).

The parent filed a notice of appeal based on the dissent, but no party sought discretionary review on the preservation issue. This Court affirmed the Court of Appeals without addressing preservation. *In re B.R.W.*, 381 N.C. at 93.

But *on the same day* that this Court issued its decision in *In re B.R.W.*, we also issued the decision in *In re J.N.* which, as noted above, squarely addressed the preservation issue that divided the Court of Appeals in *In re B.R.W.* and many other cases.

In *In re J.N.*, we held that parents must raise the constitutional issue in the trial court to preserve it for appellate review. 381 N.C. at 133. Importantly, as in *In re B.R.W.*, the parent in *In re J.N.* had opposed DSS's recommendation of guardianship in the trial court and argued that "reunification would be a more appropriate plan." *Id.* at 134. But, we noted, the parent never argued that the guardianship "would be inappropriate *on constitutional grounds*." *Id.* (emphasis added). We therefore held that "respondent waived the argument for appellate review." *Id.*

Thus, under *In re J.N.*, a parent who merely argues against a child's removal, or against the child's placement with someone else, does not adequately preserve the constitutional issue. To preserve it, the parent must inform the trial court and the opposing parties that the parent is

challenging the removal on constitutional grounds and articulate the basis for the constitutional claim.

This preservation requirement is necessary for a crucial reason. As noted above, the argument is essentially a claim that the Juvenile Code is unconstitutional as applied to that parent. After all, the argument applies only when the Juvenile Code *authorizes* the removal of the child from the parent's care, but the Constitution nevertheless *prohibits* it. Thus, the parties opposing the parent's argument must be given notice of the constitutional challenge so that they can present evidence to rebut it. *Price*, 346 N.C. at 79. This evidence, by its nature, may be different from the evidence those parties present to establish grounds for removal under the Juvenile Code—after all, the constitutional claim can prevail only in rare cases where the evidence that is sufficient to satisfy the Juvenile Code nevertheless is insufficient to comply with the constitutional criteria.

Moreover, because of this need to provide notice to the opposing parties, the preservation requirement applies even if the trial court addresses the constitutional claim on its own initiative in its order. A trial court's findings are limited to evidence in the record. *In re L.N.H.*, 382 N.C. 536, 546 (2022). Without notice that the parent is asserting a constitutional claim, the opposing parties will not know that they must present evidence that would support the necessary findings to reject the claim. *Price*, 346 N.C. at 79.

In sum, the Court of Appeals' preservation analysis in *In re B.R.W.* did not survive our holding in *In re J.N.* To prevent further confusion, we expressly overrule the preservation holding of the Court of Appeals decision in *In re B.R.W.* and the holdings of the resulting Court of Appeals case law that followed it.

Having reaffirmed the applicable preservation standard, we turn to the facts of this case. Here, respondent concedes that he "did not argue this issue as a violation of a constitutional right." Thus, under *In re J.N.*, the constitutional claim is not preserved for appellate review. Because this was the sole issue raised by respondent in the Court of Appeals, and because the issue is waived as a matter of law and not subject to appellate review, we reverse the decision of the Court of Appeals. As a result, we do not reach the remaining arguments presented to us in this appeal.

Finally, some words about the dissent. The dissent accuses us of "advocating" rather than objectively deciding this appeal. This is so, the dissent argues, because we examined whether the key constitutional

issue in the case was preserved for appellate review. The parties raised that issue in their Court of Appeals briefing but did not do so in their filings with this Court. The dissent therefore asserts that it was improper for us to consider it.

This is a flawed argument for several reasons. First, it is well-settled from precedent dating back nearly a century that "this Court is not required to pass upon a constitutional issue unless it affirmatively appears that the issue was raised and determined in the trial court." *State v. Creason*, 313 N.C. 122, 127 (1985) (collecting cases). This rule applies regardless of whether the opposing party asserts in its appellate briefing that the constitutional issue was waived. *See City of Durham v. Manson*, 285 N.C. 741, 743 (1974). As we have repeatedly explained, when a constitutional issue "was not raised in the trial court but was injected for the first time on appeal to the Court of Appeals" that issue "was not properly before the Court of Appeals" and therefore is "not properly before us." *Id.*

Even putting this precedent aside, we are the court of last resort in our State. This Court is tasked with allowing discretionary review "on its own motion" when a "decision of the Court of Appeals appears likely to be in conflict with a decision of the Supreme Court." N.C.G.S. § 7A-31(a). We do this because it is our responsibility to ensure the consistency of the State's jurisprudence and prevent competing lines of precedent from lingering and causing confusion in the lower courts. As explained above, the Court of Appeals decision in this case, and the line of cases it followed, conflicts with our holding in *In re J.N.*

We therefore entered a unanimous order (joined by our dissenting colleagues) accepting discretionary review of this issue. *In re K.C.*, No. 142A23, 386 N.C. 952 (July 9, 2024). Addressing this lingering conflict in our jurisprudence is not advocacy; it is this Court performing its central role as the Supreme Court of North Carolina.

Conclusion

We reverse the decision of the Court of Appeals.

REVERSED.

Justice RIGGS dissenting.

In a case where, until supplemental briefing requested by this Court, no party argued to this Court that Father waived his constitutional

challenge and contrary to our settled practice, the majority steps into the role of advocate and makes a "better" argument for a party. Here, the majority intervenes as such to rule that a parent may only preserve a constitutional challenge in a juvenile proceeding by informing the trial court and the opposing parties of such a challenge and providing an articulable basis for that constitutional challenge. In an improper vehicle, the majority delivers on a request from the Court of Appeals three years ago in *In re B.R.W.*, 278 N.C. App. 382, 410 (2021) (Dietz, J., concurring) ("[T]his Court could benefit from the guidance of our Supreme Court concerning when and how the constitutional issue of whether parents have acted inconsistently with their constitutionally protected rights must be raised and preserved in the trial court."). The majority then steps in to answer its own posed question by adopting a harsh, unforgiving procedural rule for constitutional claims argued in juvenile court. I respectfully dissent.

I. Appellate Review Under Rule 16

Our appellate review is limited "to consideration of the issues stated in . . . the petition for discretionary review and the response thereto . . . and properly presented in the new briefs." N.C. R. App. P. 16(a). And for appeals based on dissents, this Court's review is "limited to 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."[1] N.C. R. App. P. 16(b). Here, as the majority points out, we are reviewing DSS's dissent-based appeal as well as additional issues on which we allowed discretionary review. But until this Court requested supplemental briefing, issue preservation had not been properly raised before this Court. Issue preservation was not addressed in the dissent, not addressed in the notice of appeal, not addressed in the petition for discretionary review, and not addressed in the new briefs. We are jurists, not advocates. Because no party argued that Father failed to preserve his constitutional claim, this Court should have addressed the merits of this appeal.

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1. The majority claims that precedent and statutory law say otherwise, but those arguments are not compelling here. Neither of the cases cited, *State v. Creason*, 313 N.C. 122 (1985), or *City of Durham v. Manson*, 285 N.C. 741 (1974), speak to the situation here, when a party fails to properly submit an issue for consideration by this Court. As explained in this dissent, Rule 16(a) and (b) dictate the outcome here. Moreover, Section 7A-31 merely addresses when this Court may certify a *cause*, i.e., a case, for review rather than when this Court may consider an *issue* for review. *See Cause*, Garner's Dictionary of Legal Usage 142 (3d ed. 2011) ("*Case* is more commonly used, to be sure, but *cause* (= lawsuit) has long been current in the speech and writing of lawyers.").

Even if Father did not preserve his constitutional claim, though, the majority ignores that we can nevertheless address the merits of this appeal under Rule 2. *See* N.C. R. App. P. 2 ("To prevent manifest injustice to a party, or to expedite decision in the public interest, either court of the appellate division may . . . suspend or vary the requirements or provisions of any of these rules . . . ."). Our precedent recognizes that we may consider unpreserved issues in the interest of justice. *See Clifford v. River Bend Plantation, Inc.*, 312 N.C. 460, 463 (1984) ("However, in the interest of justice we will consider this issue and the other issues raised by plaintiffs' brief and argument [that were not properly raised at trial].").

Notwithstanding the ruling in this case, Appellate Rule 2 still allows for this Court to "suspend the appellate rules either upon application of a party or upon its own initiative." *Bailey v. State*, 353 N.C. 142, 157 (2000) (cleaned up). Rule 2 specifically "relates to the residual power of our appellate courts to consider, in exceptional circumstances, significant issues of importance in the public interest, or to prevent injustice which appears manifest to the Court and only in such instances." *Steingress v. Steingress*, 350 N.C. 64, 66 (1999) (citing *Blumenthal v. Lynch*, 315 N.C. 571, 578 (1986)). "[W]hether an appellant has demonstrated that [their] matter is the rare case meriting suspension of our appellate rules is always a discretionary determination to be made on a case-by-case basis." *State v. Campbell*, 369 N.C. 599, 603 (2017) (citing *Dogwood Dev. & Mgmt. Co. v. White Oak Transp. Co.*, 362 N.C. 191, 196 (2008)). While I believe the parties waived issue preservation questions, even if the question was not waived, addressing Father's constitutional claim would certainly prevent an injustice—being stripped of his parental right to custody without due process. If Rule 2 needed to be invoked, I believe Father presents "the rare case meriting suspension" of our preservation requirement. *Id.*

II. Father's Constitutional Right to Parent

In his principal brief, Father argued that the trial court's decision to deprive him of custody of Katy in favor of nonparents violated Father's constitutionally protected rights as a parent. Because no party nor the dissenting judge at the Court of Appeals contended that Father failed to preserve his constitutional claim, this Court should have addressed the merits of that argument. I do so below and conclude that we should have affirmed the Court of Appeals' decision and remanded this case to the trial court for more findings as to whether the Father's parenting negatively affected Katy.

The Due Process Clause of the Fourteenth Amendment to the United States Constitution prohibits this State from "depriv[ing] any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, cl. 1. According to the Supreme Court of the United States, "perhaps the oldest of the fundamental liberty interests" triggering due process protections are "the interests of parents in the care, custody, and control of their children." *Troxel v. Granville*, 530 U.S. 57, 65 (2000); *see also Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) ("It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."). This Court has expressed similar sentiments. *See Petersen v. Rogers*, 337 N.C. 397, 402 (1994) ("North Carolina's recognition of the paramount right of parents to custody, care, and nurture of their children antedates the constitutional protections set forth [by the Supreme Court of the United States].").

Because these constitutional lodestars warrant due process protections, they "do[ ] not evaporate simply because [parents] have not been [flawless] or have lost temporary custody of their child to the State." *Santosky v. Kramer*, 455 U.S. 745, 753 (1982); *see also Owenby v. Young*, 357 N.C. 142, 146 (2003) ("[The] Due Process Clause of the Fourteenth Amendment ensures that the government does not impermissibly infringe upon a natural parent's paramount right to custody solely to obtain a better result for the child."). This legal principle is further bolstered by the presumption that if "parents [ ] perform their obligations to their children," they possess a "prior right to custody." *Petersen*, 337 N.C. at 403 (quoting *In re Hughes*, 254 N.C. 434, 436–37 (1961)). Under this presumption, "the constitutionally-protected paramount right of parents to custody, care, and control of their children *must* prevail." *Petersen*, 337 N.C. at 403–04 (emphasis added). This presumption especially "favor[s] a parent in a custody dispute with a non-parent." *Routten v. Routten*, 374 N.C. 571, 576 (2020) (emphasis removed).

Yet that presumption "is not absolute." *In re R.T.W.*, 359 N.C. 539, 543 (2005) (citing *David N. v. Jason N.*, 359 N.C. 303, 305 (2005)). This Court has long acknowledged "parental rights and parental responsibilities as two sides of the same coin." *Id.* (citing 1 Blackstone, Commentaries 434–40); *see also David N.*, 359 N.C. at 305 ("[W]hile a fit and suitable parent is entitled to the custody of his child, it is equally true that where fitness and suitability are absent he loses this right."). Thus, the State may take a parent's child away by "showing that the parent is unfit to have custody or where the parent's conduct is inconsistent with his or her constitutionally protected status." *In re E.B.*, 375 N.C. 310, 315

(2020) (quoting *Adams v. Tessener*, 354 N.C. 57, 62 (2001)). While "unfitness, neglect, and abandonment" facially undermine the parent's status, "other types of conduct . . . can also rise to this level so as to be inconsistent with the protected status of natural parents." *Boseman v. Jarrell*, 364 N.C. 537, 549 (2010) (cleaned up) (quoting *Price*, 346 N.C. at 79).

Notably, though, that is the only way a parent may lose their child to the State. *Id.* (emphasis added); *see also* Becca Pearson, *The Price to Parent*, 102 N.C. L. Rev. 1299, 1309 (2024) ("There must be a very substantial reason before parental custody can be terminated by the State." (cleaned up)). And because "there is no bright line beyond which a parent's conduct meets this standard," *Boseman*, 364 N.C. at 549, all allegedly inconsistent conduct "must be viewed on a case-by-case basis." *Owenby*, 357 N.C. at 147 (quoting *Price*, 346 N.C. at 79). Indeed, we must "examine each case individually in light of all of the relevant facts and circumstances and the applicable legal precedent." *In re B.R.W.*, 381 N.C. 61, 82 (2022); *see also id.* at 83 ("In conducting the required analysis, 'evidence of a parent's conduct should be viewed cumulatively.' " (quoting *Owenby*, 357 N.C. at 147)). Only after a trial court concludes that a parent has acted in a manner inconsistent with their parental status may the "best interest of the child test . . . be applied without offending the Due Process Clause." *Owenby*, 357 N.C. at 146 (internal citation omitted); *see also Price v. Howard*, 346 N.C. 68, 79 (1997) ("If a natural parent's conduct has not been inconsistent with his or her constitutionally protected status, application of the 'best interest of the child' standard in a custody dispute with a nonparent would offend the Due Process Clause.").

Further, "a trial court's determination that a natural parent has acted in a way inconsistent with his constitutionally protected status must be supported by clear and convincing evidence." *David N.*, 359 N.C. at 307 (quoting *Adams*, 354 N.C. at 63). The clear and convincing standard "is more exacting than the preponderance of the evidence standard generally applied in civil cases" and "requires evidence that should *fully* convince." *In re I.K.*, 377 N.C. 417, 421 (2021) (emphasis added) (quoting *Scarborough v. Dillard's, Inc.*, 363 N.C. 715, 721 (2009)). If a finding is "unsupported by the record," we "simply disregard[ ] [that] finding[ ] and examine[ ] whether the remaining findings support the trial court's determination." *In re A.J.L.H.*, 384 N.C. 45, 48 (2023).

The trial court adjudicated Katy a neglected child on 15 October 2021, but as Father correctly explains, that adjudication only addressed Mother's neglect of Katy. But even the existing findings in the trial court's disposition order on 8 February 2022 are insufficient to demonstrate

that Father is unfit or that his conduct was inconsistent with his constitutionally protected status.[2] Thus, the majority implicates significant Due Process Clause concerns by even reaching the "best interest of the child" standard.

Only a fraction of the trial court's findings of fact in the disposition order address Father or his conduct. The trial court found that Father was formerly convicted "for drug-related crimes and assault on a female" and was charged with multiple offenses while the instant petition was pending, including "communicating threats and larceny of a firearm" and "assault on a female," but no evidence was specifically developed on these matters. No one testified at trial about any of Father's convictions or charges, nor were any details included in the DSS court report or any addendums.

Also, while Father was arrested for domestic violence charges against a woman in November 2021, this kind of alleged incident is insufficient to undermine Father's constitutionally protected status. *See Price*, 346 N.C. at 79 (holding that a parent's behavior is inconsistent with their right to parent "if he or she fails to shoulder the responsibilities that are attendant to rearing a child"). As the Court of Appeals noted, Father's charge was still pending at the disposition hearing, and Father consistently maintained his innocence. *See In re K.C.*, 288 N.C. App. 543, 551 (2023) ("[W]e are unable to say that . . . the existence of an unproven domestic violence charge warrant[s] forfeiture of [Father's] constitutionally protected status."). Further, there was no evidence that Katy witnessed the incident. According to Father, the incident occurred outside, and Katy was inside the back room of the house. Family court cannot be a place where the presumption of innocence in criminal matters falls by the wayside.

Besides Father's alleged criminal history, the trial court also considered the condition of Father's home and the nature of his job. Yet neither of these findings support a conclusion that Father was unfit to parent Katy. First, the trial court made no finding of fact concerning the impact of the condition of Father's home on Katy. *See* N.C.G.S. § 7B-101(15) (2023) (defining a neglecting parent as one who "[c]reates or allows to be created a living environment that is injurious to the

2. We note that the trial court also incorrectly labeled Finding 61—that Father "acted inconsistent with [his] constitutional right as [a] parent[ ]"—a finding of fact. *See In re B.R.W.*, 381 N.C. at 77 ("A trial court's determination that a parent has acted inconsistently with his or her constitutionally protected status as the parent is [a conclusion of law] subject to de novo review.").

juvenile's welfare"); *see also In re C.L.*, No. COA11-98, slip op. at 7 (N.C. Ct. App. July 19, 2011) (unpublished) ("The trial court did not make any findings about specific risks that might result from the condition of the home, nor did the court find that the condition of the home contributed to any particular impairment or risk of impairment to the children."). For example, as Father explains, "[t]here was no reported filth or bug infestations or other problems . . . that would have subjected Katy to a dangerous environment." In particular, Finding 56 states that "[t]he [c]ourt was disturbed by what she saw at [Father's] house during the video testimony," but does not provide any additional detail. In comparison to other cases from this Court, this finding is plainly insufficient to support a conclusion of unfitness. *See In re I.K.*, 377 N.C. 417, 426–28 (2021) (agreeing that clear and convincing evidence existed supporting a finding of unsafe living conditions where "the clutter in the home was piled to the ceiling in some areas and there were holes in the floor of the home covered with plywood"). Further, the DSS social worker testified that the Father always secured housing for Katy that was approved by DSS.

Second, the trial court's findings about the Father's clothing, employment, and tendency to move should not have been considered because they all relate to the Father's socioeconomic status. *See Dunn v. Covington*, 272 N.C. App. 252, 265 (2020) ("[S]ocioeconomic factors such as the quality of a parent's residence, job history, or other aspects of their financial situation . . . have no bearing on the question of fitness."); *see also Raynor v. Odom*, 124 N.C. App. 724, 731 (1996) ("[S]ocioeconomic status is irrelevant to a fitness determination . . . ." (citing *Jolly v. Queen*, 264 N.C. 711, 713–14 (1965))). Refraining from such considerations is critical to protecting the interests of "honest, industrious parents," regardless of their income status. *Jolly*, 264 N.C. at 715; *see also Bost v. Van Nortwick*, 117 N.C. App. 1, 8–9 (1994) ("[T]he finding that [a non-parent] could provide a more stable environment and better financial situation . . . does not mandate that respondent's rights as the natural father . . . be terminated."). Thus, these findings were impermissible for the trial court to rely on in concluding that Father was unfit to parent Katy.

III. Conclusion

At bottom, under the umbrella of rights that parents enjoy is the right to temporarily entrust their child to the care of trusted family and friends. The majority's failure to address the merits is particularly pernicious here. As a society, we should want to encourage parents getting the help they need, whether it be for addiction or mental health treatment or the ability to regain financial footing. If this Court punishes

a parent's thoughtful decision to make temporary, informal custody arrangements in order to advance the wellbeing of the entire family unit, we will disincentivize that kind of good parenting. Parents will not get the help they need if they will lose custody of their child because of those thoughtful decisions.

This is not to say that, upon proper investigation and substantiation, Father's criminal history and housing conditions could not be considered in relation to his constitutional right to parent. *See In re A.J.*, 386 N.C. 409, 417 (2024) ("[W]hen an appellate court determines that the trial court's findings of fact are insufficient, the court must examine whether there is sufficient evidence in the record that could support the necessary findings." (citing *In re K.N.*, 373 N.C. 274, 284 (2020)). Thus, I would affirm the Court of Appeals' judgment and remand this matter back to the trial court to "decide whether to enter a new order with sufficient findings based on the record or to change its conclusions of law because the court cannot make the necessary findings." *Id.* (citing *In re K.N.*, 373 N.C. at 284–85).

Justice EARLS joins in this dissenting opinion.

IN THE MATTER OF L.L.

No. 333PA23

Filed 13 December 2024

Child Abuse, Dependency, and Neglect—full custody awarded to non-relative—statutorily required findings sufficient

Following an abuse and neglect adjudication, the district court's final permanency planning order—awarding full custody to the juvenile's foster parents (rather than placing the juvenile with a maternal grandfather) and converting the case to a civil custody proceeding—was affirmed because the written findings of fact complied with the Juvenile Code provisions cited in the mother's appeal in that: no written finding regarding placement of the juvenile with the mother within six months was required where the impossibility of such a placement was uncontested (N.C.G.S. § 7B-906.1(e)); the findings reflected the court's determination that reunification with the mother was inconsistent with the juvenile's health and safety (N.C.G.S. § 7B-906.2(b), (d)(4)); the findings, including facts in the department of social services court report incorporated by

reference in the order, detailed the mother's availability to the court and the guardian ad litem (N.C.G.S. § 7B-906.2(d)(3)), as well as her participation in her case plan (N.C.G.S. § 7B-906.2(d)(2)); and the findings demonstrated the district court's consideration of the maternal grandfather as a potential placement, in conformance with the requirement of N.C.G.S. § 7B-903(a1) that it "first consider" a relative as a placement for a juvenile.

Justice RIGGS concurring in part and dissenting in part.

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

On discretionary review pursuant to N.C.G.S. § 7A-31 of a per curiam, unpublished decision of the Court of Appeals, *In re L.L.*, No. COA22-1045 (N.C. Ct. App. Nov. 21, 2023), vacating and remanding a permanency-planning order entered by Judge James W. Bateman III in District Court, Onslow County. Heard in the Supreme Court on 31 October 2024.

Fox Rothschild LLP, by Nathan W. Wilson, Matthew Nis Leerberg, and Margaret McCall Reece, for petitioner-appellants Daniel and Jessica Hall.

Matthew D. Wunsche, for petitioner-appellant Guardian ad Litem.

Mercedes O. Chut for respondent-appellee mother.

No brief for Onslow County Department of Social Services.

BARRINGER, Justice.

Petitioners Daniel and Jessica Hall appeal from the Court of Appeals unpublished, per curiam opinion, which reversed and remanded the trial court's permanency-planning and custody order that awarded full custody of Liam[1] to petitioners and converted the case to a Chapter 50 civil custody proceeding. The question before this Court is whether the findings contained in that trial court order are sufficient to satisfy

1. A pseudonym is used to protect the juvenile's identity and for ease of reading. *See* N.C. R. App. P. 42(b).

the relevant statutory provisions. We conclude those findings are sufficient. Accordingly, we reverse the decision of the Court of Appeals.

I. Background

A. Factual Background

The beginning of Liam's life was marked by tragedy. When Liam was barely one month old, his parents took him to the Naval Hospital in Onslow County because he appeared to have trouble breathing. Liam arrived with numerous bruises to his head and face, a fracture to his right arm, nine broken ribs, and a skull fracture. When medical staff examined Liam more closely, they further discovered that he had a chest abrasion and a skin laceration to his penis. Due to the severity of Liam's injuries, he was intubated, sedated, placed on a mechanical ventilator, and then airlifted to UNC Hospital. Liam weighed less than he did at birth.

While receiving treatment at UNC Hospital, Liam experienced multiple seizures over his first two days there and remained on a ventilator for nearly a week. Subsequent diagnostic tests revealed that Liam had already endured multiple traumas prior to hospitalization. These additional traumas included a fracture to Liam's left leg, with accompanying soft tissue damage and swelling; fractures to his right shoulder; healing lesions to the tip of his penis; and a skull fracture, with associated cranial hemorrhages and swelling. Both respondent, Liam's mother, and Liam's father claimed that the injuries occurred when Liam's father accidentally dropped Liam. The Onslow County Department of Social Services (DSS) conducted its initial inspection of the family home and found the house "very dirty, with a sticky residue on the floor and a strong odor of urine."

DSS subsequently filed a juvenile petition alleging that Liam was an abused and neglected juvenile. The petition alleged that Liam's injuries and clinical presentation were "most consistent with a medical diagnosis of abusive head trauma and non-accidental trauma." The petition further alleged that the parents' "stated history of [Liam's] trauma" did "not explain the severity or extent of the child's injuries." Liam's parents were his sole caretakers. Therefore, to ensure the immediate safety of Liam, DSS sought and obtained nonsecure custody of him that same day.

Liam's injuries were life-altering. Now, at age four, he suffers from cerebral palsy, continued seizures, developmental delay, and a possible intellectual disability. In addition, Liam lacks full awareness of his right hand and arm due to the long-term effects of his head injury. As a result, Liam requires around-the-clock care and constant medical consultations,

including six therapeutic appointments each week, bi-annual neurology monitoring, and regular gastroenterologist visits.

Both parents were arrested and charged with felony child abuse. On 16 July 2020, respondent, who had bonded out of jail and moved to Georgia, entered a case plan with DSS which required that she complete recommended parenting classes and demonstrate learned skills, complete a comprehensive clinical assessment for mental health, and participate in Liam's ongoing medical appointments. Still to this day, respondent has never plausibly explained Liam's injuries, nor participated in a single one of Liam's medical appointments as ordered by the court.

After being discharged from the hospital, Liam was placed with his foster family, petitioners, Daniel and Jessica Hall. Liam is now four years old, and petitioners are the only family he can remember. He has a loving relationship with petitioners, and considers their children his siblings. Jessica Hall has been instrumental in Liam's recovery. She schedules and attends each of Liam's medical appointments and stays at home to provide the continuous extensive care he now requires. Petitioners have provided Liam a stable, nurturing environment in which to flourish.

Before the first permanency-planning hearing in this case, Liam's maternal grandfather expressed an interest in obtaining Liam's custody; however, the maternal grandfather barely knows Liam. Moreover, by his own admission, the grandfather is unable to provide for Liam's around-the-clock medical care; instead, the grandfather claims that his live-in girlfriend would be.

These circumstances did not go unnoticed by Liam's guardian ad litem (GAL). A GAL is a trained volunteer who is wholly invested in the juvenile's best interests during abuse and neglect proceedings.[2] Among a GAL's statutory duties are "offer[ing] evidence and examin[ing] witnesses at adjudication; [ ] explor[ing] options with the court at the dispositional hearing;" and "protect[ing]and promot[ing] the best interests of the juvenile." N.C.G.S. § 7B-601(a) (2023). Pivotal to this role is the creation and maintenance of independent reports for the courts to review.[3]

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2. N.C. Jud. Branch, *About Guardian ad Litem (GAL)*, https://www.nccourts.gov/programs/guardian-ad-litem/about-guardian-ad-litem-gal#:~:text=Guardians%20ad%20Litem%20are%20appointed,that%20belongs%20to%20the%20community (last visited Dec. 5, 2024).

3. N.C. Jud. Branch, *Volunteer as a GAL* https://www.nccourts.gov/programs/guardian-ad-litem/volunteer-as-a-gal (last visited Dec. 5, 2024).

In the GAL's report, the GAL was adamant that Liam remain with petitioners. The GAL reported that as a result of his extensive injuries "Liam requires 24-hour care [that] will continue through his entire life." Petitioners currently provide and are committed to providing that continued care in the future. The report further explains that, in addition to the petitioners' proven ability to provide for all of Liam's medical needs, Liam "will shut down and become unresponsive" "if the foster mother[,] [petitioner,] is not present." This is because "[Liam's] cognitive abilities are very limited such that he does not understand being away from his foster mother." Moreover, the report emphasized that all of "[Liam's] therapists agree that if [Liam] is removed from [petitioners' care], his condition will severely deteriorate."

Despite Liam's demonstrated extraordinary needs and the GAL's strong recommendation that Liam stay with petitioners, DSS recommends that it is in Liam's best interest that he move to the maternal grandfather's home in Georgia.

B. Procedural Background

The trial court adjudicated Liam as abused and neglected on 22 September 2021, which neither parent contested.

In December 2021, the initial permanency-planning hearing was held. The trial court entered an initial permanency-planning order on 18 January 2022. That order found in part that "[DSS] would like to see respondent . . . scheduling [more] phone visits with [Liam]." The court further found that DSS is "concerned with [Liam] returning to the care of respondent mother due to [Liam's] extensive injuries and exceptional needs." The trial court also stated that it "would like to hear from both respondent mother and [the maternal grandfather] about what they will be willing to do to get [Liam] his needed medical care and what their plan is for [Liam's] care if he is placed with them in Georgia." The trial court ordered that the primary plan for Liam be reunification with his parents and that the secondary plan be custody of Liam with a court-approved caretaker, like petitioners.

At the beginning of May 2022, a second permanency-planning hearing was held. The resulting order found again that "[DSS] would like to see respondent mother scheduling [more] phone visits with [Liam]." The court also reiterated its concerns with returning Liam to respondent "due to [Liam's] extensive injuries and exceptional needs." The trial court's primary and secondary permanency plans remained unchanged.

One month later, a third permanency-planning hearing was held. At this time, Daniel Hall, a Major in the United States Marine Corps, had

received military orders which required moving the family to Florida permanently. The permanency-planning order remained substantially the same with the exception that the trial court approved the petitioners' "go[ing] on an extended visit with the juvenile in Florida."

The fourth and final permanency-planning hearing was held across the first two days of August 2022. The resulting order (final order) from this hearing made a number of findings, including findings number six and ten. Finding number six stated: "The [c]ourt received into evidence the court report of the Guardian Ad Litem." Finding number ten stated: "That the [c]ourt has considered information from any person designated by N.C.G.S. § 7B-906.1(c)."[4] It is therefore evident that the trial court heard and considered the GAL report. The Court then granted legal and physical custody of Liam to petitioners.[5]

Respondent appealed the final order to the Court of Appeals. Respondent argued that the trial court erred in ceasing reunification as a permanent plan and by awarding custody of Liam to his foster parents. *In re L.L.*, No. COA22-1045, slip op. at 8 (N.C. Ct. App. Nov. 21, 2023) (per curiam) (unpublished). Respondent challenged, first, various factual findings in the trial court's order, and then disputed the sufficiency of those findings to satisfy the relevant statutory provisions. In a per curiam, unpublished decision, the Court of Appeals rejected the first challenge but agreed with the second. *In re L.L.*, slip op. at 16–17. In the court's view, the findings were insufficient to comply with the relevant statutory provisions. Accordingly, the Court of Appeals vacated the trial court's order and remanded the matter for a new permanency-planning hearing to be held. *Id.* at 25.

Petitioners filed for discretionary review with this Court pursuant to N.C.G.S. § 7A-31 (2023). We allowed the petition.

II. Standard of Review

Respondent did not appeal the Court of Appeals' holding that the trial court's findings of fact were supported by competent evidence. Therefore, those findings are binding on appeal. *In re J.M.*, 384 N.C. 584, 591 (2023). The only question before this Court is whether the trial court's findings are sufficient under the relevant statutory provisions.

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4. N.C.G.S. § 7B-906.1 states in pertinent part, "[a]t each hearing, the court shall consider information from [ ] the guardian ad litem."

5. Judge Bateman presided during this entire permanency-planning process.

This Court interprets statutory provisions de novo. *State v. J.C.*, 372 N.C. 203, 206 (2019) (citation omitted). Moreover, "[t]he trial court's dispositional choices—including the decision to eliminate reunification from the permanent plan—are reviewed for abuse of discretion." *In re J.M.*, 384 N.C. at 591 (extraneity omitted). "An abuse of discretion is shown where a trial court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *In re A.A.*, 381 N.C. 325, 338 (2022) (extraneity omitted).

III. Analysis

"The provisions in Chapter 7B (Juvenile Code) of our General Statutes reflect the need both to respect parental rights and to protect children from unfit, abusive, or neglectful parents." *In re J.M.*, 384 N.C. at 591–92 (extraneity omitted). The Juvenile Code divides abuse, neglect, and dependency proceedings into two main phases: adjudicatory and dispositional. At the adjudicatory phase, the Department of Social Services must show by "clear and convincing evidence" that a juvenile qualifies as "abused, neglected, or dependent" as defined by the Juvenile Code. N.C.G.S. §§ 7B-101, -805 (2023). If shown, the proceedings move on to the dispositional phase. At the dispositional phase, the court's task "is to design an appropriate plan to meet the needs of the juvenile and to achieve the objectives of the State in exercising jurisdiction." *Id.* § 7B-900 (2023).[6]

The challenges at issue here were made in the dispositional phase. At this phase, the trial court may select or combine various alternatives for disposition, including placing the juvenile "in the custody of a parent, relative, private agency . . . , or some other suitable person." *See id.* § 7B-903(a) (2023). The "polar star" guiding the trial court's decision is "the best interests of the juvenile." *Id.* § 7B-100(5) (2023) (explaining that "the best interests of the juvenile are of paramount consideration by the court"); *see also In re Montgomery*, 311 N.C. 101, 109 (1984) (emphasizing that "the best interest of the child is the polar star"). Several statutory provisions direct the trial court's analysis of the best interests of the juvenile. *See* N.C.G.S. §§ 7B-906.1, 7B-906.2, 7B-903 (2023).

Petitioners argue the Court of Appeals erred by holding that the trial court failed to make sufficient findings under four subsections of those statutory provisions: N.C.G.S. §§ 7B-906.1(e), 7B-906.2(b), 7B-906.2(d), and 7B-903(a1). We agree with petitioners and address each provision in turn.

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6. Those objectives are set out in N.C.G.S. § 7B-100 (2023).

A. N.C.G.S. § 7B-906.1(e)

Subsection 7B-906.1(e) requires the trial court, "[a]t any permanency planning hearing where the juvenile is not placed with a parent" to "additionally consider the following criteria and make written findings *regarding those that are relevant*." *Id.* § 7B-906.1(e) (emphasis added). One of those criteria includes "[w]hether it is possible for the juvenile to be placed with a parent within the next six months . . . ." *Id.* The Court of Appeals held that this subfactor was not satisfied because "the permanency planning order contains no mention of Liam's placement with [respondent] mother within the six months following the order." *In re L.L.*, slip op. at 17.

The Court of Appeals failed to follow the plain language of the statute in reaching its holding. The plain language of this subsection states that the trial court must consider all enumerated criteria but need only "make written findings regarding those that are *relevant*." N.C.G.S. § 7B-906.1(e) (emphasis added). In other words, the Court of Appeals read out the key phrase "that are relevant." This omission of words runs counter to the long-standing surplusage canon of statutory interpretation. *See e.g.*, *In re B.O.A.*, 372 N.C. 372, 380 (2019) ("In construing statutory language, 'it is our duty to give effect to the words actually used in a statute and not to delete words used or to insert words not used.' " (quoting *Lunsford v. Mills*, 367 N.C. 618, 623 (2014))).

Moreover, "that are relevant" appears identically in another provision of our Juvenile Code. *Compare* N.C.G.S. § 7B-906.1(e), *with* N.C.G.S. § 7B-1110(a) (2023). Our previous interpretation of this identical phrase comes as no surprise. We interpreted this phrase to only require written findings for those *criteria that are relevant*. *In re A.U.D.*, 373 N.C. 3, 10 (2019) ("The statute does not, however, explicitly require written findings as to each factor."). This plain language interpretation is aligned with the well-established principle that "words used in one place in a statute have the same meaning in every other place in the statute." *State v. Rogers*, 371 N.C. 397, 403 (2018) (extraneity omitted). Accordingly, we hold that only relevant criteria require written findings under N.C.G.S. § 7B-906.1(e). The trial court has discretion to determine which factors were relevant.

Here the trial court did not need to make written findings as to whether Liam could be placed with respondent in the next six months. It was uncontested that Liam could not. Throughout the permanency-planning process, no party advocated that respondent should receive custody of Liam within the next six months. Instead, the parties

contested whether Liam should remain with petitioners or be transferred to the care of the maternal grandfather. In fact, DSS affirmatively agreed that respondent should not receive custody of Liam. Indeed, the DSS court report stated that it "still has concerns" about placing Liam with respondent "due to the severe abuse and injuries that [Liam] sustained without explanation from the parents."

The record therefore reveals that it was uncontested that Liam would not be placed in respondent's care within the next six months. As we stated before, where factors are uncontested there is no reason for the trial court to make written findings about them. *See In re A.K.O.*, 375 N.C. 698, 704 (2020) (clarifying that the identical phrase does not require written findings as to each factor, "particularly when there was no conflict in the evidence regarding those factors"). Accordingly, the trial court did not abuse its discretion by choosing not to make a written finding on this uncontested criterion.

Even still, the trial court's consideration of "[w]hether it is possible for the juvenile to be placed with a parent within the next six months" can be properly inferred from the findings. *See*, *e.g.*, *In re L.R.L.B.*, 377 N.C. 311, 323 (2021) (encouraging appellate courts to draw plausible inferences from findings to determine simply whether the "trial court adequately address[ed] the substance and concerns of [the statute]").

The trial court's previous permanency-planning orders had repeatedly found "[t]hat it is not likely that [Liam] will be returned home within the next six (6) months and placement with a parent is not in [Liam's] best interests because, neither parent is able to explain how [Liam] sustained the serious injuries." Then, in the final order the trial court found again that "[t]he parents were and are unable to provide any plausible explanation as to the cause of the injuries." From the context of these prior uncontested orders, an appellate court can reasonably draw the plausible inference that placement with a parent was not possible.

Moreover, the final order found Liam's injuries were the result of "non-accidental trauma" while in "the exclusive care" of respondent and Liam's father, and that both parents have been "unable to provide any plausible explanation as to the cause of the injuries." Collectively, these findings, too, create the plausible inference that placement with either parent was not possible. *See*, *e.g.*, *In re L.R.L.B.*, 377 N.C. at 323 (concluding that a finding that the respondent-mother was living with a domestic abuser was sufficient to infer that the trial court considered whether respondent was acting consistent with the juvenile's health or safety).

Liam could not be placed with respondent in the next six months because the very problems that necessitated Liam's removal had not been resolved. *See id.* (reasoning that, "the very problems that necessitated [the juvenile's] removal from the home" had not changed and therefore "returning [the juvenile] to his parents' home would be 'contrary to his welfare and best interests' "). Moreover, respondent failed to comply with the part of the plan specifically designed to address the devastating effect of these injuries; for instance, respondent has not participated in any of Liam's multiple weekly medical appointments. These findings adequately address the substance and concerns of N.C.G.S. § 7B-906.1(e).

Consistent with this Court's previous holdings, we conclude that the trial court did not abuse its discretion by failing to make written findings of fact regarding uncontested statutory factors. This conclusion alone is sufficient to support our holding that the trial court did not err under N.C.G.S. § 7B-906.1(e). Even still, we further conclude that the trial court *did* make sufficient findings for a reviewing court to draw the plausible inference that the juvenile's placement with a parent is unlikely within six months. Accordingly, we hold that the trial court did not err in its application of N.C.G.S. § 7B-906.1(e).

B. N.C.G.S. §§ 7B-906.2(b) and 7B-906.2(d)

The next provisions at issue govern the feasibility of reunification. "The goal of the permanency planning process is to 'return the child to their home or when that is not possible to a safe, permanent home within a reasonable period of time.' " *In re J.M.*, 384 N.C. at 593 (quoting Sara DePasquale, *Abuse, Neglect, Dependency and Termination of Parental Rights Proceedings in North Carolina* 7–10 (UNC School of Government 2022)). Aligned with this goal, reunification ordinarily must be the primary or secondary plan in a juvenile's permanency plan. N.C.G.S. § 7B-906.2(b).

Yet, "[t]he requirement to make reunification the primary or secondary plan is not absolute." *In re J.M.*, 384 N.C. at 594. Reunification is no longer required where "the [trial] court makes written findings that reunification efforts clearly would be unsuccessful or would be inconsistent with the juvenile's health or safety." *See* N.C.G.S. § 7B-906.2(b). Further, the court must make written findings at each permanency hearing regarding certain factors listed in N.C.G.S. § 7B-906.2(d), "which shall demonstrate the degree of success or failure toward reunification." *See id.* § 7B-906.2(d). These factors are:

> (1) Whether the parent is making adequate progress within a reasonable period of time under the plan.
>
> (2) Whether the parent is actively participating in or cooperating with the plan, the department [of Social Services], and the guardian ad litem for the juvenile.
>
> (3) Whether the parent remains available to the court, the department [of Social Services] and the guardian ad litem for the juvenile.
>
> (4) Whether the parent is acting in a manner inconsistent with the health or safety of the juvenile.

Id. § 7B-906.2(d) (2023).

At the outset, we reiterate this Court's previously articulated standard for written findings under the Juvenile Code. Specifically, the trial court's written findings need not track the statutory language verbatim, but "they must make clear that the trial court considered the evidence in light of whether reunification would be clearly unsuccessful or would be inconsistent with the juvenile's health, safety, and need for a safe, permanent home within a reasonable period of time." *In re J.M.*, 384 N.C. at 594 (extraneity omitted) (referencing N.C.G.S. § 7B-906.2).

Similarly, in keeping with this Court's approach under N.C.G.S. §§ 7B-906.1(e) and 7B-1110(a), we recognize the Juvenile Code's flexibility for written findings that are responsive to each permanency-planning dispute. Subsection § 7B-906.2(d) requires written findings "which shall demonstrate the degree of success or failure toward reunification." N.C.G.S. § 7B-906.2(d). We therefore hold that only those factors which demonstrate the degree of success or failure toward reunification require written findings.

The Court of Appeals held that the trial court failed to make sufficient findings under N.C.G.S. §§ 7B-906.2(b) and 7B-906.2(d)(2)–(d)(4). *In re L.L.*, slip op. at 19–20. We disagree. As discussed below, a careful examination of the final order and its incorporated findings confirms that these statutory requirements have been met.

1. N.C.G.S. §§ 7B-906.2(b) and 7B-906.2(d)(4)

Subsection § 7B-906.2(b) is synonymous with N.C.G.S. § 7B-906.2(d)(4) and therefore warrants the same analysis. Both require written findings that demonstrate reunification is inconsistent with the health or safety

of the juvenile. The final order, while not tracking the statutory language verbatim, did just that.

The final order found that Liam suffered severe injuries from abuse while in respondent's and Liam's father's care, that respondent has never plausibly explained the cause of those injuries, that respondent was charged with felony child abuse, and that respondent has failed to comply with trial court orders to participate in Liam's medical appointments to familiarize herself with the "extreme medical needs" of Liam. While not quoting its exact language, the final order's written findings clearly address the statute's concerns. *See In re L.M.T.*, 367 N.C. 165, 168 (2013) ("The trial court's written findings must address the statute's concerns, but need not quote its exact language."); *see also In re J.M.*, 384 N.C. 584 (2023).

Moreover, due regard for our own precedent requires us to hold that such findings are sufficient. This Court has repeatedly held that a parent's failure to offer an honest explanation for his or her child's injuries while the child was in that parent's sole custody can satisfy N.C.G.S. §§ 7B-906.2(b) and 7B-906.2(d)(4). *See In re J.M.*, 384 N.C. at 602 ("[T]he record evidence in this case provides ample basis for the trial court's determination that respondents' persistent unwillingness to acknowledge responsibility for [the juvenile's] life-threatening injuries would render further efforts at reunification clearly unsuccessful and 'inconsistent with the [juveniles'] health or safety.' " (second alteration in original)); *see also In re D.W.P.*, 373 N.C. 327, 338 (2020) (observing that "[w]ithout recognizing the cause of [the juvenile's] injuries, respondent-mother cannot prevent them from reoccurring"; therefore, termination of parental rights was proper). After all, a permanency-planning order is not a final order and may be modified at any time in response to new developments in a case, such as offering an honest explanation for Liam's injuries or attending medical appointments to understand the care Liam requires. *See In re J.M.*, 384 N.C. at 602 (noting the same).

In summary, the final order made findings that respondent failed to take responsibility for the severe abuse to Liam that occurred while in respondent's care. This alone is sufficient. But the final order went further. The trial court found that respondent failed to comply with numerous trial court orders which directed respondent to make an effort to understand the life-altering impact of that abuse on Liam. These findings address the statute's concerns and amount to more than enough support for the conclusion that reunification is inconsistent with the health or safety of Liam.

Accordingly, the record evidence and our caselaw confirm that the written findings contained in the final order fulfill the requirements of N.C.G.S. §§ 7B-906.2(b) and 7B-906.2(d)(4). The trial court did not err in its assessment of the reunification issue.

2. N.C.G.S. §§ 7B-906.2(d)(2) & (d)(3)

Subfactors §§ 7B-906.2(d)(2) and 7B-906.2(d)(3) relate to respondent's cooperation and progress with her case plan and her interactions with the trial court. *See* N.C.G.S. § 7B-906.2(d)(2) ("Whether the parent is actively participating in or cooperating with the plan, the department [of social services], and the guardian ad litem for the juvenile."); *see also id.* § 7B-906.2(d)(3) ("Whether the parent remains available to the court, the department [of social services] and the guardian ad litem for the juvenile.").

The Court of Appeals concluded that "there are no findings that address whether [respondent] had cooperated with DSS or the guardian ad litem, as required by [N.C.G.S. §] 7B-906.2(d)(2)." *In re L.L.*, slip op. at 19. The court additionally opined that "[s]imilarly, no findings address the considerations of [N.C.G.S. §] 7B-906.2(d)(3)." *Id.*

It appears that the Court of Appeals did not properly consider the DSS court report that the trial court incorporated by reference into its final order. When trial courts incorporate documents by reference, the factual findings contained in those documents—but not their opinions or recommendations—become the findings of the trial court's order. *See In re K.N.*, 378 N.C. 450, 459 (2021) (examining external files of which the trial court took judicial notice).

The DSS report listed in chronological order all contact maintained by both parents with the trial court, DSS, and the GAL. The report also noted that respondent "has travel[ed] to several court hearings"; and the report explicitly listed all prior legal proceedings in this matter. The DSS report further detailed respondent's participation with her case plan, including completing a parenting class, participating in therapy, and obtaining housing; yet the report also noted respondent's failure to attend Liam's medical appointments as ordered by the court. Taken together, these incorporated facts exhibit respondent's availability to the trial court and the GAL under N.C.G.S. § 7B-906.2(d)(3), as well as her participation with the plan, DSS, and the GAL under N.C.G.S. § 7B-906.2(d)(2). Once again, the trial court is not obligated to recite the statutory language. *In re J.M.*, 384 N.C. at 594.

Furthermore, as we have explained above, the trial court has discretion whether to make written findings under N.C.G.S. § 7B-906.2(d). Only

those factors that demonstrate the degree of success or failure toward reunification require written findings. Consequently, the trial court was not required to mechanically recite such inapplicable subfactors.

For these reasons, the trial court did not abuse its discretion. Accordingly, we conclude the trial court did not err by failing to satisfy the requirements under N.C.G.S. §§ 7B-906.2(d)(2) and 7B-906.2(d)(3).

C. N.C.G.S. § 7B-903(a1)

Subsection § 7B-903(a1) guides a trial court's placement of the juvenile. It provides a statutory preference for the placement of the juvenile with a relative. The subsection states:

> In placing a juvenile in out-of-home care under this section, the court *shall first* consider whether a relative of the juvenile is willing and able to provide proper care and supervision of the juvenile in a safe home. If the court finds that the relative is willing and able to provide proper care and supervision in a safe home, then the court *shall order* placement of the juvenile with the relative *unless* the court finds that the placement is contrary to the best interests of the juvenile.

N.C.G.S. § 7B-903(a1) (emphases added). The Court of Appeals reasoned that the trial court erred because its "findings were insufficient to overcome the statutory preference for placement with a willing and able relative." *In re L.L.*, slip op. at 20.

The Court of Appeals read the subsection as a directive to the trial court to *first* "make findings" as to "whether the maternal grandfather is willing and able to provide proper care and supervision for Liam, which can include appropriate care provided by other parties during the maternal grandfather's workday." *Id.* at 24. *Then*, "[i]f the court determines placement with the maternal grandfather is not in Liam's best interests, that determination must be supported with and based on findings explaining why." *Id.*

Notably, however, N.C.G.S. § 7B-903(a1)'s language does not require the trial court to make any written findings, but rather to "*consider* whether a relative of the juvenile is willing and able to provide proper care and supervision of the juvenile in a safe home." N.C.G.S. § 7B-903(a1) (emphasis added).

This language is in contrast to the language contained in N.C.G.S. § 7B-906.1(e). *See id.* § 7B-906.1(e). As previously discussed, N.C.G.S.

§ 7B-906.1(e) *does* require written findings for those *relevant* subfactors. This requirement is justified by the plain language of N.C.G.S. § 7B-906.1(e) which states that "the court *shall* additionally *consider* the following criteria *and make written findings* regarding those that are relevant." *Id.* (emphases added). Subsection § 7B-906.1(e) makes clear that when the legislature intends a "written findings requirement," it states just that. In contrast, N.C.G.S. § 7B-903(a1) says nothing about written findings. Therefore, we presume the legislature did not intend to impose a written findings requirement in N.C.G.S. § 7B-903(a1) because it did not state one. *See State v. Baker*, 229 N.C. 73, 77 (1948) ("It is reasonable to assume that the Legislature comprehended the import of the words it employed to express its intent when it enacted the statutes [at issue].").

Moreover, the language of the subsection does not support the Court of Appeals' interpretation that the trial court must consider in a vacuum whether placement with the maternal grandfather was contrary to Liam's best interests. *See In re L.L.*, slip op. at 24 ("The statute requires a full analysis of a relative placement prior to *any* consideration of a non-relative placement."). To be sure, it would be functionally impossible for the trial court to determine which placement option is in the "best interests" of the juvenile without considering and comparing all the placement options.[7]

Whether the trial court properly considered N.C.G.S. 7B-903(a1) is reviewed for abuse of discretion.

Here the trial court certainly considered whether the maternal grandfather was "willing and able" to care for Liam. The maternal grandfather testified extensively at the hearing about his willingness and ability to take custody of Liam. The trial court then expressly found "[t]hat it is in the best interests of [Liam] that his custody be granted to [petitioners]." The trial court then made twelve additional findings outlining why placement with petitioners was better for Liam than placement with the maternal grandfather.

For example, despite the maternal grandfather's testimony regarding his capacity to care for Liam, the trial court was doubtful based on its finding that he "is employed full-time and unable to provide the type

7. To the extent the Court of Appeals' opinion might be read to mean that subsection 7B-903(a1) requires a specific arrangement of written findings, we reject any such understanding. Subsection 7B-903(a1) does not require any specific sequence of findings in the trial court's order.

of childcare necessary to meet [Liam's] needs." Instead, the trial court found that the grandfather's girlfriend, who "is not related by blood or marriage to [Liam]," would care for him. Moreover the court found that, "[Liam] has not had significant regular contact with [the grandfather] or [his girlfriend] sufficient to form a close bond with them." At the hearing, the trial court even voiced concern that neither the maternal grandfather nor his girlfriend had ever actually talked with Liam's doctors to understand the level of medical care Liam requires.

It is evident from the trial court's findings that it did consider placement of Liam with the grandfather as the statute requires. However, the trial court was unconvinced that placement with the grandfather—who lacked knowledge of the full extent of Liam's medical needs, who worked full-time, and who lacked any bond with Liam—was in Liam's best interests. This reflects the trial court's proper exercise of its function as a factfinder. *In re N.C.E.*, 379 N.C. 283, 292 (2021) ("[I]t was the trial court's role as fact-finder 'to pass upon the credibility of the witnesses and the weight to be given their testimony and the reasonable inferences to be drawn therefrom.' " (quoting *In re A.R.A.*, 373 N.C. 190, 196 (2019) (extraneity omitted))).

In contrast, the trial court also made numerous findings in the final order regarding the placement of Liam with petitioners. The trial court found that "[Liam] has been living with the Hall's for twenty-six months, [and] they are the only 'family' that he is familiar with." The court further found that "[Liam] has a close, loving, and bonded relationship in the nature of a parent/child relationship with the Hall's and . . . their children." Moreover, the court found that "[petitioners] have demonstrated over the past twenty-six months that they are willing and able to provide for all of [Liam's] special and intensive needs." These trial court findings adequately demonstrate that placement with the maternal grandfather was not in Liam's best interests.

Furthermore, in findings of facts numbers six and ten, the trial court confirmed that it *considered* the GAL's report that was received into evidence. This report evidenced the GAL's strong recommendation that Liam remain with the petitioners. As stated above, the GAL reported that as a result of his extensive injuries "Liam requires 24-hour care [that] will continue through his entire life." Petitioners currently provide and are committed to providing that continued care in the future. The report further explains that, in addition to the petitioner's proven ability to provide for all of Liam's medical needs, Liam "will shut down and become unresponsive" "if the foster mother[, petitioner,] is not present." This is because "[Liam's] cognitive abilities are very limited such that he

does not understand being away from his foster mother." Moreover, the report emphasized that all of "[Liam's] therapists agree that if [Liam] is removed from [petitioners' care], his condition will severely deteriorate."

The hearing testimony, reports, and resulting final order indicate that the trial court considered placement with the maternal grandfather. The trial court's consideration of the maternal grandfather but ultimate decision to place Liam with petitioners instead is not manifestly unsupported by reason. We therefore conclude that the trial court did not abuse its discretion and thus satisfied the plain language of N.C.G.S. § 7B-903(a1).

IV. Conclusion

In this case, the trial court removed an infant from the custody of his parents after one or both parents inflicted life-altering injuries upon him. Confronted with the severity of the abuse, the unwillingness of either parent to admit responsibility, the extensive ongoing needs of the child as a result of this unexplained abuse, and the failure of respondent to gain an understanding of the child's medical needs as the court repeatedly ordered, the trial court determined that reunification with respondent and placement of the child with respondent's father would be inconsistent with the child's health or safety. We hold that those findings contained in the trial court's order are sufficient to satisfy the provisions of N.C.G.S. §§ 7B-906.1(e), 7B-906.2(b), 7B-906.2(d), and 7B-903(a1). Accordingly, we reverse the decision of the Court of Appeals and affirm the trial court's order awarding full custody of Liam to petitioners and converting the case to a Chapter 50 civil custody proceeding.

REVERSED.

Justice RIGGS concurring in part and dissenting in part.

Liam's short life has already been harder than any child's life should be, and I understand the resistance to disrupting the stability he has found with his foster parents. However, as judges, emotion plays no role in our obligation to apply the law and defer to the legislature's policy decisions. In difficult situations like this, the General Assembly has evinced a clear preference that children should be placed with willing and able relatives rather than with the department of social services or a foster family. *See* N.C.G.S. § 7B-903(a1) (2023) ("In placing a juvenile in out-of-home care under this section, the court shall first consider whether a relative of the juvenile is willing and able to provide proper

care and supervision of the juvenile in a safe home."). The preference for relative placement is rooted in the state's objective to "design an appropriate plan to meet the needs of the juvenile" and "strengthen the home situation" with appropriate community-level resources. *Id.* § 7B-900 (2023). This direction aligns with the federal requirement that state foster care systems "shall consider giving preference to an adult relative over a non-related caregiver when determining a placement for a child" to be eligible for federal social security grants. 42 U.S.C. § 671(a)(19).

Here, the majority's statutory interpretation of N.C.G.S. § 7B-903(a1) contradicts the General Assembly's clear policy preference for placement of children with willing and able relatives. The majority's decision allows direct comparison of relative placement with foster care placements and runs the risk of introducing class bias into child placement decisions. Further, the majority weakens the statutory requirement that the trial court make specific findings of fact at each permanency planning hearing and before eliminating reunification with the child's parent under N.C.G.S. § 7B-906.2. This majority's decision to disregard the statutory requirements for written findings will only serve to frustrate the ability of appellate courts to engage in meaningful review of disposition orders under Chapter 7B. For these reasons, I respectfully dissent in part. I concur in part with the majority's decision that N.C.G.S. § 7B-906.1(e) only requires written findings as to the factors that are relevant to the case.

I. Analysis

A. Preference for Relative Placement Under N.C.G.S. § 7B-903(a1).

In interpreting N.C.G.S. § 7B-903(a1), the majority first concluded that a trial court is not required to make any written findings establishing that the trial court first considered a family placement because, unlike other statutes, the statutory language of N.C.G.S. § 7B-903(a1) does not explicitly require the trial court to make written findings. The statute, however, requires if the trial court "*finds* that the relative is willing and able to provide proper care and supervision in a safe home, then the court *shall* order placement of the juvenile with the relative unless the court finds that the placement is contrary to the best interests of the juvenile." N.C.G.S. § 7B-903(a1) (emphases added). Second, the majority effectively writes the preference for relative placement out of the statute by concluding—contrary to the plain language of the statute—that the trial court can compare a foster care placement to a relative placement. I disagree with both conclusions.

First, findings of fact play an important role in the legal system by allowing appellate courts to engage in meaningful review of the trial court's decision. *See State v. Jordan*, 385 N.C. 753, 757 (2024) (recognizing that when the trial court does not make findings of fact, the lack of findings frustrates the ability of appellate courts to engage in appellate review because the appellate court has no underlying facts to which it can apply the law). In reviewing a disposition order, like the order in this case, appellate courts consider whether the findings of fact support the conclusions of law. *See*, *e.g.*, *In re J.M.*, 384 N.C. 584, 591 (2023) ("Appellate review of a trial court's permanency planning order is restricted to whether there is competent evidence in the record to support the findings of fact and whether the findings support the conclusions of law." (cleaned up)); *In re J.D.R.*, 239 N.C. App. 63, 66 (2015) ("On appeal from the trial court's disposition order, we must determine (1) whether the trial court's findings of fact are supported by clear and convincing evidence, and (2) whether its conclusions of law are supported by the findings.").

When the trial court does not provide findings of fact to support a conclusion that relative placement is "contrary to the best interests of the juvenile," N.C.G.S. § 7B-903(a1), then the appellate court will have no choice but to remand for additional findings or essentially abandon any meaningful appellate review. *See*, *e.g.*, *In re L.R.L.B.*, 377 N.C. 311, 326 (2021) (remanding for additional findings of fact sufficient for appellate review regarding whether the trial court contemplated N.C.G.S. § 7B-906.2(d)(3)); *In re N.K.*, 375 N.C. 805, 824–25 (2020) (remanding for findings regarding whether the department of social services complied with notice requirements under the Indian Child Welfare Act). Although this statute does not explicitly require findings of fact to demonstrate that the trial court first considered relative placement, such findings would be consistent with the legislature's commitment to creating records that allow for meaningful appellate review. *See Coble v. Coble*, 300 N.C. 708, 712 (1980) ("The requirement for appropriately detailed findings is thus not a mere formality or a rule of empty ritual; it is designed . . . to allow the appellate courts to perform their proper function in the judicial system." (cleaned up)). Findings are necessary to demonstrate whether the trial court appropriately considered the relative placement before making a permanent placement decision. Consistent with the design and practice of all juvenile cases, to minimize disruptive revisiting of placement decisions during appellate review, I believe the General Assembly did indeed intend for trial courts to make findings of fact that it "first consider[ed]" whether placement with a relative would be "contrary to the best interests of the juvenile." N.C.G.S. § 7B-903(a1).

Second, the majority asserts that "it would be functionally impossible for the trial court to determine which placement option is in the 'best interests' of the juvenile, without considering and comparing all the placement options." Therefore, in the majority's view, the trial court must compare a relative placement with a foster care placement and award custody to the "better" placement between the two.

This interpretation is obviously contrary to the plain language of N.C.G.S. § 7B-903(a1). It is hard to imagine that the legislature could have been clearer. "[T]he court shall *first consider* whether a relative of the juvenile is willing and able to provide proper care and supervision of the juvenile in a safe home." N.C.G.S. § 7B-903(a1) (emphasis added). There is simply no reasonable interpretation of this statutory language to allow for a comparison between a relative placement and a foster care placement. "If the court finds that the relative is willing and able to provide proper care and supervision in a safe home, then the court *shall* order placement of the juvenile with the relative unless the court finds that the placement is contrary to the best interests of the juvenile." *Id.* (emphasis added). "It is well established that the word 'shall' is generally imperative or mandatory when used in our statutes." *Morningstar Marinas/Eaton Ferry, LLC v. Warren Cnty.*, 368 N.C. 360, 365 (2015) (cleaned up) (quoting *Multiple Claimants v. N.C. Dep't of Health & Hum. Servs.*, 361 N.C. 372, 378 (2007)). Thus, the statute mandates that the trial court consider the suitability of a relative placement before it even considers the foster care placement. Direct comparison of the placements contradicts the plain language of the statute.

Sensible policy reasons explain why the legislature did not adopt the approach the majority takes today. Directly comparing foster care placements to relatives creates a troubling environment where foster or adoptive placements with more financial means or two-parent households have an advantage over less affluent or single relatives. The state has no business deciding whether a nicer house or access to a car means that a non-relative placement is better for the child than a relative placement. Put simply, the majority opens the door for classist biases and assumptions to pour into trial courts' considerations of placement and best interest. Family poverty will cost children the opportunity to stay in their community and grow up with their relatives. Working people will be treated as lesser parents than those in households where one or more parents have the privilege of not working outside the home. Economic wealth will determine custody. Opening this door is a terrible injustice for many far outside the confines of this case.

The General Assembly has clearly decided that relative placement is preferred. Today the majority steps beyond its proper role and into the role of legislature by rewriting the statute to, at best, create an even playing field between relative placements and foster care placements and, at worst, disadvantage relative placements because of wealth. *See Brown v. Brown*, 213 N.C. 347, 349 (1938) ("[I]t is a well-settled rule that all questions of public policy are for the determination of the Legislature and not for the courts, it will not be assumed that any statute enacted by the Legislature was intended to override or depart from principles of public policy founded on good morals unless the language of the statute clearly and unequivocally indicates such an intent.").

Beyond this enormous overstep, legally, the majority also is on shaky ground factually. The trial court in this case did not find that placement with Liam's grandfather would be contrary to his best interests, as required by the statute. Instead, the trial court found that "it is in the best interests of the juvenile that his custody be granted to [the Halls.]" The trial court's order includes four findings about placement with the grandfather: (1) "[the grandfather] is employed full-time and unable to provide the type of childcare necessary to meet [Liam's] needs"; (2) "[the grandfather] lives with his [partner], . . . who is willing to provide care for the child"; (3) "[the grandfather's partner] is not related by blood or marriage to [Liam]"; and (4) "[t]he child has not had significant regular contact with [the grandfather] or [the grandfather's partner] sufficient to form a close bond with them."

Concluding that placement with Liam's grandfather is contrary to Liam's best interest simply because the grandfather works full time and Liam's caretaker is not related by blood or marriage necessarily suggests that working parents are somehow less valuable or important than stay-at-home parents. I worry that if the grandfather were employed as an investment banker or in some other occupation that allowed him to pay for professional nurses and therapists to care for Liam all day, then the trial court and the majority might not have had the same concerns about Liam's care during working hours. And that in and of itself is a problem. Here, the record shows that Grandfather is gainfully employed and able to provide for Liam; further, his partner left her job to provide full-time care to meet Liam's unique needs. Absent further findings, by necessity made in writing, establishing that the trial court found it is contrary to Liam's best interest to be placed with the grandfather, the majority's conclusion unreasonably limits relative placements by approving improper considerations as to who provides care during working hours. *See, e.g.*, *Fisher v. Gaydon*, 124 N.C. App. 442, 445 (1996) (recognizing

that the "traditional two-parent model . . . is not the determinative factor qualifying a group of persons as a family" and that "[*u*]*nmarried* parents living with their children have also been accorded recognition as family units"); *see also Moore v. City of E. Cleveland*, 431 U.S. 494, 499 (1977) ("[W]hen the government intrudes on choices concerning family living arrangements, this Court must examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation.").

For these reasons, I would remand this case to the trial court to make findings about whether placement with Liam's grandfather is contrary to Liam's best interest.

B. Required Findings Under N.C.G.S. § 7B-906.2(b) & (d).

The majority also weakens the statutory requirements for findings of fact in other areas of Chapter 7B, specifically the requirement for findings when the trial court ceases reunification efforts with the parents. The decision to cease reunification efforts with a child's parents is a significant step that should not be taken lightly.

For that reason, at a permanency planning hearing during which the trial court decides to cease reunification efforts with the parents, "the court shall make written findings as to each of the [factors], which shall demonstrate the degree of success or failure toward reunification." N.C.G.S. § 7B-906.2(d) (2023). Additionally, the trial court must make "written findings that reunification efforts clearly would be unsuccessful or would be inconsistent with the juvenile's health or safety." *Id.* § 7B-906.2(b).

> Although use of the actual statutory language is the best practice, the statute does not demand a verbatim recitation of its language. Instead, the order must make clear that the trial court considered the evidence in light of whether reunification would be futile or would be inconsistent with the juvenile's health, safety, and need for a safe, permanent home within a reasonable period of time.

In re L.E.W., 375 N.C. 124, 129–30 (2020) (cleaned up) (considering whether the trial court made the factual findings required by N.C.G.S. § 7B-906.2(b) and (d) in eliminating reunification with the parent).

In this case, the majority concluded the order was sufficient to eliminate reunification for three reasons. First, significantly, the majority holds that the trial court does not need to make written findings about

each factor under N.C.G.S. § 7B-906.2(d)—"only those factors that demonstrate the degree of success or failure toward reunification require written findings." This conclusion directly contravenes the plain language of the statute. Second, the majority determined that factual findings contained in documents that have been incorporated by reference become findings of the trial court. This conclusion also runs contrary to the General Assembly's requirement that the trial court make written findings. Finally, the majority concluded that N.C.G.S. § 7B-906.2(b) is synonymous with N.C.G.S. § 7B-906.2(d)(4), and therefore, separate analysis of the factors is unnecessary. In my view, these required findings address independent issues and warrant separate findings.

1. Subsection 7B-906.2(d) Requires Written Findings for Each Factor

First, the majority concluded that only those N.C.G.S. § 7B-906.2(d) "factors that demonstrate the degree of success or failure toward reunification require written findings." The basis for this conclusion was that in other areas of the Juvenile Code, the General Assembly included limiting language that written findings were only required for those factors that were relevant. *See* N.C.G.S. § 7B-906.1(e) (2023) ("[T]he court shall additionally consider the following criteria and make written findings regarding those that are relevant . . . ."; N.C.G.S. § 7B-1110(a) (2023) ("[T]he court shall consider the following criteria and make written findings regarding the following that are relevant . . . ."). The comparison is flawed because the mandate and language in N.C.G.S. § 7B-906.2(d) is markedly different than those other examples. Here, "the court *shall make written findings* as to *each* of the following, which shall demonstrate the degree of success or failure toward reunification." N.C.G.S. § 7B-906.2(d) (emphases added).

The statute instructs that written findings shall be made for all factors, and the second clause provides instructions on the purpose of those findings. *See In re H.A.J.*, 377 N.C. 43, 51 (2021) (affirming the trial court's order after concluding the "trial court's findings of fact establish that it addressed *each of the factors* specified in N.C.G.S. § 906.2(d)" (emphasis added)). The majority relied upon the clause "which shall demonstrate the degree of success or failure toward reunification" to support its conclusion that findings are not required for all factors. But of course, the basic rules of grammar tell us that a phrase introduced by the word "which" is a nonrestrictive clause, and the omission of the clause does not change the meaning of the sentence. *See* Bryan A. Garner, *The Redbook: A Manual on Legal Style*, § 13.3, at 342 (5th ed. 2023) ("*Which* introduces a nonrestrictive clause, one set off by commas

and whose omission would not change the meaning . . . ."); *see also Smith Chapel Baptist Church v. City of Durham*, 350 N.C. 805, 811 (1999) ("Ordinary rules of grammar apply when ascertaining the meaning of a statute." (quoting *Dunn v. Pac. Emps. Ins. Co.*, 332 N.C. 129, 134 (1992))). Therefore, the sentence requiring findings under N.C.G.S. § 7B-906.2(d) can only properly be read as written: "[T]he court shall make written findings as to each of the following[.]" N.C.G.S. § 7B-906.2(d). For that reason, I would hold that N.C.G.S. § 7B-906.2(d) requires the trial court to make written findings as to each factor.

2. The Trial Court—Not the Reference Documents—Makes the Findings of Fact

Second, the majority creates a novel standard that "factual findings contained in [reference] documents" become findings of the trial court. Relying upon this Court's decision in *In re K.N.*, 378 N.C. 450 (2021), the majority says that the trial court does not need to make written findings; rather, the appellate court can use factual findings found in documents the trial court incorporated by reference, and those findings become the findings of the trial court. However, in *In re K.N.*, "the trial court took judicial notice of the children's underlying file," but the trial court itself made the findings of fact and conclusions of law. *Id.* at 459. The case only stands for the proposition that the trial court may take judicial notice of and incorporate reference documents, *id.*, but the trial court—not the authors of the incorporated documents—must still make the findings of fact required by N.C.G.S. § 7B-906.2.

The General Assembly identified a requirement that the trial court make the written findings of fact under both N.C.G.S. § 7B-906.2(b) and N.C.G.S. § 7B-906.2(d) and "[i]t is not the province of the courts to rewrite statutes." *State v. J.C.*, 372 N.C. 203, 208 (2019). This Court has held that "information contained in the respective reports of [department of social services] and the [guardian ad litem], however, does not satisfy the trial court's statutory obligation to fulfill the requirements of N.C.G.S. § 7B-906.2(d)[ ] by making written findings . . . ." *In re L.R.L.B.*, 377 N.C. at 324 (concluding that information in a department of social services report or guardian ad litem report was insufficient to meet the statutory requirement for a written finding under N.C.G.S. § 7B-906.2(d)(3)). Additionally, for the required finding under N.C.G.S. § 7B-906.2(b), this Court has held that the trial court must make clear that it "considered the evidence in light of whether reunification would be clearly unsuccessful or would be inconsistent with the juvenile's health, safety, and need for a safe, permanent home within a reasonable period of time." *In re J.M.*, 384 N.C. at 594 (cleaned up) (quoting *In re H.A.J.*, 377 N.C.

43, 49 (2021)). Unless the trial court makes such findings, an appellate court cannot determine whether the trial court properly considered the evidence.

On review, an appellate court should not comb through the reference documents to identify "findings" in the record because doing so would infringe on the trial court's duty to decide "the weight and credibility of the evidence, and the inferences drawn from the evidence." *In re D.W.P.*, 373 N.C. 327, 330 (2020). The "trial court must, through processes of logical reasoning, based on the evidentiary facts before it, find the ultimate facts essential to support the conclusions of law." *Id.* at 330–31 (cleaned up). "The resulting findings of fact must be sufficiently specific to allow an appellate court to review the decision and test the correctness of the judgment." *Id.* at 331 (cleaned up).

Thus, I would remand this case to the trial court for the trial court to make findings of fact as to each of the required factors in N.C.G.S. § 7B-906.2(d) rather than assuming that some parts of the incorporated documents constitute the trial court's findings.

3. Subsections 7B-906.2(b) & 7B-906.2(d) Require Separate Findings

Third, the majority merges the requirement for findings under N.C.G.S. § 7B-906.2(d)(4) regarding Liam's mother's success or failure toward reunification with the ultimate finding that "reunification efforts clearly would be unsuccessful or would be inconsistent with the juvenile's health and safety" under N.C.G.S. § 7B-906.2(b). These are different findings and should not be combined into a single analysis.

The requirements of N.C.G.S. § 7B-906.2(d) direct the trial court to consider "the degree of success or failure" the parent is making toward reunification. N.C.G.S. § 7B-906.2(d). Specifically, N.C.G.S. § 7B-906.2(d)(4) requires a written finding as to "[w]hether the parent is acting in a manner inconsistent with the health or safety of the juvenile." *Id.* § 7B-906.2(d)(4). The language here evidences an intent to consider how the parent is currently acting toward the child. In contrast, N.C.G.S. § 7B-906.2(b) requires an ultimate conclusion as to whether "reunification efforts clearly would be unsuccessful or would be inconsistent with the juvenile's health and safety" before ceasing all effort for reunification. *Id.* § 7B-906.2(b). Subsection 7B-906.2(b) asks the trial court to consider the growth and development of the parent toward healthy future interactions with the child.

In concluding that the findings of fact in the order were sufficient under both subsections, the majority primarily relied upon the past

incidents that originally led to Liam being taken into custody by the Onslow County Department of Social Services. However, the trial court order gave little consideration to findings about the current interactions between Liam and his mother. That is not to say that the trial court might not, in compliance with the statute, arrive at the same conclusion; however, in my view, the trial court fell short of establishing that further efforts at reunification would clearly be unsuccessful or inconsistent with the health and safety of the child. I would remand this case to the trial court to make the findings of fact required by our statutes.

Finally, the majority concluded that the mother's failure to offer an explanation for the child's injury alone is sufficient to meet the requirement for findings to cease reunification with the parents under N.C.G.S. § 7B-906.2(b). While I understand that our most recent precedent holds that a parent's "persistent unwillingness to acknowledge responsibility for [a child's] life-threatening injuries would render further efforts at reunification clearly unsuccessful and inconsistent with the juvenile's health or safety" and may satisfy the requirement of subsection 7B-906.2(b), *In re J.M.*, 384 N.C. at 602 (cleaned-up), I also recognize that situations exist in which a parent did not injure their child and does not have the information to provide an honest explanation for the injuries, *see id.* at 613 (Earls, J., dissenting) (recognizing the problem of creating a situation where, in cases in which the parent actually does not know who injured the child, "[t]here is nothing the parent can do to overcome his or her ignorance about the cause of [the child's] injuries unless the parent chooses to dishonestly blame the other").

While I agree that the mother's failure to take responsibility for Liam's injuries is a relevant consideration, I must emphasize a few additional important considerations. There is a real tension in requiring a parent facing a criminal charge to forfeit their right against self-incrimination and then also stating as the majority does, as a matter of law, that failure to claim responsibility for abuse is sufficient to sever a parent-child relationship permanently. Second, blanket rules about one specific issue are counterproductive in complex family law cases. In this case, the trial court found that "[t]he parents were and are unable to provide any plausible explanation as to the cause of the injuries." While this finding does say that the mother has not taken responsibility for Liam's life-altering injuries, the order does not establish that the mother continues to act in a manner inconsistent with Liam's health and safety. For example, it is unclear if the trial court considered, and the majority does not discuss, whether the mother's compliance with her Georgia case plan and her success in regaining custody of Liam's brother demonstrates that she is currently acting in a manner consistent with Liam's health

and safety. Such developments should be reflected in the trial court's assessments. These cases are much too complex for simplistic one-size-fits-all conclusions, and the majority contributes to that misfit. *See id.* at 615 (Earls, J., dissenting) ("Contrary to the majority's conclusion that *In re D.W.P.* requires this Court to affirm the trial court's elimination of reunification from the permanency plan here, *In re D.W.P.* suggests that a holistic review of respondent-parents' subsequent conduct was required, rather than treating their lack of knowledge about the cause of [the child's] injuries as determinative. Specifically, the parents' relationship with their children, their compliance with their case plans, and their demonstrated behavioral growth as a result of engaging with their case plan requirements are all relevant considerations in assessing whether reunification is appropriately included in their children's permanency plans.").

In sum, I would remand this case for independent findings for each of the factors identified in N.C.G.S. § 7B-906.2(d) and for an ultimate finding that continued reunification efforts would be clearly inconsistent with Liam's health or safety as required by N.C.G.S. § 7B-906.2(b).

C. Required Findings Under N.C.G.S. § 7B-906.1(e).

I concur with the majority's conclusion that a trial court is only required to make written findings about the factors in N.C.G.S. § 7B-906.1(e) that are relevant. Even still, if the factor is relevant, the trial court must make the finding. Appellate courts may, of course, make inferences from the findings in the order that is appealed but should not engage in a fact-finding journey into other orders that were not appealed or reports considered by the trial court in an effort to make findings on behalf of the trial court. *See In re L.R.L.B.*, 377 N.C. at 323–24 (remanding for additional findings when the trial court's findings do not address the statute's concerns even though information in the record may address the concern). It is not the role of the appellate court to infer the findings from orders that were not appealed or reports that the trial court considered.

II. Conclusion

In sum, I would hold that a trial court must make findings of fact to demonstrate that it first considered whether a willing and able relative placement was contrary to the best interests of the child before the trial court considers a foster care placement. Additionally, I would follow the plain language of N.C.G.S. § 7B-906.2(d) and hold that the trial court must make written findings as to each factor identified in N.C.G.S. § 7B-906.2(d). I would also hold that when a trial court decides to cease

reunification efforts with a parent, the trial court must make an independent finding demonstrating that the court considered whether further efforts at reunification would clearly be unsuccessful or inconsistent with the juvenile's health or safety as required by N.C.G.S. § 7B-906.2(b). For these reasons, I respectfully concur in part and dissent in part.

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

NORTH STATE DELI, LLC D/B/A LUCKY'S DELICATESSEN; MOTHERS & SONS, LLC D/B/A MOTHERS & SONS TRATTORIA; MATEO TAPAS, L.L.C. 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

No. 225PA21-2

Filed 13 December 2024

Insurance—commercial—government-ordered pandemic restrictions—temporary business closures—"direct physical loss" met

In a claim brought by numerous bars and restaurants (plaintiffs) seeking insurance coverage for their loss of business when—during the COVID-19 pandemic—government-mandated restrictions temporarily limited the use of and access to their physical properties, plaintiffs were entitled to partial summary judgment on the issue of whether their losses were covered by their "all-risk" commercial property insurance or supplemental business income policies. Under each policy, any ambiguity in the phrase "direct physical loss" was construed in favor of the policyholders, and, here, plaintiffs sufficiently alleged direct physical losses where government-issued orders rendered their properties unusable for their insured purposes, and the policies did not specifically exclude viruses or contaminants from covered risks.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 284 N.C. App. 330 (2023), reversing an order entered on 9 October 2020 by Judge Orlando F. Hudson Jr. in Superior Court, Durham County, and remanding the case. Heard in the Supreme Court on 22 October 2024.

The Paynter Law Firm, PLLC, by Gagan Gupta and Stuart M. Paynter, for plaintiff-appellants.

Brooks, Pierce, McLendon, Humphrey & Leonard, LLP, by Kimberly M. Marston, Jim W. Phillips Jr., and Gary S. Parsons; and Litchfield Cavo, LLP, by Daniel G. Litchfield, pro hac vice, and Alan I. Becker, pro hac vice, for defendant-appellees.

Joshua H. Stein, Attorney General, by Ryan Y. Park, Solicitor General, and Kaeli Czosek, Solicitor General Fellow, for the State of North Carolina, amicus curiae.

Robinson, Bradshaw & Hinson, P.A., by Richard C. Worf Jr.; and Covington & Burling LLP, by Rukesh A. Korde, pro hac vice, and Tyler Weinblatt, pro hac vice, for United Policyholders and National Independent Venue Association, amici curiae.

Guy W. Crabtree for North Carolina Restaurant & Lodging Association, Restaurant Law Center, and Angus Barn, Inc., amici curiae.

Office of the City Attorney for the City of Durham, by Kimberly M. Rehberg; and Patrick W. Baker, Adam M. Jones, Rhonda D. Orin, pro hac vice, Marshall Gilinksy, pro hac vice, and Madilynne Lee, pro hac vice, for Cities of Charlotte and Durham, amici curiae.

Roger A. Peters II for American Property Casualty Insurance Association, amicus curiae.

EARLS, Justice.

Plaintiffs are bars and restaurants in North Carolina (collectively, restaurants) that were forced to suspend business operations because of COVID-19-related orders by government authorities.[1] When the

1. They are Lucky's Delicatessen, Mothers & Sons Trattoria, Mateo Bar de Tapas, Saint James Seafood, Parizade, Bin 54, City Kitchen, Village Burger, Nasher Cafe, Local 22,

global pandemic struck in the spring of 2020, each restaurant carried a materially similar commercial property insurance policy with defendants Cincinnati Insurance Company and Cincinnati Casualty Company (together, Cincinnati). Those policies protect the businesses' building and personal property as well as business income from any "direct physical loss" to property not excluded by the policy. The dispute here is whether a "direct physical loss" occurred when government orders forced temporary restrictions on the use of and access to the restaurants' physical property.

Cincinnati argues that these temporary physical closures are not the type of direct "loss" contemplated by the policy and refuses liability for coverage. The restaurants argue that these closures are a covered property "loss" under the policy's ordinary meaning and seek a declaratory judgment to that effect.

Below, the trial court sided with the restaurants, finding on a motion for partial summary judgment that such losses are covered. The Court of Appeals then reversed that order, interpreting the insurance contract to exclude such losses, and remanded the case, directing the trial court to enter summary judgment in favor of defendants. *N. State Deli, LLC v. Cincinnati Ins. Co.*, 284 N.C. App. 330, 334 (2022). We disagree with the Court of Appeals based on our Court's long-standing rules of insurance contract interpretation. Because a reasonable policyholder in the restaurants' shoes could expect "direct physical loss" to property, as used in this policy, to include the results of COVID-19-era government orders which affected the restaurants' use of and access to their physical property, and because the policy otherwise contains no exclusion for viruses, we construe the ambiguity here in favor of coverage. Accordingly, we hold that this policy does cover the restaurants' alleged losses and that the restaurants are entitled to their motion for partial summary judgment. We therefore reverse the judgment of the Court of Appeals and remand to the Court of Appeals for further remand to the trial court for further proceedings consistent with this opinion.

I. Background

A. Government orders issued in response to COVID-19 forced covered establishments to suspend business operations.

"A ruling on a motion for summary judgment must consider the evidence in the light most favorable to the non-movant, drawing all

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Kipos Greek Taverna, Golden Fleece, Vin Rouge, Rosewater, Farm Table, and Gatehouse Tavern. These restaurants and bars are based in Buncombe, Chatham, Durham, Orange, and Wake counties. The parent companies of those businesses are the plaintiff parties.

inferences in the non-movant's favor." *Morrell v. Hardin Creek, Inc.*, 371 N.C. 672, 680 (2018). Undisputed evidence submitted during discovery showed the following: starting in March of 2020, state and local governments responded to the COVID-19 public health crisis with multiple orders aimed at stopping the virus's spread. *See, e.g.*, Exec. Order No. 141, 34 N.C. Reg. 2360 (May 20, 2020). The orders imposed broad limitations on the use and operation of a variety of business properties across the state. Relevant here, they forced owners and employees of bars and restaurants to close or curtail business operations. For example, varying state orders limited the sale of food and beverages "to carry-out, drive-through and delivery services only" and limited access to facilities that sell food and beverages accordingly. *See, e.g.*, Exec. Order No. 118, 34 N.C. Reg. 1834 (Mar. 17, 2020). Bars with no food service were closed outright. *See id.* Later orders kept restaurants closed except for preparing food for off-premises consumption, *see* Exec. Order No. 120, 34 N.C. Reg. 1844 (Mar. 23, 2020), and established social distancing and occupancy limits as time progressed, *e.g.*, Exec. Order No. 131, 34 N.C. Reg. 1960 (Apr. 9, 2020). These state orders were enforced by threat of criminal prosecution. *E.g.*, *id.* at 1968.

Local or municipal orders supplemented these statewide measures. For example, the City of Durham, where at least some of the restaurants are or were located, prohibited travel to or engagement in business activities with enumerated exceptions, including that restaurants were permitted to prepare and serve food for off-premises consumption only.

The restaurants offered evidence that these mandated closures, use restrictions, and corresponding declines in business income caused the businesses to furlough and lay off their employees and even risk having to close permanently. Sixteen of the restaurants closed completely after the orders, and two remained open for take-out only before closing for business in May 2020 for a period of time. After the pandemic, at least one of the restaurants (Lucky's Delicatessen) never reopened.

B. The restaurants maintained an "all-risk" commercial property insurance policy and supplemental business income coverage.

At the time of these forced closures, the restaurants carried an "all-risk" commercial property insurance policy and supplemental business income policy with Cincinnati. "All-risk" or "open-perils" insurance is a type of property insurance that protects property loss or damage from any peril, unless the peril is expressly excluded. *See Open-Perils Insurance*, Black's Law Dictionary (12th ed. 2024). It is more protective for insureds because it covers imagined and unimagined perils, so a

business need not guess in advance what misfortune might befall it. *See Avis v. Hartford Fire Ins. Co.*, 283 N.C. 142, 146 (1973). The policy is also structured to allow insurance companies to carve out certain events from coverage, including those not conducive to risk-spreading across the pool of insureds. Erik S. Knutsen & Jeffrey W. Stempel, *Infected Judgment: Problematic Rush to Conventional Wisdom and Insurance Coverage Denial in a Pandemic*, 27 Conn. Ins. L.J. 185, 194–95 (2021). In addition to excluded perils, an "all-risk" or "open-perils" policy is further limited by what types of losses are actually covered—as in, the type of property "damage" or "loss" triggering coverage under a commercial property insurance policy. *See Avis*, 283 N.C. at 146 (noting that "all risks" does not include "all losses").

A hypothetical to clarify this risk/loss distinction: If an alien spaceship crashes into a small restaurant, that is a covered risk (aliens are not an excluded cause of loss) and a covered loss (the commercial building is damaged). If an alien spaceship dumps glitter all over the restaurant, that is a covered risk (aliens are not excluded), but the insurance company likely could successfully contend that is not a covered loss (the owner can vacuum up the glitter, and the building is fine). A policyholder is entitled to coverage if they experience both a covered "risk" and a qualifying "loss."

The restaurants here have such "all-risk" policies for which they have paid tens of thousands of dollars in premiums. Specifically, they each have a commercial property insurance policy that insures building and personal property from direct physical loss or damage caused by a covered cause of loss—that is, all causes of loss that are not specifically excluded. They also have a "Business Income (and Extra Expense) Coverage" supplement insuring against lost business income sustained when the business must suspend its operations because of a covered loss.[2]

Starting with the property insurance policy, it says the following: "We will pay for direct 'loss' to Covered Property at the 'premises' caused by or resulting from any Covered Cause of Loss." The quotations denote a term defined in the policy. According to the definitions section, " 'Loss' means accidental physical loss or accidental physical damage." But the policy does not define "physical loss," "physical damage," or

2. Although there are multiple policies at issue across the multiple restaurants, the operative language is the same in each, and therefore, we refer to North State Deli's policy, attached as an exhibit to Matthew Raymond Kelly's affidavit.

"accidental," even as it defines dozens of other terms across three pages of definitions.

The policy confirms that it is an "all-risk" policy by defining the scope of its risk coverage only by its exclusions: Covered Causes of Loss means "direct 'loss' unless the 'loss' is excluded or limited in this Coverage Part." The excluded Causes of Loss span six pages. Examples include: earthquakes; an ordinance or law that regulates construction, use, or repair of any building or structure; war or military action; certain kinds of flooding or mudslides; fungi; wear and tear; dishonest or criminal acts; exposure to weather; and pollutants of certain kinds.

Notably, viruses or contaminants are not excluded. On the contrary, one of the restaurants' owners and operators, Matthew Raymond Kelly, alleged that he expressly requested that his insurance broker ensure that the policies provide coverage for losses due to viruses, given his knowledge of a previous norovirus outbreak among North Carolina restaurants. (The broker, Morris Insurance Agency, Inc., is a defendant in this action.) The broker allegedly indicated that the policy *would* cover virus-related events —the very policy under which the restaurants now seek coverage.

The specific provision under which the restaurants seek coverage is the supplemental "Business Income (And Extra Expense) Coverage Form." It stipulates:

> We will pay for the actual loss of "Business Income" you sustain due to the necessary "suspension" of your "operations" during the "period of restoration". The "suspension" must be caused by direct "loss" to property at "premises" . . . . The "loss" must be caused by or result from a Covered Cause of Loss.

Loss here is defined the same way as above ("accidental physical loss or accidental physical damage"). A "suspension" means, in relevant part, a "slowdown or cessation of . . . business activities." The period of restoration is defined as:

> a. Begins at the time of direct "loss".
>
> . . . .
>
> b. Ends on the earlier of:
>
> (1) The date when the property at the "premises" should be repaired, rebuilt or replaced with reasonable speed and similar quality;

> (2) The date when business is resumed at a new permanent location; or
>
> (3) 12 consecutive months after the date of direct "loss".

Putting together this web of provisions, the restaurants are entitled to recover insurance payments for the slowdown or cessation of business activities if their losses stemming from the government-ordered shutdowns are a "direct" "physical loss or . . . physical damage" to property caused by a covered risk.

C. The trial court sided with the restaurants, and the Court of Appeals reversed.

Because they were concerned Cincinnati would deny coverage for their claimed losses, the restaurants filed suit in 2020. At issue here is the restaurants' claim for a declaratory judgment that gubernatorial, county, and municipal orders constitute covered perils under the policies that caused "direct physical loss" to property at the described premises and that Cincinnati must therefore pay the resulting lost business income and extra expenses as defined by the polices. The restaurants moved for partial summary judgment on that count on 3 August 2020.

The trial court agreed with the restaurants and granted their motion. Because Cincinnati did not define "direct" "physical loss" or "physical damage" in the policy, the court reasoned, those words must be given their ordinary meaning. The ordinary meaning of "loss," it noted, includes the "act of losing possession." "Direct" and "physical" connote a causal relationship between a source and a material object. It further noted that "or" in "physical loss or . . . physical damage" suggests "loss" cannot also require structural alteration to property or else "damage" would be rendered meaningless. Moreover, it determined that since the policy does not exclude the cause of the restaurants' losses, government shutdowns due to a virus must be included.

At the Court of Appeals, a unanimous panel reversed the trial court's order. While noting that the goal of insurance contract interpretation is to arrive at the coverage intended by the parties and that any ambiguities are to be construed against the insurer, it concluded that no "direct physical loss of or damage to" property occurs from loss of use of or access to property. *N. State Deli*, 284 N.C. App. at 333. Since there was no physical harm to property, only "loss of business," partial summary judgment in favor of the restaurants was error. *Id.* at 333–34. The restaurants filed a petition for discretionary review, and the Court allowed the petition.

II. Analysis

A. Standard of Review

"Our standard of review of an appeal from summary judgment is de novo." *Kimberley Rice Kaestner 1992 Fam. Tr. v. N.C. Dep't of Revenue*, 371 N.C. 133, 137 (2018) (quoting *In re Will of Jones*, 362 N.C. 569, 573 (2008)), *aff'd sub nom. N.C. Dep't of Revenue v. Kimberley Rice Kaestner 1992 Fam. Tr.*, 588 U.S. 262 (2019). Summary judgment is appropriate when "the record shows that 'there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.' " *In re Will of Jones*, 362 N.C. at 573 (quoting *Forbis v. Neal*, 361 N.C. 519, 523–24 (2007)). The meaning of language in an insurance policy presents a question of law for the Court. *Accardi v. Hartford Underwriters Ins. Co.*, 373 N.C. 292, 295 (2020).

A dispute regarding coverage under an insurance policy is properly resolved on summary judgment "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.' " *N.C. Farm Bureau Mut. Ins. Co. v. Martin ex rel. Martin*, 376 N.C. 280, 285 (2020) (quoting *Waste Mgmt. of Carolinas, Inc. v. Peerless Ins. Co.*, 315 N.C. 688, 690–91 (1986)).

Cincinnati does not contest the restaurants' factual allegations, nor does it argue that any exclusions apply that preclude coverage. Its sole contention is that the restaurants have failed to carry their burden to establish that their businesses had to suspend operations because of a direct physical loss or damage to property. Since the dispute over the restaurants' claim for a declaratory judgment turns only on the interpretation of "direct" "physical loss or . . . physical damage" to property as used in the policy, we agree that this claim is properly resolved at summary judgment.

B. Rules of Insurance Contract Interpretation

As with all contracts, the goal of interpreting a contract for insurance "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). In doing so, "the plain language of the policy controls." *N.C. Farm Bureau Mut. Ins. Co.*, 376 N.C. at 286. Terms that are defined in a policy should be given that definition. *Woods*, 295 N.C. at 505–06. Undefined words are given their ordinary meaning consistent with the context in which the term is used. *Accardi*, 373 N.C. at 295. One way of understanding ordinary meaning is to consult standard, nonlegal dictionaries. *N.C. Farm*

Bureau Mut. Ins. Co., 376 N.C. at 287. Terms should also be interpreted in harmony with other portions of the policy, if possible, and to give effect and purpose to each word or term. *Wachovia Bank & Tr. Co. v. Westchester Fire Ins. Co.*, 276 N.C. 348, 355 (1970).

In addition to these general rules for contract interpretation, special interpretive principles apply when interpreting contracts for insurance, as our Court has long recognized. *E.g.*, *Jones v. Cas. Co.*, 140 N.C. 262, 263–65 (1905). Namely, the insurance contract "should be given that construction which a reasonable person in the position of the insured would have understood it to mean." *Grant v. Emmco Ins. Co.*, 295 N.C. 39, 43 (1978); *accord Wachovia Bank & Tr. Co.*, 276 N.C. at 356 (noting that undefined terms should be given the "meaning most favorable to the insured which is consistent with the use of the term in ordinary speech"); *Register v. White*, 358 N.C. 691, 699 (2004). Where a policy term is ambiguous, because "the language is 'fairly and reasonably susceptible to either of the constructions for which the parties contend,' " it should be construed against the insurance company and in favor of the policyholder. *Accardi*, 373 N.C. at 295 (quoting *Wachovia Bank & Tr. Co.*, 276 N.C. at 354); *accord Brown v. Lumbermens Mut. Cas. Co.*, 326 N.C. 387, 392 (1990). Subject to those principles of construction, provisions granting coverage must be read expansively, and provisions excluding coverage must be read narrowly. *Wachovia Bank & Tr. Co.*, 276 N.C. at 355.

These basic principles reflect the reality of the parties' respective bargaining power: insurance companies prepare the policies and choose what language to use. *See Grant*, 295 N.C. at 43. They are also experienced in managing risk and drafting policies accordingly. *Cf. Infected Judgment*, at 194–95 (describing insurance as a "risk-based product, designed to buffer chance happenings of loss-related events by pooling collective risk" and noting some considerations in structuring and pricing insurance polices in light of possible pandemic-related losses). This Court will not impose on an insurance company liability it did not assume and for which the policyholder did not pay. *Accardi*, 373 N.C. at 295. But insurance companies have ample notice of these longstanding interpretive principles, which set clear " 'rules of engagement' for novel arguments" on which all parties can rely. *See* New Appleman North Carolina Insurance Law §§ 1.03, 1.05 (2024 ed. 2023) (noting that insurance disputes are governed by "basic principles [that] have been invoked by the courts time and again," including that provisions that provide coverage are construed liberally and ambiguities are resolved against the insurer); 18 Strong's North Carolina Index 4th, Insurance

§ 124 (2014) (compiling cases). Such rules of engagement are a useful interpretive tool to ensure efficient dispute resolution and are consistent with our approach to other kinds of contract interpretation. *See O'Grady v. First Union Nat'l Bank*, 296 N.C. 212, 227 (1978) (describing the general rule of contract interpretation that ambiguities are construed against the drafting party).

Put simply, because of these rules, insurance companies know they must clearly "mark out and designate" the contours of their policy and that "it is not the function of the court to sprinkle sand upon the ice by strict construction of the [otherwise slippery] term." *Jamestown Mut. Ins. Co. v. Nationwide Mut. Ins. Co.*, 266 N.C. 430, 437 (1966). If, in applying these background principles, coverage expands beyond what the company says it contemplated, then "the fault lies in its own selection of the words by which it chose to be bound." *Id.* at 438.

C. Application to the Restaurants' Policies

The issue here is whether the phrase "direct" "physical loss" to property as it is used in the restaurant's policies covers their loss of physical use of and access to their property due to virus-related government orders.

Again, the policy does not define this operative term. "Loss" is defined as "accidental physical loss or accidental physical damage," but none of those constituent phrases are defined among the dozens of definitions in the policy. "Accidental" is part of this definition, but it is not contested here. Our task then is to interpret the ordinary meaning of "direct physical loss" in the context of this policy.

We start by consulting relevant definitions in standard, nonlegal dictionaries. *See N.C. Farm Bureau Mut. Ins. Co.*, 376 N.C. at 287. "Direct" is characterized by "a close esp[ecially] logical, causal, or consequential relationship" or marked by the "absence of an intervening agency, instrumentality, or influence." *Direct*, Webster's Third New International Dictionary 640 (2002). "Physical" means material, as opposed to mental, moral, spiritual, or imaginary. *Physical*, Webster's Third New International Dictionary 1706. "Loss" means a deprivation, failure to keep possession, or the state or fact of being destroyed. *Loss*, Webster's Third New International Dictionary 1338.[3] Put together, a covered cause

3. Ironically, Webster's Third also defines "loss" as "the amount of an insured's financial detriment due to the occurrence of a stipulated contingent event (as death, injury, destruction, or damage) in such a manner as to charge the insurer with a liability under the terms of the policy," which if applied here renders the policy totally circular. *Loss*, Webster's Third New International Dictionary 1338.

of loss must, absent an intervening factor, result in the material deprivation, dispossession, or destruction of property.

Both parties make reasonable arguments about whether that ordinary meaning includes closures due to government orders. The restaurants argue that the orders did immediately result in material deprivation of property. The orders targeted individual conduct on the property, the functions of the property, and how policyholders could physically access and occupy the insured space, including whether and under what conditions the business premises could be open. *See*, *e.g.*, Exec. Order No. 120, 34 N.C. Reg. 1844 (Mar. 23, 2020). That in turn affected the feasibility of business operations. It is true that these restrictions were temporary, but there is no "total" or "partial" modifier that excludes temporary property restrictions from coverage.

Cincinnati counters that "direct physical loss" cannot simply mean "loss of physical use." By analogy, it points out that "loss of a car" does not mean the same thing as "loss of use of a car," as any grounded teenager could confirm, quoting *Image Dental, LLC v. Citizens Ins. Co. of Am.*, 543 F. Supp. 3d 582, 590–91 (N.D. Ill. 2021). Extending that logic, it notes that the COVID-19 virus and corresponding government orders regulated the activities of people, not property, and that the restaurants experienced no physical change to the business property itself.

Contrary to Cincinnati's arguments, though, we fail to see why the ordinary meaning of "direct physical loss" is entirely insensitive to the "use" for which a property is insured. Again, by analogy, the homeowner who cannot live in their house due to irremediable cat urine odor is not placated that their property is not "lost" because it could be used as a home for cats. *See Mellin v. N. Sec. Ins. Co.*, 115 A.3d 799, 805 (N.H. 2015) (concluding that "physical loss to property" could include loss resulting from persistent cat urine odor which rendered a property "temporarily or permanently unusable or uninhabitable"). This overlap between property "use" and "loss" follows from a contextual and common-sense expectation that insurance should protect from threats to property that make it unusable for the purpose for which it is insured. Property "loss" surely occurs when it is no longer usable for its insured purpose, as a policyholder would reasonably expect. Thus when the restaurants lost physical use of their properties as restaurants due to the pandemic orders, they experienced a direct physical loss.

Can harmonizing the phrase "direct physical loss" with other policy provisions clarify its contours? We note, as the trial court below did, that "direct physical loss" is used in conjunction with "direct physical

damage," so "loss" must have some meaning distinct from "damage" to effectuate both provisions. *See also C.D. Spangler Constr. Co. v. Indus. Crankshaft & Eng'g Co.*, 326 N.C. 133, 142 (1990). "Damage" is defined as "injury or harm to . . . property." *Damage*, Webster's Third New International Dictionary 571. The distinct meaning of "loss" could be one of degree, as Cincinnati argues: "loss" is complete destruction or total dispossession, as in an instance of theft, while "damage" is a less-than-complete impairment or alteration. That reading would exclude temporary restrictions under the pandemic-era government orders that barred access to or use of restaurant dining rooms but not the restaurants' entire premises. Alternatively, a reasonable policyholder could see these two words in the disjunctive and read "loss" as purposely broader than "damage." A broader definition could encompass dispossession, deprivation, or impairment of use or function, complete or partial. That would include temporary dispossession or deprivation of the businesses' physical property under government orders, as the restaurants argue.

It is not obvious from the conjunction "or" which of these two distinct yet overlapping meanings the parties intended. But a "reasonable person in the position of the insured" could certainly read the provision to include the latter, and the ambiguity counsels us to find in favor of the restaurants' reading. *See Grant*, 295 N.C. at 43.

Looking yet further to neighboring language in the policies, Cincinnati urges that the provision indicating the duration for which it will provide insurance benefits after the property loss or damage, called the "period of restoration," should color the meaning of "direct physical loss" in the policy. Assuming without deciding that a reasonable insured would look to a provision on the duration of coverage to understand the scope of the coverage, the ordinary meaning of the "period of restoration" here again supports both parties' constructions.

The provision in the restaurants' policies about the "period of restoration" states that it runs through one of three disjunctive alternatives: the date by which the property should be repaired, rebuilt, or replaced; the date when business is resumed at a new permanent location; or twelve consecutive months after the direct physical loss or damage. Cincinnati points out that the indemnity ends "on the earlier of" the three alternatives. Necessarily then, a policyholder must know exactly how long each alternative takes, so all losses must be capable of complying with all three alternatives, it argues. That implies direct physical losses are only those that can be "repaired, rebuilt or replaced," it says.

But that conclusion does not follow as a matter of ordinary meaning, rooted in the reasonable understanding of the insured. If a policy gives two alternatives and says the "earlier" is operative, and one is clearly inapplicable, the "earlier" is the only applicable one. The insured does not lose coverage because the "loss" cannot be restored under both alternatives.[4] Same, here. If two of the three options (resuming at a new permanent location or repairing, rebuilding, or replacing the lost property) do not apply, a reasonable policyholder would expect the twelve-consecutive-month limit to be the "earliest" and thus controlling option. And that temporal limit says nothing as to the contours of a "direct physical loss."

Looking even further, the varying "exclusions" from covered causes of loss underscore that the restaurants reasonably expected their losses in these circumstances to be covered. Because the policy excludes certain kinds of government zoning regulations, government ordinances, government seizures, and war and military actions, a person in the insured's shoes could reasonably expect virus-related government orders that are *not* an excluded cause of loss to be covered under the policy.

Notably, too, the restaurants' policies contain no exclusions for viruses in general, even as 82.83% of business insurance policies had such exclusions.[5] Cincinnati may dismiss the existence of virus exclusions in other policies as extratextual, but where a contract defines coverage only by excluded risks, as this one does, a policyholder must know something about the universe of perils beyond the four corners of the document to know what coverage they have paid for.

Further, concerns about viruses and their consequences for business operations were common enough in the restaurant industry that at least one restaurant specifically sought coverage for such losses under

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4 Consider the instant policy, putting aside the temporal alternative of twelve consecutive months. One restoration end-date is when the property at the premises "should be repaired, rebuilt or replaced." The other is "[t]he date when business is resumed at a new permanent location." It is clear a policyholder would not comply with both. For example, if escaped radioactive waste from a nuclear powerplant renders the next-door restaurant completely inoperable, then the restaurant policyholder may not have the option to rebuild, repair, or replace its lost property. She would need to move to a new permanent location. And the time it takes to resume at that new permanent location would be the "earliest" and thus operative period of restoration.

5. This figure is according to one insurance industry data measure. *See* Nat'l Ass'n of Ins. Comm'rs, COVID-19 Property & Casualty Insurance Business Interruption Data Call, Part 1, Premiums and Policy Information, at 3 (June 2020), https://content.naic.org/sites/default/files/inline-files/COVID-19%20BI%20Nat%27l%20Aggregates_2.pdf (last visited Dec. 10, 2024).

the instant policy. Knowledge of the risks of viruses, together with knowledge that other policies exclude virus risks while this one does not, underscores that a policyholder would reasonably understand the absence of such an exclusion as an affirmative grant of coverage. *See Grant*, 295 N.C. at 43. This conclusion is further supported by the allegation that the restaurants' insurance broker apparently shared this interpretation of the policy.

Finally, at the highest level of context, Cincinnati emphasizes that this is a commercial property insurance policy. It is not insurance against lost profits, which it says follows from the restaurants' reading of "direct" "physical loss" to property. But the restaurants counter that they seek coverage not under the first-level property insurance policy—rather their claim is under the supplemental business income coverage form. A policyholder may reasonably believe that "they purchased business interruption insurance as an add-on to their property coverage in order to insure a capital asset—the income-earning power of their business." *Infected Judgment*, at 199. If that capital asset "is interrupted due to an interference with their use of the property[,] . . . their reasonable expectation would be that the business interruption portion of their policy would cover such losses," especially since the interruption coverage relates to the "all-risk" property insurance for which viruses and corresponding orders are not excluded. *See id.* That is a particularly reasonable expectation for a restaurant policyholder, since restaurants are accustomed to operating on razor-thin margins and can only do business with use of their physical space.

Cincinnati, again, could have provided a narrower definition of "direct physical loss" for this business income coverage. It did not. Instead, it opted only to restate its non-definition: " 'Loss' means accidental physical loss or accidental physical damage." Of course, the more definitions there are, the longer contracts become, and the more difficult they can be for an ordinary policyholder to understand. But an insurance company need not define every term in its policy to define the core provision around which the entire policy operates.

At bottom, a reasonable person in the position of the insured would understand the restaurants' policies to include coverage for business income lost when virus-related government orders deprived the policyholder restaurants of their ability to physically use and physically operate property at their insured business premises. Since Cincinnati's interpretation of "direct physical loss" to property is also reasonable, North Carolina's background principles compel us to resolve this ambiguity in favor of the insured policyholder. *See Accardi*, 373 N.C. at 295.

We therefore conclude that the restaurants have stated a claim for coverage due to a "direct physical loss" to property under their policies, and they are entitled to partial summary judgment as the trial court concluded.

In so holding, we decline to do what other courts have done and affirmatively define the "slippery" term Cincinnati chose to use in this manifestly ambiguous situation. *See Jamestown*, 266 N.C. at 437; *see also Schleicher & Stebbins Hotels, LLC v. Starr Surplus Lines Ins. Co.*, 302 A.3d 67, 77 (N.H. 2023) (cautioning against an overly broad judicial interpretation of "direct physical loss"). We are aware of the opinions by other courts holding the opposite of what we hold today. But the array of definitions offered in those opinions underscores that "direct physical loss" has a range of reasonable interpretations—many of which include considerations of use, possession, and function that are implicated by virus-related government orders. *See, e.g.*, *Ungarean v. CNA & Valley Forge Ins. Co.*, 323 A.3d 593, 607–08 (Pa. 2024) (concluding that "direct physical loss . . . of property" requires "a physical disappearance, partial or complete deterioration, or absence of a physical capability or function of the property"); *Huntington Ingalls Indus., Inc. v. Ace Am. Ins. Co.*, 287 A.3d 515, 529 (Vt. 2022) (concluding that "direct physical loss" means "persistent destruction or deprivation, in whole or in part, with a causal nexus to a physical event or condition"); *Starr Surplus Lines Ins. Co. v. Eighth Jud. Dist. Ct.*, 535 P.3d 254, 262 (Nev. 2023) ("[D]irect physical loss to covered property requires material or tangible destruction or dispossession as a result of material or tangible impact directed toward the property itself." (cleaned up)); *Cajun Conti LLC v. Certain Underwriters at Lloyd's*, 2022-01349 (La. 3/17/23), 359 So. 3d 922, 926 ("[D]irect physical loss . . . requires [that a] property sustain a physical, meaning tangible or corporeal, loss or damage [or otherwise become uninhabitable]."); *Conn. Dermatology Grp., PC v. Twin City Fire Ins. Co.*, 288 A.3d 187, 198 (Conn. 2023) ("[D]irect physical loss of property . . . [requires] some physical, tangible alteration to or deprivation of the property that renders it physically unusable or inaccessible." (cleaned up)); *Another Planet Ent., LLC v. Vigilant Ins. Co.*, 548 P.3d 303, 307 (Cal. 2024) ("[D]irect physical loss or damage to property . . . must result in some injury to or impairment of the property as property.").

North Carolina's background rules of insurance contract interpretation counsel against this approach. It is the insurance company's responsibility to define essential policy terms and the North Carolina courts' responsibility to enforce those terms consistent with the parties' reasonable expectations. *See Grant*, 295 N.C. at 43. Otherwise, insurance companies are licensed to pitch consumers on an expansive, "all-risk" policy,

while hiding behind a narrower definition imposed by judicial fiat when it comes time to pay out. Such a setup contradicts our Court's holdings that the lodestar for insurance contract interpretation is the reasonable expectation of the policyholder and that ambiguities should be resolved in the insured's favor.

III. Conclusion

In light of the above, we cannot say that the restaurants' policies unambiguously bar coverage when government orders and threatened viral contamination deprived the policyholder restaurants of their ability to physically use and physically operate property at their insured business premises. Accordingly, the policyholder restaurants have stated a claim for coverage and are entitled to their claim for partial summary judgment. We reverse the judgment of the Court of Appeals and remand this case to the Court of Appeals for further remand back to the trial court for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

PHILIP MORRIS USA, INC., PETITIONER
v.
NORTH CAROLINA DEPARTMENT OF REVENUE, RESPONDENT

No. 62A23

Filed 13 December 2024

Taxation—statutory construction—purpose and legislative intent—export credit allowed in a tax year—summary judgment improper

In a complex business case requiring the interpretation of N.C.G.S. § 105-130.45 (repealed effective 1 January 2018) regarding a taxpayer's yearly limit of $6,000,000 of export credit—a tax credit based on the number of cigarettes manufactured in the state for export in a given year—the trial court erred in allowing summary judgment in favor of the Department of Revenue, whose position was that the provision capped the export credit that could be generated in any tax year. Construing the pertinent language of the statute, the Supreme Court held that the $6,000,000 cap applied only to the amount of export credit that could be claimed in any tax year

and did not limit a taxpayer's ability to generate credit in excess of that amount in any tax year, to carry forward as otherwise provided.

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 petition for review of final decision entered on 29 September 2022 by Judge Julianna Theall Earp, 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 14 February 2024.

Ward & Smith, P.A., by Alex C. Dale and Christopher S. Edwards; and Parker Poe Adams & Bernstein LLP, by Kay Miller Hobart and Dylan Z. Ray, for petitioner-appellant.

Joshua H. Stein, Attorney General, by Tania X. Laporte-Reveron, Assistant Attorney General, and Ronald D. Williams, Special Deputy Attorney General, for respondent-appellee.

BARRINGER, Justice.

This matter involves a dispute between Philip Morris USA, Inc. (Philip Morris) and the North Carolina Department of Revenue (Department), related to tax credits available to manufacturers of cigarettes for exportation (Export Credits), carried forward from prior years' tax returns by the citizen taxpayer. The specific issue before the Court is whether the "credit allowed" in N.C.G.S. § 105-130.45(b) (2003) (repealed effective 1 January 2018) limits the Export Credits claimed by Philip Morris such that the citizen taxpayer cannot carry forward to future years the Export Credits generated in prior years.

Therefore, to address that issue, the Court must determine what is meant by "credit allowed" in N.C.G.S. § 105-130.45, titled "credit for manufacturing cigarettes for exportation" (Export Credit Statute). Philip Morris and the Department each argue that the plain meaning of the statute supports their respective positions; however, since neither party's textual analysis provides a univocal interpretation, we find the statute ambiguous. For the reasons stated below, we hold that any

generated Export Credit in excess of the annual statutorily defined cap may be carried forward for the succeeding ten years. Accordingly, we reverse the trial court's order of summary judgment in favor of the Department and remand this matter to the trial court for further proceedings not inconsistent with this opinion.

Background

The Export Credit Statute allows cigarette manufacturers a tax credit based on the volume of cigarettes they manufactured in North Carolina for export each year. N.C.G.S. § 105-130.45 (2003). The Export Credit that may be taken or claimed in any tax year is "not [to] exceed the lesser of six million dollars ($6,000,000) or fifty percent (50%) of the amount of tax imposed by this Part for the taxable year." *Id.* § 105-130.45(c). "This limitation applies to the cumulative amount of the credit allowed in any tax year, including carryforwards claimed by the taxpayer under this section for previous tax years." *Id.*

Philip Morris' cigarette exportation generated more than six million dollars of Export Credits in 2005 and 2006 but less than the cap in 2012, 2013, and 2014. Nevertheless, Philip Morris claimed the maximum six million dollars for tax years 2012, 2013, and 2014, carrying forward a portion of the generated but unclaimed Export Credits from 2005 and 2006.

The Department audited Philip Morris' corporate income tax returns for tax years 2012 through 2014.[1] The Department then issued a report disallowing Export Credits claimed by Philip Morris, followed by proposed assessments for each of the audited tax years. The Department disallowed Philip Morris' claimed credits because, according to the Department, the Export Credit Statute limits the credits that can be "generated." Accordingly, credits generated in a year are capped at six million dollars. Thus, according to the Department, Philip Morris had no credits available to carry forward as it had generated, and used, six million dollars in both 2005 and 2006. Philip Morris objected and requested review by the Department pursuant to N.C.G.S. § 105-241.11. Following review, the Department issued a Notice of Final Determination sustaining the proposed assessments.

Philip Morris then petitioned the Office of Administrative Hearings for a contested tax case hearing. The parties filed cross-motions for

1. The Department conceded that all the Export Credits on the 2012 return and some on the 2013 return were proper. Therefore, these credits are not at issue.

summary judgment. The administrative law judge (ALJ) issued a final decision granting the Department's motion and denying Philip Morris' motion. Philip Morris then petitioned the superior court for judicial review of the final decision.

The trial court stated that "the amended Export Credit Statute plainly indicates that the General Assembly intended to limit credit generation to six million dollars per year effective 1 January 2005." On this basis, the trial court found that Philip Morris improperly claimed the excess Export Credits, carried forward from the 2005 and 2006 tax years, on its 2013 and 2014 returns. Accordingly, the trial court affirmed the final decision of the ALJ and granted summary judgment in favor of the Department.

Philip Morris now appeals the trial court's order and opinion to this Court, pursuant to N.C.G.S. § 7A-27(a)(2).

Standard of Review

Questions of law, including matters of statutory interpretation, are reviewed de novo. *Winkler v. N.C. State Bd. of Plumbing*, 374 N.C. 726, 729–30 (2020). " '[*D*]*e novo*' mean[s] fresh or anew; for a second time . . . ." *In re Hayes*, 261 N.C. 616, 622 (1964) (extraneity omitted).

Analysis

The Export Credit Statute, N.C.G.S. § 105-130.45,[2] reads in pertinent part:

> (b) Credit. -- A corporation engaged in the business of manufacturing cigarettes for exportation to a foreign country and that waterborne exports cigarettes and other tobacco products through the North Carolina State Ports during the taxable year is allowed a credit against the taxes levied by this Part. The amount of credit allowed under this section is determined by comparing the exportation volume of the corporation in the year for which the credit is claimed with the corporation's base year exportation volume, rounded to the nearest whole percentage. In the case of a successor in business, the amount of credit allowed under this section is determined by comparing the

2. We note that subsection (f), "Report," became effective 1 January 2007. *See* N.C.G.S. § 105-130.45(f) (2005). This has no bearing on our statutory analysis of the 2003 Amendment to the subject statute.

> exportation volume of the corporation in the year for which the credit is claimed with all of the corporation's predecessor corporations' combined base year exportation volume, rounded to the nearest whole percentage. The amount of credit allowed may not exceed six million dollars ($6,000,000) . . . .
>
> . . . .
>
> (c) Cap. -- The credit allowed under this section may not exceed the lesser of six million dollars ($6,000,000) or fifty percent (50%) of the amount of tax imposed by this Part for the taxable year reduced by the sum of all other credits allowable, except tax payments made by or on behalf of the taxpayer. This limitation applies to the cumulative amount of the credit allowed in any tax year, including carryforwards claimed by the taxpayer under this section for previous tax years. Any unused portion of a credit allowed in this section may be carried forward for the next succeeding ten years.
>
> . . . .
>
> (f) Report. -- The Department [of Revenue must publish by May 1 of each year] the following information itemized by taxpayer [for the 12-month period ending the preceding December 31]:
>
> (1) The number of taxpayers taking a credit allowed in this section.
>
> (2) The total amount of exports with respect to which credits were taken.
>
> (3) The total cost to the General Fund of the credits taken.

A. Statutory Terms Defined

Since the propriety of allowing the tax credit carryforwards is the crux of this case, it is necessary to define these statutory terms. "If words at the time of their use had a well-known legal or technical meaning, they are to be so construed unless the [document at issue] itself discloses that another meaning was intended." *Wachovia Bank & Tr. Co. v. Waddell*, 237 N.C. 342, 346 (1953) (interpreting the meaning of "receipts" in a will); *see also* Antonin Scalia & Bryan A. Garner, *Reading*

Law: The Interpretation of Legal Texts 69 (2012) [hereinafter *Reading Law*] ("Words are to be understood in their ordinary, everyday meanings—*unless the context indicates that they bear a technical sense.*" (emphasis added)). Therefore, when a term has a well-known technical meaning in an industry or profession, such as accounting, the technical meaning rather than the plain meaning is favored.

A "carryforward" is "[a]n income-tax deduction [or credit] . . . that cannot be taken entirely in a given period but may be taken in a later period." *Carryforward*, *Black's Law Dictionary* (8th ed. 2004) The Financial Accounting Standards Board (FASB) defines "carryforward" as "the amount by which tax credits available for utilization exceed statutory limitations." Fin. Acct. Stands. Bd., *Statement of Financial Accounting Standards* No. 109, at 112 (1992).[3] Therefore, examination of the carryforward allowed by the Export Credit Statute as recognized in the tax accounting industry is critical to our analysis.

In the context of the accounting industry and profession, a "credit" is "an amount that directly offsets tax liabilities." Richard A. Westin, *Lexicon of Tax Terminology* 154 (1984) [hereinafter *Lexicon*]. Furthermore, "[c]redits . . . reduce income taxes for the year." *Id.* *Black's Law Dictionary* defines "tax credit" as "an amount subtracted directly from one's total tax liability . . . as opposed to a deduction from gross income." *Tax Credit*, *Black's Law Dictionary* (8th ed. 2004). By contrast, a deduction is something that is or may be subtracted from one's gross income. *Deduction*, *Black's Law Dictionary* (8th ed. 2004); *see also Pittsburgh Brewing Co. v. Comm'r*, 107 F.2d 155, 156 (3d Cir. 1939).

The meaning of "allow" as defined by *Merriam-Webster* includes, "to reckon as a deduction or an addition." *Allow*, *Merriam-Webster's Collegiate Dictionary* (11th ed. 2003); *accord Lexicon* 30 ("[A]llowed: the amount of depreciation actually claimed, whether or not legally excessive."). These definitions of "allow" are consistent with the Supreme Court of the United States' 1943 interpretation of "allowed." *Virginian Hotel Corp. v. Helvering*, 319 U.S. 523, 526–28, 526 n.7 (1943)

3. "The FASB is recognized by the U.S. Securities and Exchange Commission as the designated accounting standard setter for public companies. FASB standards are recognized as authoritative by many other organizations, including state Boards of Accountancy and the American Institute of CPAs (AICPA). The FASB develops and issues financial accounting standards through a transparent and inclusive process intended to promote financial reporting that provides useful information to investors and others who use financial reports." Fin. Acct. Stands. Bd., *About the FASB*, https://www.fasb.org/about-us/about-the-fasb (last visited Nov. 29, 2024).

(examining the meaning of "allowed depreciation deductions"). In *Virginian Hotel Corp.*, the Court states that " '[a]llowed' connotes a grant." *Id.* at 527. Furthermore, the Court states that "[d]eductions stand if the Commissioner takes no steps to challenge them. . . . If the deductions are not challenged, they certainly are 'allowed,' since tax liability is then determined on the basis of returns." *Id.*; *see also United States v. Hemme*, 476 U.S. 558, 565–66 (1986). This logic is consistent with interpreting the definition as meaning "to exist" or "to claim."

Since 1943, the Supreme Court of the United States has interpreted the word "allowed" to mean "claimed." *See Virginian Hotel Corp.*, 319 U.S. at 526–28. "When a term has long-standing legal significance, it is presumed that legislators intended the same significance to attach by use of that term, absent indications to the contrary." *Wilkie v. City of Boiling Spring Lakes*, 370 N.C. 540, 550 (2018) (extraneity omitted).

As demonstrated by the foregoing definitions, the phrase "credit allowed" means the maximum credit a taxpayer may *claim*. Such an interpretation aligns with the technical use and long-standing meaning of the term in the accounting industry. Consistent with this clear technical definition, the Department concedes that Philip Morris' interpretation of "credit allowed" in subsection (b) as claimed, and consequently what is allowed to be carried forward, is consistent with the Department's prior interpretation of N.C.G.S. § 105-130.45 before the 2003 Amendment to that statute.

To be sure, however, this technical definition does not allow a taxpayer to offset an unlimited amount of tax liability by claiming the credit. The statute caps a taxpayer's ability to offset its tax liability in any given year at "six million dollars ($6,000,000) or fifty percent (50%) of the amount of tax imposed by this Part for the taxable year reduced by the sum of all other credits allowable." N.C.G.S. § 105-130.45(c). This limitation also applies to the use of any unclaimed credit carryforward from previous years. "Any unused portion of a credit allowed . . . may be carried forward for the next succeeding ten years." *Id.*

B. Ambiguous Use of "Credit Allowed"

Philip Morris and the Department each argue that the plain meaning of the Export Credit Statute supports their respective positions. Yet, a close reading of the statute reveals that "credit allowed" is used in two inconsistent ways—once in its technical meaning and once in its plain meaning—thus producing a statutory ambiguity.

Recently, this Court in *State v. Fritsche* summarized the analytical framework for engaging in statutory construction:

> 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.

385 N.C. 446, 449 (2023) (quoting *In re R.L.C.*, 361 N.C. 287, 292 (2007)).

We have further clarified that in tax cases, "[w]hen a statute provides for an exemption from taxation, any ambiguities therein are resolved in favor of taxation." *Aronov v. Sec'y of Revenue*, 323 N.C. 132, 140 (1988) (citation omitted) (recognizing that "[d]eductions . . . are in the nature of exemptions"[4]). But, this tenet does not mean "game over," and that we should put down our pens and decline to analyze the language further. Instead, "[i]n cases of [any] 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." *Fritsche*, 385 N.C. at 449. Moreover, "[c]anons of construction are interpretive guides, not metaphysical absolutes. They should not be applied to reach outcomes plainly at odds with legislative intent." *Town of Midland v. Harrell*, 385 N.C. 365, 376 (2023).

Subsection (c) uses the term "allowed" according to its technical meaning—"to claim." This subsection, entitled "Cap," establishes the cap or limit on the amount that a corporation may *claim* on its annual income tax return. This is consistent with the technical definition discussed above. As indicated by the statutory context and further clarified by the title "Cap," this subsection limits the amount of Export Credits that may be claimed annually.[5]

To reconcile this ambiguity and bring clarity and logical meaning to the statute, the context of the statute and the "whole text" canon require a plain meaning reading of "credit allowed" in subsection (b). "Generate" means "to define or originate (as a mathematical or linguistic set or structure) by the application of one or more rules or operations." *Generate*, *Merriam-Webster's Collegiate Dictionary* (11th ed. 2003).

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4. It follows that credits are in the nature of deductions and exemptions.

5. The title to subsection (c), "Cap," serves to clarify that subsection (c) imposes a limit on the export credit's use. However, the title of subsection (b), "Credit," is not sufficiently specific to add clarity as to whether "credit allowed" means "credit generated" or "credit earned."

Here the statute provides the formula by which the "Export Credit Statute" is calculated each year: the amount by which the exportation volume of the corporation in the year exceeds the corporation's base year exportation volume, rounded to the nearest whole percentage. N.C.G.S. § 105-130.45(b). Based on this formulaic purpose of subsection (b), the dictionary definition, and the statutory context, the plain and logical meaning of "credit allowed" in subsection (b) is "generate."

The Department argues, and the trial court agreed, that the 2003 Amendment to the Export Credit Statute clarifies that credit "generated" for carryforward purposes is limited to six million dollars each year. We disagree. As stated above, the Department concedes that Philip Morris' interpretation of "credit allowed" prior to the 2003 Amendment did not limit the amount of Export Credit that could be generated each year. So, what has changed?

The 2003 Amendment added the following language to subsection (b):

> *In the case of a successor in business*, the amount of credit allowed under this section is determined by comparing the exportation volume of the corporation in the year for which the credit is claimed with *all of the corporation's predecessor corporations' combined base year exportation volume*, rounded to the nearest whole percentage. The amount of credit allowed may not exceed six million dollars ($6,000,000).

Id. (2003) (emphases added). This amendment ensured that "a successor in business" could not claim its own six million dollar credit in addition to any carryforward credit available to its predecessors.

As stated above, the Department concedes that the *original* statute did not impose a limit on the amount of credit that could be generated each year. Here the legislature demonstrates by its word choice—"[i]n the case of a successor in business" and "all of the corporation's predecessor corporations' combined base year exportation volume"—that it did not amend the statute to change the amount of credit that could be generated and thus available for carryforward. Instead, its amendment is designed to prevent "double dipping" by a surviving corporation and a merged corporation, prohibiting both from taking advantage of the same credit and carryforward on their separate income tax returns. It is difficult to understand how this interpretation amounts to an absurd or bizarre consequence as the dissent contends.

Furthermore, the application of the doctrine of last antecedent bolsters this interpretation. "[R]elative and qualifying words, phrases, and clauses ordinarily are to be applied to the word or phrase immediately preceding rather than extending to or including others more remote . . . ." *Wilkie*, 370 N.C. at 548–49 (extraneity omitted). The language at issue, "[t]he amount of credit allowed may not exceed six million dollars ($6,000,000)," follows directly after the sentence beginning, "[i]n the case of a successor in business" without even a paragraph break. N.C.G.S. § 105-130.45(b). Under this doctrine, the last sentence's "credit allowed" limitation can only relate to "successors in business."

Further support for the point that "credit generated" is not limited to six million dollars is found by comparing the subject statute with N.C.G.S. § 105-130.46, titled "credit for manufacturing cigarettes for exportation while increasing employment and utilizing state ports" (Enhanced Employment Credit Statute). These statutes are a part of the same session law and were adopted by the General Assembly on the same day. An Act to . . . Modify the Cigarette Exportation Tax Credit and Modify the Base Year . . . [and] Create an Enhanced Tax Credit for Cigarette Exportation, S.L. 2003-435, §§ 5.2-5.4, 6.1-6.2, 2003 N.C. Sess. Laws (2d Extra Sess. 2003) 1421, 1431–35. The Export Credit Statute incentivized increasing exports; the Enhanced Employment Credit Statute incentivized increasing employment. The Enhanced Employment Credit Statute reads as follows:

> (a) Purpose. -- The credit authorized by this section is intended to enhance the economy of this State by encouraging qualifying cigarette manufacturers to increase employment in this State with the purpose of expanding this State's economy, the use of the North Carolina State Ports, and the use of other State goods and services, including tobacco.
>
> . . . .
>
> (d) Credit. -- A corporation that satisfies the employment level requirement under subsection (c) of this section, is engaged in the business of manufacturing cigarettes for exportation, and exports cigarettes and other tobacco products through the North Carolina State Ports during the taxable year is allowed a credit as provided in this section. The amount of credit allowed under this section is equal to forty cents (40¢) per one thousand cigarettes exported. The amount of

> credit *earned* during the taxable year may not exceed ten million dollars ($10,000,000).
>
> . . . .
>
> (g) Ceiling. -- The total amount of credit that may be taken in a taxable year under this section may not exceed the lesser of the amount of credit which may be *earned* for that year under subsection (d) of this section or fifty percent (50%) of the amount of tax against which the credit is taken for the taxable year reduced by the sum of all other credits allowable, except tax payments made by or on behalf of the taxpayer. This limitation applies to the cumulative amount of the credit allowed in any tax year, including carryforwards claimed by the taxpayer under this section or G.S. 105-130.45 for previous tax years.
>
> . . . .
>
> (k) Reports. -- Any corporation that takes a credit under this section must submit an annual report by May 1 of each year to the Senate Finance Committee, the House of Representatives Finance Committee, the Senate Appropriations Committee, the House of Representatives Appropriations Committee, and the Fiscal Research Division of the General Assembly. The report must state the amount of credit *earned* by the corporation during the previous year, the amount of credit including carryforwards claimed by the corporation during the previous year, and the percentage of domestic leaf content in cigarettes produced by the corporation during the previous year. The first reports required under this section are due by May 1, 2006.

Id. § 105-130.46 (2004) (emphases added).

The term "earned" in the Enhanced Employment Credit Statute is conspicuously absent in the statute before us, indicating that the General Assembly clearly imposed a restriction in the Enhanced Employment Credit Statute on the amount of credit that can be generated. In subsection (d) of the Enhanced Employment Credit Statute, unlike the Export Credit Statute, the General Assembly clearly limited the amount of credit that could be generated by specifically stating that "[t]he amount

of credit *earned* during the taxable year may not exceed ten million dollars ($10,000,000)." *Id.* § 105-130.46(d) (emphasis added). Then, in subsection (g), "Ceiling," it tied the amount of "credit earned" to the ceiling by stating: "The total amount of credit taken in a taxable year under this section may not exceed the lesser of the . . . credit which may be *earned*." *Id.* § 105-130.46(g) (emphasis added). This language demonstrates that the General Assembly clearly mandated that the amount "earned" was restricted as to both the amount of the Enhanced Employment Credit that could be generated and the amount of the Enhanced Employment Credit that could be claimed each year, thus limiting maximum carryover. No such limitation appears in the Export Credit Statute.

Statutes are to be read harmoniously in a way that renders them internally compatible, not contradictory. *Reading Law* 180–82; *e.g.*, *Town of Pinebluff v. Moore County*, 374 N.C. 254, 257 (2020); *Bd. of Adjustment v. Town of Swansboro*, 334 N.C. 421, 427 (1993); *Town of Blowing Rock v. Gregorie*, 243 N.C. 364, 371 (1956). Identical words used in legislation should have the same meaning; different words carry different meanings. *Reading Law* 170–73. The Enhanced Employment Credit Statute uses both of the terms "credit allowed" and "earned," indicating a difference in meaning between the terms. The subject statute does not use the term "earned" at all. Accordingly, "credit earned" and "credit allowed" must have different meanings.

Therefore, in answering our question, "what has changed?", only one change can be found. That change is the amendment to subsection (c) of section 105-130.45. However, that amendment merely increases the time frame for carryforward from five years to ten years. N.C.G.S. § 105-130.45(c) (2003). This does not alter our analysis.

C. The Department's Inconsistent Interpretation of the Statute

The Department concedes that it has taken positions consistent with the interpretation set forth herein. Prior to the 2003 Amendment, the Department did not interpret N.C.G.S. § 105-130.45 to limit the amount of "credit generated." Thus, we begin our analysis with the Department's original interpretation.

At the time relevant to this case, N.C.G.S. § 105-264(a) provided, in part:

> It is the duty of the Secretary [of the Department of Revenue] to interpret all laws administered by the Secretary. The Secretary's interpretation of these laws shall be consistent with the applicable rules. An

> interpretation by the Secretary is prima facie correct. When the Secretary interprets a law by adopting a rule or publishing a bulletin or directive on the law, *the interpretation is a protection to the* officers and *taxpayers* affected by the interpretation, *and taxpayers are entitled to rely upon the interpretation*.[6]

N.C.G.S. § 105-264(a) (2012) (emphases added).[7] Indeed, this Court has even stated that "[i]n *all* tax cases, the construction placed upon the statute by the Secretary [ ] of Revenue . . . will be given due consideration by a reviewing court." *Aronov*, 323 N.C. at 140 (emphasis added) (citation omitted).

However—to clarify—this is not to say that *every* interpretation by the Secretary of Revenue is deserving of deference by a reviewing court. Subsection 105-264(a) makes clear that while "[a]n interpretation by the Secretary is prima facie correct," that "interpretation is a *protection to the . . . taxpayers* affected by the interpretation." N.C.G.S. § 105-264(a) (emphasis added). In other words, deference to the Secretary's interpretation is warranted in cases in which such an interpretation serves to benefit the citizen taxpayer, not the State. This is a statutory mandate.

To the extent that *Aronov* established a rule permitting deference to the Secretary in all circumstances, we disavow any such understanding. We therefore align ourselves with previous precedent repudiating agency deference when the question is one of law. *See, e.g.*, *Brooks v. McWhirter Grading Co.*, 303 N.C. 573, 580–81 (1981) ("When the issue on appeal is whether a state agency erred in interpreting a statutory term, an appellate court may freely substitute its judgment for that of the agency and employ *de novo* review." (citations omitted)).

Nonetheless, even in the absence of such caselaw providing deference, the Department represented its interpretation as controlling. Every year the Department publishes its Tax Law Changes publication, which summarizes the recent legislative changes to the State's Revenue laws.

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6. "The legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other." N.C. Const. art. I, § 6. Interestingly, "[t]his principle, of course, distributes the power to make law to the legislature, the power to execute law to the executive, and the power to interpret law to the judiciary." *News & Observer Publ'g Co. v. Easley*, 182 N.C. App. 14, 19–20 (2007); *accord*, *e.g.*, *In re Ernst & Young, LLP*, 363 N.C. 612, 616 (2009).

7. This is the version of section 105-264(a) that was in effect during the tax years in which Philip Morris—relying on the Department's interpretation—claimed the relevant deductions. More specifically, that is, 2012 through 2014.

Consistent with this practice, the Department issued the *Supplement to the 2003 Tax Law Changes: Extra Session on Economic Development Incentives* [hereinafter *2003 Supplement*], https://www.ncdor.gov/documents/laws-and-decisions/north-carolina-supplement-2003-tax-law-changes/open. In this publication the Department states:

> This document is designed for use by personnel in the North Carolina Department of Revenue. *It is available to those outside the Department as a resource document*. It gives a brief summary of the following tax law changes:
>
> (1) Changes made by prior General Assemblies that take effect for tax year 2003. Each change enacted by a prior General Assembly is also discussed in the Department's Tax Law Change document for the year the change was enacted.
>
> (2) Changes made by the 2003 General Assembly, regardless of when they take effect.

N.C. Dep't of Revenue, *North Carolina 2003 Tax Law Changes* 1 (2003), https:// www.ncdor.gov/documents/laws-and-decisions/north-carolina-supplement-2003-tax-law-changes/open (emphasis added). Accordingly, this publication is used internally by the Department and externally relied upon as a resource by citizen taxpayers. *Id.*

As early as 1999, the Department included the Export Credit Statute in its website publication *1999 Tax Law Changes-Corporate Income Tax*, https://www.ncdor.gov/taxes-forms/information-tax-professionals/revenue-laws/1999-tax-law-changes/1999-tax-law-changes-corporate-income-tax. Indicated by the web address "information-tax-professionals," the Department recognized that information it disseminates on the website regarding this tax provision was provided for use by "tax professionals" representing taxpayers, bolstering its reliability.

In the *Rules and Bulletins Taxable Years 2003 & 2004*, the Department noted that the "second extra session of the 2003 General Assembly made several changes to [the Export Credit Statute]." N.C. Dep't of Revenue, *Rules and Bulletins Taxable Years 2003 & 2004* [hereinafter *2003 & 2004 Bulletin*], https://www.ncdor.gov/documents/files/corp-rules-and-bulletins-2003-and-2004/open. But because, the changes would not be effective until 2005, the Department declared the Amendment "outside the scope of this publication" and *specifically* directed citizen taxpayers to the Department's website for information regarding these law changes. *Id.*

In the *2003 Supplement* found on the Department's website, the Department summarized several substantive, clarifying, and technical changes made by the 2003 Amendment to the statute. *See 2003 Supplement*, https://www.ncdor.gov/documents/laws-and-decisions/north-carolina-supplement-2003-tax-law-changes/open. The Department neither indicated a change of position nor identified a new limitation on a taxpayer's ability to generate, and thus carry forward credits under N.C.G.S. § 105-130.45.

Inexplicably, the Department even failed to mention that the carryover provision had been extended to ten years; however, the Department did acknowledge other changes. The Department acknowledged that "[s]ubdivision (3) was added to provide a definition for successor in business." *2003 Supplement* at 5. The Department further stated that "[a] successor in business is a corporation that through amalgamation, merger, acquisition, consolidation, or other legal succession becomes invested with the rights and assumes the burdens of the predecessor corporation and continues the cigarette exportation business." *Id.*

The Department also discussed one change to subsection (b) of N.C.G.S. § 105-130.45 that it characterized as "clarifying." According to the Department: "The clarifying change clarifies that the maximum *allowable credit* for cigarettes exported during a tax year is six million dollars, before applying the tax limitations provided for in subsection (c)." *Id.* (emphasis added). Nowhere does the Department use the term "generate." Instead, the Department uses the term, "allowable credit." *Id.* As defined above, "allowable credit" or "credit allowed" is the maximum credit that a taxpayer may *claim*. *See Virginian Hotel Corp.*, 319 U.S. at 526–27. Therefore, according to the Department's own explanation of the 2003 Amendment, the change only applied to amounts claimed and not to those generated.

Moreover, "[a] clarifying amendment, unlike an altering amendment, is one that does not change the substance of the law but instead gives further insight into the way in which the legislature intended the law to apply from its original enactment." *Ray v. N.C. Dep't of Transp.*, 366 N.C. 1, 9 (2012). In recognition that the Department has conceded that the original Export Credit Statute, prior to the 2003 Amendment, did not limit credit generation, a clarifying statement does not alter this position.

The Department missed yet another opportunity to notify citizen taxpayers that it changed its position when it published its 2005 & 2006

bulletin.[8] "When the Secretary interprets a law by adopting a rule or publishing a bulletin or directive on the law, the interpretation is a protection to the officers and taxpayers affected by the interpretation, and taxpayers are entitled to rely upon the interpretation." N.C.G.S. § 105-264(a). In this bulletin, there was an entire section dedicated to "limitations and carryforward," which largely parroted the language of the statute. However, significantly, the Department again made no mention that it was changing positions. *See* N.C. Dep't of Revenue, *Rules and Bulletins Taxable Years 2005 & 2006* [hereinafter *2005 & 2006 Bulletin*], https://www.ncdor.gov/documents/files/2005-2006-rulesandbulletins/open.

The trial court found that "the [foregoing] documents upon which Philip Morris claims to rely are not rules, bulletins, or directives from the Secretary communicating the Secretary's interpretation of the law." We disagree.

Black's Law Dictionary defines "bulletin" as "an officially published notice or announcement concerning the *progress of matters* of public importance and interest." *Bulletin*, *Black's Law Dictionary* (6th ed. 1990) (emphasis added).[9] *The 1999 Tax Law Changes-Corporate Income Tax*, the *2003 & 2004 Bulletin*, the *2003 Supplement*, and the *2005 & 2006 Bulletin* are undoubtedly officially published announcements concerning matters of public importance. These are precisely the type of documents contemplated by the statute, and those upon which citizen taxpayers can rely. *See* N.C.G.S. § 105-264(a) ("[T]he interpretation [of the Secretary of the Department of Revenue] is a protection to the officers and taxpayers affected by the interpretation, and *taxpayers are entitled to rely upon the interpretation*." (emphasis added)).

For example, the *2003 Supplement* evidenced the "progress of the matter" as the General Assembly revised the statute to clarify the rules for successors in business and extended the carryforward time period. The Department endorsed this document in its *2003 & 2004 Bulletin* by *specifically* directing citizen taxpayers to the Department's official website for "information on these tax changes." *2003 & 2004 Bulletin* at 76. Therefore, Philip Morris was entitled to rely upon this series of bulletins.

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8. On 11 April 2006, Philip Morris made it clear by letter to the Department of Revenue its intention to claim tax credit carryforwards earned in tax years 1999 through 2004 in excess of six million dollars each year.

9. We recognize that the most appropriate definition would be found in *Black's Law Dictionary* 8th edition, which was published in 2004; however, *Black's Law Dictionary* suspended its printing of the definition for "Bulletin" in 2004.

Finally and most troubling, after the subject tax years, the Department published for calendar year 2008 an economic incentives report on the Export Credits as mandated by section 105-130.45(f). *See* N.C.G.S. § 105-130.45(f) (2007). In this report the Department noted that Philip Morris had "generated" Export Credits of twelve million dollars over multiple years. Therein, the Department wrote that Philip Morris' "export volumes . . . resulted in the generation of credits above the $6 million cap. *These excess credits are available to be taken in future years*." N.C. Dep't of Revenue, *Cigarette Export Credits*, Processed During Calendar Year 2008 (2009) (emphasis added). Even after the Department had taken one position regarding the 2006 and 2007 returns, it took the opposite position in 2008 without any explanation for doing so.

Simply put, the Department's actions amount to an abrupt reversal of policy without notice to the public or taxpayers. The actions here lacked transparency and are plainly contrary to the trust the public deserves from its government. This conduct is unacceptable. As mandated by statute and recognized by the Department in its own publications, citizen taxpayers must be able to rely on the representations of the Department. Businesses need consistency and clarity to operate efficiently. *See*, *e.g.*, *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2272 (2024) (stating "unwarranted instability in the law[ ] leav[es] those attempting to plan around agency action in an eternal fog of uncertainty"); *see also*, *e.g.*, *Bulova Watch Co. v. Brand Distribs. of N. Wilkesboro*, *Inc.*, 285 N.C. 467, 472 (1974) (explaining "stability in the law and uniformity in its application . . . enable people to predict with reasonable accuracy the consequences of their acts and business transactions").

The Department should consistently, plainly, and publicly interpret and apply revenue statutes and regulations for all taxpaying citizens. This is a statutory mandate.

Conclusion

The fulcrum of this case is the meaning of "credit allowed" contained in subsections (b) and (c) of the Export Credit Statute. A close reading of the statute reveals an inconsistent use of the term which creates an ambiguity.

In examining subsection (c), we appropriately consider the term's technical use and understanding. That technical use and understanding compel us to adopt an interpretation of "credit allowed" in subsection (c) consistent with its common use in the accounting industry. Accordingly, we define "credit allowed" as contained in subsection (c) as the amount of credit which may be *claimed* each tax year.

At the same time to bring clarity and logical meaning to the statute, in subsection (b) we examine the context of the statute and employ the "whole text" canon to find that the plain meaning of "credit allowed" is most appropriate. We, therefore, reconcile any ambiguity by adopting the term's plain meaning in that context. The plain meaning of "credit allowed" contained in subsection (b) is the amount of credit which may be *generated* each tax year.

Even further, it is undisputed that the Department interpreted the original version of the Export Credit Statute as permitting unlimited credits calculated based on cigarette exports, which could then be carried forward. In fact, as found by the trial court, the Department conceded that Philip Morris' current interpretation of "credit allowed" is consistent with the Department's prior interpretation of N.C.G.S. § 105-130.45 before the 2003 Amendment.

The Department now argues that the 2003 Amendment revised the statute to limit export credits generated to six million dollars each year. We disagree. The legislature—as demonstrated by the language in the Amendment—made clear that the Amendment is designed to prevent "double dipping" by a surviving corporation and a merged corporation, thus prohibiting both from taking advantage of the same credit and carryforward on their separate income tax returns. The only change to the carryforward provision is the extension of the carryforward period from five to ten years.

Moreover, the Department's representations and actions do not support its current position. Despite acknowledging the ability to "generate" credits "above the $6 million cap" in its 2008 economic incentives report mandated by subsection (f) of the Export Credit Statute, the Department now argues that the 2003 Amendment always created a limit on export credits "generated." Yet the Department has repeatedly failed to act in accordance with this interpretation or even announce its change in position. As mandated by N.C.G.S. § 105-264(a) and recognized by this Court, Philip Morris is entitled to rely on these representations and actions.

Accordingly, we reverse the trial court's order of summary judgment in favor of the Department and remand this matter to the trial court for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

Justice RIGGS dissenting.

The question presented by this case is whether the North Carolina statute that provides a tax credit to corporations manufacturing cigarettes for exportation, N.C.G.S. § 105-130.45, limits the credit that a taxpayer can generate in a given tax year. The plain language of the amended version of the statute unambiguously says the amount of credit a taxpayer can generate in a given year under N.C.G.S. § 105-130.45(b) "may not exceed six million dollars." N.C.G.S. § 105-130.45(b) (2003).[1] While I agree with the majority that the phrase "credit allowed" has different meanings in different subsections of N.C.G.S. § 105-130.45, reading the statute in context, I do not agree that the different meanings create ambiguity in the statute. Subsection (b) provided a taxpayer the formula for calculating the credit that the taxpayer can generate within a given year. Reading the entire subsection in context, the phrase limiting the "credit allowed" to six million dollars should apply equally to corporations and successors in business. *See King v. Burwell*, 576 U.S. 473, 486 (2015) ("[O]ftentimes the meaning—or ambiguity—of certain words or phrases may only become evident when placed in context. So when deciding whether the language is plain, we must read the words in their context and with a view to their place in the overall statutory scheme." (cleaned up)). Therefore, I would affirm the decision of the Business Court and respectfully dissent.

I. Analysis

In 1999, the General Assembly adopted economic development legislation to provide export tax credits to manufacturers of cigarettes exported for sale outside of the United States. Under the original version of N.C.G.S. § 105-130.45, subsection (b) allowed a taxpayer to generate or accrue an unlimited amount of export tax credit based on its volume of cigarettes exported, while subsection (c) limited the amount of credit a taxpayer could claim per year to six million dollars. Neither party disputes that the original 1999 version of N.C.G.S. § 105-130.45 was unambiguous.

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1. Section 105-130.45 was amended by Session Law 2003-435 and was effective for cigarettes exported on or after 1 January 2005. *See* Act of Dec 16, 2003, S.L. 2003-435, § 5.2, 2003 N.C. Sess. Laws 1421, 1431–32. The modified language was first codified in the 2004 interim supplement but was left out of the General Statutes until 2009. *Compare* N.C.G.S. § 105-130.45 (Supp. 2004), *with* N.C.G.S. § 105-130.45 (2005). The language in the session law, however, is controlling. *See Wright v. Fid. & Cas. Co. of N.Y.*, 270 N.C. 577, 587 (1967) (noting that Session Laws are controlling over the codified version of the General Statutes).

In 2003, the General Assembly modified the language in N.C.G.S. § 105-130.45(b), the subsection that provides the formula for calculating the tax credit for corporations engaged in the business of manufacturing cigarettes within the state for foreign exportation. The section was modified by the addition of the language in italics below:

> (b) Credit. — A corporation engaged in the business of manufacturing cigarettes for exportation to a foreign country *and that waterborne exports cigarettes and other tobacco products through the North Carolina State Ports during the taxable year* is allowed a credit against the taxes levied by this Part. The amount of credit allowed under this section is determined by comparing the exportation volume of the corporation in the year for which the credit is claimed with the corporation's base year exportation volume, rounded to the nearest whole percentage. *In the case of a successor in business, the amount of credit allowed under this section is determined by comparing the exportation volume of the corporation in the year for which the credit is claimed with all of the corporation's predecessor corporations combined base year exportation volume, rounded to the nearest whole percentage.* The amount of credit allowed *may not exceed six million dollars ($6,000,000) and* is *computed* as follows:
>
> . . . .
>
> (c) Cap. — The credit allowed under this section may not exceed the lesser of six million dollars ($6,000,000) or fifty percent (50%) of the amount of tax imposed by this Part for the taxable year reduced by the sum of all other credits allowable, except tax payments made by or on behalf of the taxpayer. This limitation applies to the cumulative amount of the credit allowed in any tax year, including carryforwards claimed by the taxpayer under this section for previous tax years. Any unused portion of a credit allowed in this section may be carried forward for the next succeeding *ten* years.

An Act to Make the Following Changes Recommended by the Governor: . . . Extend the Sunset On and Modify the Cigarette Exportation Tax

Credit and Modify the Base Year, [and] Create an Enhanced Tax Credit for Cigarette Exportation . . . . , S.L. 2003-435 § 5.2, 2003 N.C. Sess. Laws (2d Extra Sess. 2003) 1421, 1431–32. Although not included in the excerpt above, subsection (b) of N.C.G.S. § 105-130.45 concludes with a calculation table incorporating the computation specifications for calculating the tax credit based upon export volume.

A. N.C.G.S. § 105-130.45 Is Not Ambiguous

The majority begins its analysis by concluding that N.C.G.S. § 105-130.45 is ambiguous because the phrase "credit allowed" has different meanings in subsections (b) and (c) of the statute. However, the fact that the phrase "credit allowed" has different meanings in subsection (b) and subsection (c) does not per se create ambiguity in the statute. When we apply the majority's definition of "credit allowed" to the plain language of subsection (b)—in its entirety—the amended statute applies a six million dollar annual limit to the generation of export tax credits for both corporations and successors in business alike.

This Court begins every question of statutory interpretation with a presumption that the words used in the statute unambiguously represent the will of the legislature. *See N.C. Dep't of Corr. v. N.C. Med. Bd.*, 363 N.C. 189, 201 (2009) ("Because the actual words of the legislature are the clearest manifestation of its intent, we give every word of the statute effect, presuming that the legislature carefully chose each word used."). Whether statutory language is ambiguous does not turn solely on dictionary definitions of its component words but also on "the specific context in which that language is used, and the broader context of the statute as a whole." *Yates v. United States*, 574 U.S. 528, 537 (2015) (plurality opinion) (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997)). The Court "does not read segments of a statute in isolation"; rather, we construe statutes to "giv[e] effect, if possible, to every provision." *Rhyne v. K-Mart Corp.*, 358 N.C. 160, 188 (2004). It is well established that "[w]hen the language of a statute is clear and without ambiguity, it is the duty of this Court to give effect to the plain meaning of the statute, and judicial construction of legislative intent is not required." *Diaz v. Div. of Soc. Servs.*, 360 N.C. 384, 387 (2006).

Generally, there is a "natural presumption that identical words used in different parts of the same act are intended to have the same meaning." *Atl. Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1932). But that presumption does not always hold, and the fact that a legislative body may choose to give identical words different meanings in different sections of a statute does not, by definition, mean that

the statute is ambiguous. *See id.* (recognizing that the presumption that words in the same statute have the same meaning "readily yields whenever there is such variation in the connection in which the words are used as reasonably to warrant the conclusion that they were employed in different parts of the act with different intent"). Words have different shades of meaning and may be construed differently even when used in the same statute. *Id.* The Supreme Court of the United States has repeatedly "affirmed that identical language may convey varying content" even when used "in different provisions of the same statute." *Yates*, 574 U.S. at 537 (plurality opinion); *see also*, *e.g.*, *Wachovia Bank, N.A. v. Schmidt*, 546 U.S. 303, 313–14 (2006) ("located" has different meanings in different provisions of the National Bank Act); *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 594–98 (2004) ("age" has different meanings in different provisions of the Age Discrimination in Employment Act of 1967); *Robinson*, 519 U.S. at 342–44 ("employee" has different meanings in different sections of Title VII of the Civil Rights Act of 1964); *United States v. Cleveland Indians Baseball Co.*, 532 U.S. 200, 213 (2001) ("wages paid" has different meanings in different provisions of 26 U.S.C.); *Atl. Cleaners*, 286 U.S. at 433–37 ("trade or commerce" has different meanings in different sections of the Sherman Act). For this reason, I do not find it reasonable to conclude the statute is ambiguous simply because credit allowed is used differently in different subsections.

Statutory interpretation is determined "not only by reference to the language itself, but as well by the specific context in which that language is used, and the broader context of the statute as a whole." *Yates*, 574 U.S. at 537 (plurality opinion) (cleaned up); *see also Vogel v. Reed Supply Co.*, 277 N.C. 119, 131 (1970) ("Words and phrases of a statute must be construed as a part of the composite whole and accorded only that meaning which other modifying provisions and the clear intent and purpose of the act will permit." (cleaned up)). In N.C.G.S. § 105-130.45, the titles of the different subsections provide context for the different uses of the phrase "credit allowed" and aid our interpretation of the statute. The majority, in a footnote, says "while the title of subsection (c) "Cap" serves to clarify that subsection (c) imposes a limit on the export credit's use, the title of subsection (b) "Credit" is not sufficiently specific to add clarity." I find this reasoning circular: the majority jumps to assume ambiguity in a statute to which it objects and then disclaims that a subsection title cannot save the statute from ambiguity. But if you start from a presumption of non-ambiguity, the subsection titles provide corroborating evidence and are not required to do much work to save the statute.

Indeed, when these titles are viewed in the context of the purpose of the statute—to provide a tax credit for cigarette manufacturing for export—it is obvious that one of the subsections in N.C.G.S. § 105-130.45 must tell the taxpayer how to calculate the credit. That is exactly the purpose of subsection (b): to give the taxpayer the formula to calculate how much credit it has generated in a given year. *See King*, 576 U.S. at 486 ("[W]hen deciding whether the language is plain, we must read the words 'in their context and with a view to their place in the overall statutory scheme.' " (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000))). This interpretation is further reinforced by the language in the final sentence of subsection (b) leading into the calculation table: "The amount of credit allowed may not exceed six million dollars ($6,000,000) and is computed as follows:".

The majority concludes that the first phrase of that final sentence—the amount of credit allowed may not exceed six million dollars—only applies to successors in business. But that interpretation does not work for two reasons: First, it runs contrary to the principle that portions of a subsection should not be read in a vacuum. *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991) (recognizing "the cardinal rule that a statute is to be read as a whole, since the meaning of statutory language, plain or not, depends on context" (internal citation omitted)). Second, adhering to the majority's interpretation would produce an absurd result. *See State ex rel. Comm'r of Ins. v. N.C. Auto. Rate Admin. Off.*, 294 N.C. 60, 68 (1978) ("In construing statutes courts normally adopt an interpretation which will avoid absurd or bizarre consequences, the presumption being that the legislature acted in accordance with reason and common sense and did not intend untoward results."). Following the majority's interpretation to its logical conclusion would result in a statute that only provides a tax credit for successors in business.

To the first point, subsection (b) must be interpreted in the context of the entire subsection. *See Univ. of Texas Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 353 (2013) (acknowledging that with statutory construction the "choice of words is presumed to be deliberate, so too are [statute's] structural choices"). Subsection (b) is composed of four sentences. The first sentence states the conditions that a corporation must meet to qualify for this credit. *See* N.C.G.S. § 105-130.45(b). The balance of the subsection explains how taxpayers determine the credit. The second sentence begins with the phrase "The amount of credit allowed under this section is determined by," and goes on to explain that a corporation determines the applicable credit by comparing exportation volume in the year the credit is claimed with a base year exportation volume. *See id.*

The next sentence of the subsection clarifies that a successor in business determines its tax credit using export volumes of the "corporation's predecessor corporations' combined base year exportation volume." *See id.* The final sentence of the subsection begins with "[t]he amount of credit allowed may not exceed six million dollars" and then provides the computational details. *See id.* This sentence does not contain any limiting clause to indicate that it only applies to a "successor in business." The contrast between the last two sentences makes clear that if the General Assembly wanted to limit the amount of credit calculated based upon the formula that follows, it knew how to add a limiting clause. However, the General Assembly did not include limiting language to restrict the application of the final sentence to just successors in business.

The majority's interpretation produces an absurd result: A scenario in which the tax credit statute only provides a computational framework for a successor in business, not the original corporation, to calculate a tax credit. Using the majority's logic, if the phrase "[t]he amount of credit allowed may not exceed six million dollars ($6,000,000)" only applies to a successor in business, then the second clause of that same sentence also only applies to a successor in business because "credit allowed" is the subject for both clauses of the sentence. Therefore, credit allowed must mean the same thing when applied to each clause in the sentence. If credit allowed in that final sentence only applies to successors in business, then the computation details also only apply to a successor in business and corporations like Philip Morris are left without a means of calculating a tax credit. Because principles of statutory interpretation require avoidance of an absurd result, the final sentence in subsection (b) must limit the amount of tax credit generated per year to six million dollars for both corporations and successors in business.

The majority also argues that the doctrine of the last antecedent bolsters its interpretation that the six million dollar limit only applies to a successor in business. However, the majority misapplies the doctrine. The majority quotes the doctrine of the last antecedent from *Wilkie v. City of Boiling Spring Lakes* but omits the final phrase of the doctrine that explains the doctrine applies "unless the context indicates a contrary intent." 370 N.C. 540, 548–49 (2018) (quoting *HCA Crossroads Residential Ctrs., Inc. v. N.C. Dep't of Hum. Res.*, 327 N.C. 573, 578 (1990)). In full, the doctrine says that "relative and qualifying words, phrases, and clauses ordinarily are to be applied to the word or phrase immediately preceding rather than extending to or including others more remote, unless the context indicates a contrary intent." *Id.* (cleaned up). Put simply, "a limiting clause or phrase . . . ordinarily . . . modifi[es]

only the noun or phrase that it immediately follows." *Paroline v. United States*, 572 U.S. 434, 447 (2014) (quoting *Barnhart v. Thomas*, 540 U.S. 20, 26 (2003)). The phrase at issue, here, "The amount of credit allowed may not exceed six million dollars," is not a relative or qualifying phrase in the sentence discussing how the credit allowed is determined for a successor in business. Rather, it is an independent clause in a different sentence that explains the methodology for calculating the credit. Furthermore, "successor in business" is not the noun or phrase immediately preceding "credit allowed." The statute's context plainly indicates that "credit allowed" does not modify "successor in business." The doctrine of the last antecedent does not apply in this scenario.

B. The Department's Interpretation of the Statute

The majority concludes that because the Department allowed taxpayers to generate an unlimited amount of tax credit before the statute was amended and the Department did not identify the change in the statute as a substantive change in its 2003 Tax Supplement, the Department should be precluded from enforcing the six million dollar generation limit in the amended statute. But by that logic, the majority's argument would allow an administrative agency to invalidate legislative action simply by not identifying the legislative action as substantive. That cannot be the case.

The majority begins its discussion of Philip Morris' reliance on the Department's interpretation of N.C.G.S. § 105-130.45 by stating that the Court should not defer to the Department's interpretation in all circumstances. I agree generally, but I think this then creates some trouble for the majority's cause. The statute that gives the Secretary of the Department of Revenue the duty to interpret laws administered by the Department, N.C.G.S. § 105-264(a), explicitly states that "[t]he Secretary's interpretation of these laws shall be consistent with the applicable rules." This Court has further recognized that in reviewing a taxpayer's challenge to an exemption from tax, the Court is mindful that tax credits, a type of exemption from taxation, "are privileges, not rights, and are allowed as a matter of legislative grace." *Aronov v. Sec'y of Revenue*, 323 N.C. 132, 140 (1988) (cleaned up). "A statute providing exemption from taxation is strictly construed against the taxpayer and in favor of the State." *Id.*

It then becomes significant that this Court is asked to construe an amended statute. In construing a statute with reference to an amendment, "it is logical to conclude that an amendment to an unambiguous statute indicates the intent to change the law." *Childers v. Parker's, Inc.*,

274 N.C. 256, 260 (1968). The majority attached significance to the fact that prior to the amendment, the Department did not interpret N.C.G.S. § 105-130.45 to limit the amount of "credit generated." But before the amendment, the statute did not contain language limiting the amount of credit a taxpayer could generate—that language was added as part of the amendment. This Court assumes that the legislature understands the law, understands that a taxpayer could generate an unlimited tax credit before N.C.G.S. § 105-130.45 was modified, and intentionally made the change.

After the statute was amended, the Department identified the change in the *Supplement to 2003 Tax Law Changes*. To be sure, the Department characterized the change as a clarifying change. The supplement stated the change "clarifies that the maximum allowable credit for cigarettes exported during a tax year is six million dollars, before applying the tax limitations provided for in subsection (c)." Thus, while it is understandable that Philip Morris may consider this change to be more substantive than clarifying, the Department does not, by supplement publication, get to change the nature of the amendment to the statute. The Department's definition of the change as clarifying instead of substantive in the Supplement is not dispositive because the Department's interpretation of the nature of the amendment is not dispositive. *See Aronov*, 323 N.C. at 140 ("In all tax cases, the construction placed upon the statute by the Secretary . . . of Revenue, although not binding, will be given due consideration by a reviewing court."). This Court, and the majority, have recognized that a clarifying amendment "gives further insight into the way in which the legislature intended the law to apply from its original enactment." *Ray v. N.C. Dep't of Transp.*, 366 N.C. 1, 9 (2012). The legislature seemingly realized the original statute allowed taxpayers to generate and carry forward an unlimited amount of tax credit and wanted to place limits on the maximum tax credit a taxpayer could generate under this statute, similar to the limits placed on the maximum generation of tax credits found in N.C.G.S. § 105-130.46, captioned "Credit for manufacturing cigarettes for exportation while increasing employment and utilizing State Ports." N.C.G.S. § 105-130.46(d) (2005) ("The amount of credit earned during the taxable year may not exceed ten million dollars ($10,000,000)."). The legislature has that authority. I doubt the Court would allow the legislature's authority to amend criminal statutes to be undermined by a similar concern of notice to taxpayers.

In concluding that the *Supplement to 2003 Tax Law Changes* would not put a taxpayer on notice that the change limited the amount of credit a taxpayer could generate in a given year, the majority contradicts its

own interpretation of the statute. The *Supplement to 2003 Tax Law Changes* identified that the modifications to subsection (b) "clarifie[d] that the maximum allowable credit for cigarettes exported during a tax year is six million dollars, before applying the tax limitations provided for in subsection (c)."[2] The majority interpreted this explanatory language to "appl[y] to the amounts claimed and not to those generated." But the majority already said that "the plain and logical meaning of 'credit allowed' in subsection (b) is 'generate.' " If subsection (b) addresses how much credit a taxpayer can generate, then a modification to that subsection is a modification to the amount of credit a taxpayer can generate.

Finally, I am troubled by the scolding tone with which the majority addresses the Department. The majority does not purport to overrule *North Carolina Acupuncture Licensing Board v. North Carolina Board of Physical Therapy Examiners* or the long line of cases cited in that decision, so it is still the law of the land that this Court "gives great weight to an agency's interpretation of a statute it is charged with administering" even though the "agency's interpretation is not binding." 371 N.C. 697, 700 (2018) (cleaned up). It is also still true that the Supreme Court "will not follow an administrative interpretation in direct conflict with the clear intent and purpose of the act under consideration." *Id.* at 701 (cleaned up). Here, it seems plain to me that regardless of the Department's prior interpretations, the Department's current interpretation is consistent with the clear intent and purpose of the law at issue here. I do not see any grounds for inferring bad intent or actions on the part of the Department for honoring the intent of the legislature. It may be that this Court intends to follow the federal trend and more fully reject agency deference as the Supreme Court of the United States did in *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244 (2024). But this larger, politically-charged issue does not relate to situations in which an agency is acting in accord with the legislature regarding what I believe to be a non-ambiguous statute. In my view, the General Assembly clearly amended N.C.G.S. § 105-130.45(b) to add a limit to the credit a taxpayer could generate under the amended statute. The Department identified the change to the taxpayer. The Department's identification of the change as a clarifying change, not a substantive change, does not give this Court an avenue to write the change out of the statute. *See Ali*

2. Subsection (c), captioned as "Cap," limits the "cumulative amount of the credit allowed in any tax year, including carryforwards claimed by the taxpayer under this section for previous tax years." N.C.G.S. 105-130.45(c).

v. Fed. Bureau of Prisons, 552 U.S. 214, 228 (2008) ("We are not at liberty to rewrite the statute to reflect a meaning we deem more desirable.").

II. Conclusion

In sum, I would hold that the amended version of N.C.G.S. § 105-130.45 creates a limit on the amount of tax credit that a corporation or successor in business can generate in a given tax year and thus would affirm the decision of the Business Court.

Justice EARLS joins in this dissenting opinion.

SCHOOLDEV EAST, LLC
v.
TOWN OF WAKE FOREST

No. 268A22

Filed 13 December 2024

Zoning—unified development ordinance—school construction—connectivity requirements—ambiguous provision—free use of land

In conducting a de novo review of a town's denial of petitioner's permit applications for the construction of a proposed charter school, the Supreme Court reversed the decision of the Court of Appeals and held that, where the town's unified development ordinance regarding the inclusion of off-premise sidewalks was ambiguous, the lower appellate court erred by adopting the town's interpretation of that provision and instead should have strictly construed the provision in favor of the free use of land per public policy. Since petitioner carried its initial burden of production by presenting competent, material, and substantial evidence tending to show that it was entitled to the issuance of permits and no evidence was presented to the contrary, the matter was remanded with instructions for the town to approve petitioner's site plan and subdivision applications.

Justice RIGGS dissenting.

Justice EARLS joins in this dissenting opinion.

On discretionary review pursuant to N.C.G.S. § 7A-31 and on appeal pursuant to N.C.G.S. § 7A-30(2) (2023) from the decision of a divided panel of the Court of Appeals, 284 N.C. App. 434 (2022), affirming an order entered on 14 April 2021 by Judge Vince Rozier in Superior Court, Wake County. On 6 April 2023, the Supreme Court allowed respondent's conditional petition for discretionary review as to additional issues. Heard in the Supreme Court on 9 April 2024.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P., by J. Mitchell Armbruster, Tobias R. Coleman, and Amy Crout; and Stam Law Firm, P.L.L.C., by Paul Stam and R. Daniel Gibson, for petitioner-appellant.

Wyrick Robbins Yates & Ponton LLP, by Samuel A. Slater, D. Scott Hazelgrove II, and T. Nelson Hughes Jr., for respondent-appellee.

Robinson, Bradshaw & Hinson, P.A., by Richard A. Vinroot and Jazzmin M. Romero, for North Carolina Coalition of Charter Schools, amicus curiae.

Van Winkle, Buck, Wall, Starnes & Davis, P.A., by Craig D. Justus; and J. Michael Carpenter for North Carolina Home Builders Association, Inc., amicus curiae.

ALLEN, Justice.

The public policy of North Carolina encourages "the free and unrestricted use and enjoyment of land." *Kirby v. N.C. Dep't of Transp.*, 368 N.C. 847, 852 (2016) (cleaned up). This policy advances our state's enduring commitment to property rights. *See id.* at 852–53 ("The fundamental right to property is as old as our state." (citing N.C. Const. of 1776, Declaration of Rights § XII; *Bayard v. Singleton*, 1 N.C. (Mart.) 5, 9 (1787))).

At the same time, laws enacted by our General Assembly grant counties and municipalities significant authority to adopt and enforce zoning and other land use ordinances that limit what property owners may do with or on real property. Although this Court will uphold legitimate ordinances, the state's public policy disfavoring property restrictions influences how we construe unclear or ambiguous ordinance provisions in disputes between property owners and local governments. Specifically, this Court will resolve any well-founded doubts about a provision's

meaning in favor of "the free use of land." *Westminster Homes, Inc. v. Town of Cary Zoning Bd. of Adjustment*, 354 N.C. 298, 308 (2001).

The outcome of this litigation between respondent Town of Wake Forest and petitioner Schooldev East, LLC, depends on the proper interpretation of a provision in the Town's Unified Development Ordinance (UDO). The Town relied on the provision to deny petitioner's applications for permits necessary for the construction of a proposed charter school. Because the provision's meaning is unclear, the Court of Appeals should have construed it in favor of the free use of land. The Court of Appeals instead adopted the Town's interpretation and ruled against petitioner. When properly construed, the UDO provision does not sustain the denial of petitioner's applications, which petitioner supported with competent, material, and substantial evidence. We therefore reverse the decision of the Court of Appeals and remand this case with instructions to the Town to approve petitioner's applications.

I. Background

Petitioner proposed to build a charter school in the Town. To that end, petitioner agreed to purchase some thirty-five acres of a roughly sixty-eight-acre tract of land owned by Jane Harris Pate and located on Harris Road. On 4 November 2019, petitioner applied to the Town for a major subdivision plan permit and a major site plan permit.[1] If granted, the subdivision permit would have resulted in the division of the Pate tract into three parcels, with petitioner's thirty-five-acre parcel in the middle. The site plan permit application sought approval for the construction of the charter school on the middle parcel (campus lot).

On 3 September 2020, pursuant to procedures outlined in the Town's UDO, the Town's planning board and board of commissioners (BOC) held a joint public hearing and quasi-judicial hearing during which petitioner's legal counsel presented evidence including maps, graphs, reports, and witness testimony in support of petitioner's applications. A substantial portion of the presentation was devoted to explaining how the applications complied with section 3.7.5 in the UDO's supplemental

1. As defined by the UDO, "[a] site plan is an architectural and/or engineering drawing of proposed improvements for a specific location that depicts such elements as building footprints, driveways, parking areas, drainage, utilities, lighting, and landscaping." Town of Wake Forest UDO, § 6.2.1(D). A "major site plan" refers to permit applications that "include 100 or more residential dwelling units and to all development applications which require an Enhanced Transportation Impact Analysis." *Id.* § 15.8.2(A). A "major subdivision plan" involves permit applications requiring "divisions of land into [four] or more lots, or which require dedication of public utilities and/or public streets." *Id.* § 15.9.2(A).

use standards for elementary and secondary schools, which reads in pertinent part:

> **A. For Schools in the RD**[2] **Zone Only**: To encourage walking and bicycle accessibility by schoolchildren to schools, it shall be required by the applicant to demonstrate how such accessibility can be achieved, given the low density nature of this district. Accommodation may include the construction of additional off-premise sidewalks, multi-use trails/paths[,] or greenways to connect to existing networks.
>
> **B. For All Schools:**
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> . . . .
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> 2. Connectivity (vehicular and pedestrian) to surrounding residential areas is required. Where a full vehicular connection is impractical, a multi-use trail connection shall be provided.

Petitioner's evidence indicated that petitioner intended to construct a ten-foot-wide multi-use path along the entire Harris Road frontage of the campus lot. The multi-use path would have provided pedestrian and bicycle access to Joyner Park, a public park across the road from the campus lot with more than three miles of paved trails. It would also have provided pedestrian and bicycle access to a future 273-home subdivision on the other side of Harris Road.

No one challenged petitioner's evidence or introduced evidence in opposition thereto. On the contrary, the Town's planning staff advised the planning board and the BOC that N.C.G.S. § 160A-307.1 prevented the Town from requiring petitioner to "install[ ] road, curb/gutter[,] and multiuse path improvements." Under that statute, "[a] city may only require street improvements related to schools that are required for safe ingress and egress to the municipal street system and that are physically connected to a driveway on the school site." N.C.G.S. § 160A-307.1 (2023).

By a four-to-three vote, the planning board recommended that the BOC deny petitioner's applications. The BOC subsequently considered

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2. "RD" refers to the Town's "rural holding district." A rural holding district is a district where "the principal uses of the land are restricted due to lack of available utilities, unsuitable soil types[,] or steep slopes." It is "intended for low density with the maximum density for residential developments within" the district being "1 unit per acre." The campus lot was in the Town's rural holding district.

the applications at its meeting on 20 October 2020. According to the UDO, each application had to comply with the following standards:

> 1. The plan is consistent with the adopted plans and policies of the town;
> 2. The plan complies with all applicable requirements of this ordinance;
> 3. There exists adequate infrastructure (transportation and utilities) to support the plan as proposed; and
> 4. The plan will not be detrimental to the use or development of adjacent properties or other neighborhood uses.

Town of Wake Forest UDO, §§ 15.8.2(J) (major site plans), 15.9.2(J) (major subdivision plans).

The Town attorney advised the commissioners that they could not simply endorse the planning board's recommendation. Rather, they had to determine independently whether "competent, substantial, and material evidence in the record" satisfied the four UDO standards listed above.

The BOC took up petitioner's site plan first. Despite the Town attorney's admonition, the commissioners' deliberations went beyond the evidence introduced at the quasi-judicial hearing. Some commissioners worried that the proposed charter school would have a negative impact on a nearby public elementary school. One commissioner remarked that the elementary school had an occupancy level of just sixty-seven percent. Another opined that "with [the charter school] directly abutting [the elementary] school that's below occupancy," the charter school would "draw students from [the elementary school] which means less money going into [the elementary] school."

Ultimately, one of the commissioners moved to deny the site plan for lack of compliance with Standards 1 and 2.[3] With respect to Standard 1, the commissioner asserted that the site plan was inconsistent with aspects of the Town's comprehensive plan. *See generally* N.C.G.S. § 160D-501(a1) (2023) ("A comprehensive or land-use plan is intended to guide coordinated, efficient, and orderly development within the

3. The commissioner also moved to deny the site plan application for noncompliance with Standard 4. However, the superior court later ruled that petitioner presented sufficient evidence of compliance with Standard 4, and the Town did not appeal that ruling. Accordingly, this issue is not before us.

planning and development regulation jurisdiction based on an analysis of present and future needs.").[4] In particular, the commissioner pointed to the comprehensive plan's statement that school designs should allow safe pedestrian access from adjacent neighborhoods. To justify denial under Standard 2, the commissioner highlighted the residential connectivity requirement in UDO § 3.7.5(B). The commissioners unanimously voted in favor of the motion to deny the site plan.

The BOC's discussion of the subdivision plan centered on UDO § 3.7.5(A). Several commissioners expressed their belief that the subdivision plan did not provide adequate pedestrian and cycling accessibility. The discussion then turned to whether the Town could lawfully mandate that developers construct sidewalks connecting schools to surrounding neighborhoods. The Town attorney advised the BOC that N.C.G.S. § 160A-307.1 preempted such action. The commissioners disregarded that advice and unanimously voted to deny the subdivision plan based on lack of compliance with UDO § 3.7.5(A).

The BOC reduced its decisions to writing in two orders dated 17 November 2020. The first denied the site plan application because petitioner "failed to demonstrate compliance with UDO [§ 3.7.5(B)], which requires connectivity (vehicular and pedestrian) to surrounding residential areas." The second order denied the subdivision plan application because "the evidence submitted failed to demonstrate how the application was complying with UDO [§ 3.7.5(A)], which states that, schools in the RD zone are to encourage walking and bicycle accessibility by school children to schools."

Petitioner sought review of the BOC's orders in the Superior Court, Wake County. Following a hearing, the superior court entered an order on 14 April 2021 affirming those orders. The court rejected petitioner's contention that the denial of its applications violated N.C.G.S. § 160A-307.1. According to the court, the BOC "properly analyzed the scope of [N.C.G.S. § 160A-307.1] and determined that it did not preempt Town plans and ordinances requiring [petitioner] to demonstrate pedestrian and bicycle connectivity." The superior court further concluded, based on a review of the whole record, that the site plan failed to satisfy "the Town's plans and ordinances requiring pedestrian and bicycle connectivity" and "[a]s a result, the [BOC] properly denied both the [s]ite [p]lan [a]pplication and the [s]ubdivision [a]pplication." Petitioner appealed.

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4. When petitioner filed its applications, the relevant enabling legislation was codified in Chapter 160A. In 2019, the General Assembly consolidated and recodified the land use enabling laws into Chapter 160D. This recodification has no bearing on our disposition.

A divided panel of the Court of Appeals affirmed the superior court's order. *Schooldev E., LLC v. Town of Wake Forest*, 284 N.C. App. 434, 448 (2022). As a threshold matter, the majority agreed with petitioner that the superior court "erred when it applied whole record review to the issue of whether the burden of production is met." *Id.* at 444 (cleaned up). The superior court "should have 'applied *de novo* review to determine the initial legal issue of whether [p]etitioner had presented competent, material, and substantial evidence.' " *Id.* (quoting *PHG Asheville, LLC v. City of Asheville*, 262 N.C. App. 231, 241 (2018), *aff'd*, 374 N.C. 133 (2020)). Nonetheless, the majority held that the superior court "correctly affirmed the [BOC's] decisions because [p]etitioner failed to meet its burden of production to show it [was] entitled to the requested permits." *Schooldev*, 284 N.C. App. at 444.

In reaching its holding, the majority acknowledged that N.C.G.S. § 160A-307.1 restricts the ability of municipalities to require street improvements for new schools. *Id.* at 447–48. The majority reasoned, however, that the statute did not control the outcome of this case because "the term 'street improvements' referred to in [N.C.G.S.] § 160A-307.1 does not include sidewalk improvements." *Id.* at 448.

Turning to UDO Standard 1 (consistency with the Town's plans and policies), the majority examined whether petitioner made a sufficient showing that its site and subdivision plans were "consistent with the adopted plans and policies of the Town." *Id.* at 449 (cleaned up). It noted that the BOC considered the comprehensive plan's policy that "school campuses shall be designed to allow safe, pedestrian access from adjacent neighborhoods."[5] *Id.* at 450 (cleaned up). Although comprehensive plans themselves are merely advisory in nature, the majority characterized UDO § 3.7.5 as "an ordinance by which [this policy] was implemented." *Id.* at 451; *see also* N.C.G.S. § 160D-501(c) (stating that comprehensive plans "shall be advisory in nature without independent regulatory effect"). Thus, "[p]etitioner's failure to satisfy UDO § 3.7.5 was a proper basis on which the Town denied [p]etitioner's applications." *Schooldev*, 284 N.C. App. at 451.

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5. The BOC had also concluded that petitioner's plans failed to satisfy the comprehensive plan's policy that school locations "should serve to reinforce desirable growth patterns rather than promoting sprawl." *Schooldev*, 284 N.C. App. at 437. However, because the BOC had not adopted a zoning regulation to implement this policy, the Court of Appeals majority held that the policy was "solely advisory" and thus "was not a proper basis for the [BOC] to deny the [s]ite [p]lan [a]pplication." *Id.* at 450. The Town did not seek our review of this issue.

Similarly, the majority determined that UDO Standard 2 (compliance with UDO requirements) mandated that petitioner's site and subdivision plans satisfy UDO § 3.7.5. *Id.* The majority expressly rejected petitioner's argument that UDO § 3.7.5 was a zoning ordinance and therefore was "inapplicable to [petitioner's] subdivision request." *Id.* It then explained why, in its view, petitioner's evidence did not rise to the level of competent, material, and substantial evidence.

> Our review of the record shows [p]etitioner brought forth evidence demonstrating it would dedicate a twenty-five-foot right of way line along the frontage of the property and provide a ten-foot-wide multi-use path one foot behind the right of way line. Petitioner also offered testimony tending to show the proposed sidewalk would align with the entrance into Joyner Park and the trails within Joyner Park. Since [p]etitioner demonstrates that it would provide pedestrian connectivity to only one residential neighborhood through Joyner Park located to the south of the proposed school, we hold the superior court did not err in affirming the [BOC's] decision to deny the [a]pplications.

Id. at 452–53 (cleaned up).

The dissenting judge agreed that the superior court erred by applying the whole record test. *Id.* at 453 (Tyson, J., concurring in part and dissenting in part). Unlike the majority, however, the dissenting judge would have held (1) that N.C.G.S. § 160A-307.1 barred the Town from requiring petitioner and other school developers to construct "sidewalks, bike paths, trails, etc. to link . . . school campus[es] to surrounding neighborhood[s]" and (2) that "[p]etitioner clearly produced competent, material, and substantial evidence to make a *prima facie* showing of entitlement to the respective permits." *Id.* at 461, 463.

Petitioner filed a notice of appeal based on the dissent in the Court of Appeals. Although it has since been repealed, N.C.G.S. § 7A-30(2) then created 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." *See* N.C.G.S. § 7A-30(2) (2023), *repealed by* Current Operations Appropriations Act of 2023, S.L. 2023-134, § 16.21(d)–(e), https://www.ncleg.gov/Sessions/2023/Bills/House/PDF/H259v7.pdf. Pursuant to N.C.G.S. § 7A-31, the parties

filed petitions for discretionary review asking us to consider additional issues. We allowed their petitions.[6]

II. Judicial Review of Quasi-Judicial Decisions

"Quasi-judicial decisions involve the application of ordinance policies to individual situations rather than the adoption of new policies." David W. Owens, *Land Use Law in North Carolina* 6 (4th ed. 2023). The BOC's decisions in this case qualify as quasi-judicial because in making them the BOC had to "find[ ] . . . facts regarding the specific proposal[s] and . . . exercise . . . some judgment and discretion in applying predetermined policies to the situation." *Id.*; *see also County of Lancaster v. Mecklenburg County*, 334 N.C. 496, 507 (1993) ("In the zoning context, these quasi-judicial decisions involve the application of zoning policies to individual situations, such as variances, special and conditional use permits, and appeals of administrative determinations.").

When considering permit applications in a quasi-judicial capacity, a local government board "must determine whether '[the] applicant has produced competent, material, and substantial evidence *tending to establish* the existence of the facts and conditions which the ordinance requires for the issuance of [the requested] permit.' " *PHG Asheville*, 374 N.C. at 149 (quoting *Humble Oil & Refin. Co. v. Bd. of Aldermen*, 284 N.C. 458, 468 (1974)). Competent evidence is evidence that is relevant and admissible. *Competent Evidence*, Black's Law Dictionary (12th ed. 2024). Material evidence has "some logical connection with the facts of the case or the legal issues presented." *Material Evidence*, Black's Law Dictionary (12th ed. 2024). Substantial evidence consists of "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Humble Oil*, 284 N.C. at 470–71 (cleaned up).

By satisfying its initial burden of production, an applicant makes a prima facie case that the permit should be issued. *Id.* at 468. The board must then grant the application unless it makes contrary findings that are likewise supported by "competent, material, and substantial evidence

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6. In its petition for discretionary review, petitioner asked this Court to consider whether the Town had "the statutory authority to require a school to provide off-site sidewalk improvements under the power granted by N.C.G.S. § 160A-372 (now N.C.G.S. § 160D-804)." The Town's petition requested that we determine whether the decision of the Court of Appeals majority "equate[d] to a finding . . . that the Town could require sidewalk improvements on land outside of the subdivision." We conclude at the end of this opinion that there is no need for us to decide these additional issues.

appearing in the record." *Id.* A decision to deny the application must rest on one or more grounds set out in the ordinance. *Id.* In short, the board must base its decision on the evidence and the text of the ordinance, not on the biases or whims of its members.

"Appeals of [a local government board's] quasi-judicial decisions go directly to superior court." Owens, *Land Use Law*, at 266; *see also* N.C.G.S. § 160D-1402(b) (2023) ("An appeal in the nature of certiorari shall be initiated by filing a petition for writ of certiorari with the superior court."). When reviewing a quasi-judicial decision by a local government board, the superior court does not function as a trial court; rather, it "sits in the posture of an appellate court[ ] and . . . reviews th[e] evidence presented to the [local government] board." *PHG Asheville*, 374 N.C. at 149 (quoting *Mann Media, Inc. v. Randolph Cnty. Plan. Bd.*, 356 N.C. 1, 12–13 (2002)).

The superior court reviews the board's decision to determine whether it was:

> a. In violation of constitutional provisions, including those protecting procedural due process rights[;]
>
> b. In excess of the statutory authority conferred upon the local government, including preemption, or the authority conferred upon the decision-making board by ordinance[;]
>
> c. Inconsistent with applicable procedures specified by statute or ordinance[;]
>
> d. Affected by other error of law[;]
>
> e. Unsupported by competent, material, and substantial evidence in view of the entire record[; or]
>
> f. Arbitrary or capricious.

N.C.G.S. § 160D-1402(j)(1).

The standard of review used by the superior court depends on the precise issues raised on appeal. *PHG Asheville*, 374 N.C. at 150. If a petitioner alleges that the board made an error of law, the court reviews the alleged error de novo, "consider[ing] the matter anew and freely substitut[ing] its own judgment for the [board's] judgment." *Id.* (quoting *Mann Media*, 356 N.C. at 13–14); *see also* N.C.G.S. § 160D-1402(j)(2) ("The court shall consider the interpretation of the decision-making board [when reviewing an alleged error of law], but is not bound by that interpretation, and may freely substitute its judgment as appropriate.").

On the other hand, if a petitioner alleges that the board's action was unsupported by competent, material, and substantial evidence or was arbitrary or capricious, the court undertakes a whole record review. *PHG Asheville*, 374 N.C. at 150–51. "In conducting a whole record review, the [superior] court must examine all competent evidence (the 'whole record') in order to determine whether the [board's] decision is supported by substantial evidence." *Id.* at 151 (cleaned up).

The decision of the superior court is subject to appeal. In such cases, the Court of Appeals analyzes the superior court's order for errors of law by "(1) determining whether the [superior] court exercised the appropriate scope of review and, if appropriate, (2) deciding whether the court did so properly." *Id.* (quoting *Mann Media*, 356 N.C. at 14). "In the event that the case under consideration reaches this Court after a decision by the Court of Appeals, the issue before this Court is whether the Court of Appeals committed any errors of law." *Id.*

III. Analysis

To examine the Court of Appeals' decision for errors of law, this Court must "make the same inquiry that the Court of Appeals was called upon to undertake in reviewing the [superior] court's order. As a result, we will now examine whether the [superior] court utilized the appropriate standard of review and, if so, whether it did so properly." *See id.*

As we have seen, whole record review is the proper standard of review for allegations that a local government board did not base its quasi-judicial decision on competent, material, and substantial evidence. Yet the question before the superior court was not whether competent, material, and substantial evidence in the record supported the BOC's decision. Instead, the question was whether the evidence petitioner submitted to satisfy its initial burden of production amounted to competent, material, and substantial evidence. Under this Court's precedent, answering that second question "involves the making of a legal, rather than a factual, determination." *PHG Asheville*, 374 N.C. at 152. Accordingly, the Court of Appeals majority rightly held that the superior court erred by not conducting a de novo review. *Id.* at 152–53; *see also* N.C.G.S. § 160D-1402(j)(2) ("Whether the record contains competent, material, and substantial evidence is a conclusion of law, reviewable de novo.").

"If a [superior] court fails to properly make a de novo review" of alleged errors of law, "the appellate court can apply a de novo review rather than remand the case" where, as here, "the record on appeal . . .

provide[s] the requisite information for the review." Owens, *Land Use Law*, at 653. Consequently, we review de novo whether petitioner met its initial burden of production.

In its principal brief to this Court, petitioner offers three main reasons for reversing the Court of Appeals majority's ruling that "[p]etitioner failed to meet its burden of production to show it met [UDO § 3.7.5] to establish a *prima facie* case for entitlement of the permits." *Schooldev*, 284 N.C. App. at 453. First, petitioner argues that the Town exceeded its statutory authority by, among other things, erroneously relying on UDO § 3.7.5 to deny petitioner's subdivision permit request even though UDO § 3.7.5 is a zoning ordinance, not a subdivision ordinance. *See generally Lanvale Props., LLC v. County of Cabarrus*, 366 N.C. 142, 158-59 (2012) (explaining that "subdivision ordinances control the development of specific parcels of land while general zoning ordinances regulate land use activities over multiple properties located within a distinct area of the [local government's] territorial jurisdiction"). Second, petitioner maintains that N.C.G.S. § 160A-307.1 largely preempts the pedestrian and bicycle connectivity requirements in UDO § 3.7.5. Third, petitioner argues that it presented sufficient evidence of compliance with UDO § 3.7.5 and so should have been granted the requested permits in any event.

We agree with petitioner's third argument. As explained below, petitioner carried its initial burden of production by presenting competent, material, and substantial evidence of compliance with UDO § 3.7.5, and the BOC did not have before it any competent, material, and substantial evidence to support a finding to the contrary. Hence, the BOC should have approved petitioner's permit applications regardless of whether UDO § 3.7.5 qualifies as a subdivision ordinance or N.C.G.S. § 160A-307.1 preempts UDO § 3.7.5. We therefore do not reach petitioner's first two arguments.

In its brief to this Court, the Town argues that petitioner's evidence was insufficient because UDO § 3.7.5 "does not require connectivity to just one 'surrounding residential area,' but instead to all surrounding residential areas." The Court of Appeals majority appears to have adopted the Town's interpretation of UDO § 3.7.5. *See Schooldev*, 284 N.C. App. at 453 (noting that petitioner's plans "would provide pedestrian connectivity to only one residential neighborhood").

The dispositive issue on appeal is thus whether UDO § 3.7.5 mandates pedestrian and bicycle connectivity to *all* residential areas surrounding the campus lot. To resolve this matter, we again refer to the text of UDO § 3.7.5.

> **A. For Schools in the RD Zone Only:** To encourage walking and bicycle accessibility by schoolchildren to schools, it shall be required by the applicant to demonstrate how such accessibility can be achieved, given the low density nature of this district. Accommodation may include the construction of additional off-premise sidewalks, multi-use trails/paths[,] or greenways to connect to existing networks.
>
> **B. For All Schools:**
>
> . . . .
>
> 2. Connectivity (vehicular and pedestrian) to surrounding residential areas is required. Where a full vehicular connection is impractical, a multi-use trail connection shall be provided.

Although UDO § 3.7.5(A) requires a permit applicant to demonstrate how its plans can achieve pedestrian and bicycle connectivity, it does not expressly declare that the applicant's plans must provide connectivity to *all* surrounding residential areas. Similarly, while UDO § 3.7.5(B)(2) declares that pedestrian connectivity "to surrounding residential areas is required," it does not state that connectivity to *all* surrounding residential areas is necessary.

In some of its arguments to this Court, the Town essentially concedes that UDO § 3.7.5 is unclear. It admits that municipalities lack statutory authority to compel developers to build streets or roads outside their respective subdivisions. *See Buckland v. Haw River*, 141 N.C. App. 460, 463 (2000) (holding that the subdivision enabling statute "does not empower municipalities to require a developer to build streets or highways *outside* its subdivision"). For this reason, the Town insists that UDO § 3.7.5 should not be interpreted to require the construction of sidewalks or other improvements across land outside a developer's subdivision site. Thus, according to the Town, the term "off-premise" in UDO § 3.7.5(A) does not refer to areas outside a subdivision; rather, "off-premise" means "off the school's premises (the school's campus) but still within the subdivision site." While the Town's narrow interpretation of "off-premise" may not contradict anything in UDO § 3.7.5(A), it is not obvious from the text of the ordinance that the BOC used the term with that meaning in mind.

Furthermore, if we accept the Town's position that UDO § 3.7.5 does not mandate off-site improvements, it appears that there could be

scenarios in which UDO § 3.7.5(B)(2) would not mandate pedestrian connectivity to all surrounding residential areas. Under the Town's reading, UDO § 3.7.5(B)(2) cannot be understood to require connectivity to a surrounding residential area if providing it would entail the construction of a sidewalk or multi-use path outside the developer's subdivision. This situation might arise, for instance, where an empty lot separates the subdivision site for a proposed school from a nearby neighborhood. Perhaps the BOC did not intend the phrase "surrounding residential areas" in UDO § 3.7.5(B)(2) to include any neighborhood that does not actually share a border with the developer's subdivision site. We cannot reach that conclusion based solely on the text of UDO § 3.7.5 or related UDO provisions, however.

As if it were checkmate, our dissenting colleagues point to dictionary definitions of "surrounding" to argue that the phrase "surrounding residential areas" is not ambiguous. Specifically, they maintain that, because "surrounding" has been defined as "all around a place or thing" and "enclosing or encircling," the BOC did not need to use the term "all" in UDO § 3.7.5(B)(2) to express its intent that developers provide connectivity to every residential area located around a proposed school.

Courts often rely on dictionary definitions when construing terms in statutes or ordinances—we did so earlier in this very opinion—but this practice can do more harm than good when courts apply the definitions to manufacture a false certainty. Our dissenting colleagues ignore that modifiers such as "completely," "entirely," and "all" are commonly attached to "surrounding," "surrounded," and similar words. We might say, for example, that a military unit is "completely surrounded" by hostile forces. Likewise, one dictionary defines "encompass" to mean "to surround *entirely*." *Encompass*, *Oxford Dictionary of English* (3d ed. 2010) (emphasis added). Another dictionary defines "surround" as "to enclose *on all sides*." *Surround*, *Merriam-Webster's Collegiate Dictionary* (11th ed. 2007) (emphasis added). Thus, even lexicographers sometimes add modifiers to words like "surround" to ensure clarity.

Because UDO § 3.7.5 is unclear, we consult this Court's precedents on the correct interpretation of uncertain provisions in land use ordinances. These precedents instruct us to resolve any "well-founded doubts" about a provision's meaning "in favor of the free use of property." *Yancey v. Heafner*, 268 N.C. 263, 266 (1966) (cleaned up); *see also Westminster Homes*, 354 N.C. at 308 ("[A]mbiguous zoning statutes should be interpreted to permit the free use of land . . . .").

This is no arbitrary canon of construction. It reflects our state's longstanding public policy favoring the "free and unrestricted use and enjoyment of land." *Kirby*, 368 N.C. at 853 (quoting *J.T. Hobby & Son, Inc. v. Fam. Homes of Wake Cnty., Inc.*, 302 N.C. 64, 71 (1981)). That public policy recognizes and preserves the foundational place of property rights in our constitutional order. *See id.* at 852–53 ("The fundamental right to property is as old as our state." (citing N.C. Const. of 1776, Declaration of Rights § XII; *Bayard*, 1 N.C. (Mart.) at 9)). If local governments adopt ordinances that interfere with property rights, they owe it to property owners to use plain language. *See Arter v. Orange Cnty.*, 386 N.C. 352, 352 (2024) ("Local governments have a responsibility to enact clear, unambiguous zoning rules."). Property owners should not need law degrees to figure out what local government ordinances allow them to do with their own land.

Consistent with our precedents, we resolve our doubts about the meaning of UDO § 3.7.5 against the Town and in favor of the free use of property. Thus, we do not interpret UDO § 3.7.5 to require pedestrian and bicycle connectivity to all residential areas surrounding the campus lot. Petitioner satisfied its initial burden by presenting competent, material, and substantial evidence that its proposed multi-use path would provide pedestrian and bicycle access to the public park and 273-home subdivision on the other side of Harris Road.

Because petitioner carried its initial burden of production and no one offered any evidence in opposition to its applications, the BOC had no basis on which to conclude that petitioner's applications failed to satisfy Standards 1 and 2 of the UDO. Consequently, the superior court erred by affirming the BOC's orders denying the applications, and the Court of Appeals erred in turn by affirming the superior court's order.

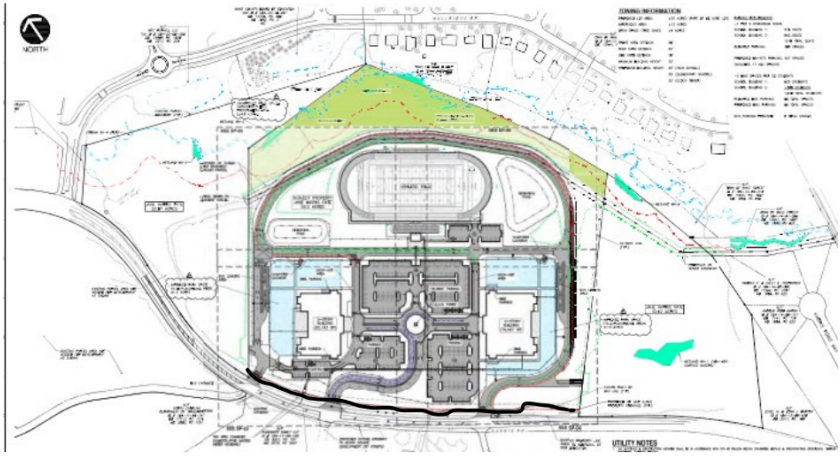
IV. Conclusion

For the reasons explained above, we reverse the decision of the Court of Appeals and remand this case with instructions to the Town to approve petitioner's site plan and subdivision plan applications. Inasmuch as our resolution of this case makes it unnecessary to reach the additional issues raised in the parties' petitions for discretionary review, we further conclude that discretionary review was improvidently allowed.

REVERSED AND REMANDED; DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

Justice RIGGS dissenting.

In our system of law, we develop factual records for a reason. And we, as appellate courts, understand that we should treat with deference the evidence presented to and found by decision makers. Although a trite saying, the adage "a picture is worth a thousand words" carries much significance in this matter.



The site plan map above answers so many questions about the matter at hand, but rather than examine it and meaningfully engage with what it shows, the majority ignores this evidence and renders a clear ordinance meaningless. How does it do this? By invoking the "free use of land" canon of statutory construction. That canon, though, is reserved only for ambiguous ordinances. And even when it is appropriate, it merely calls for a strict interpretation of the ordinance; the canon does not permit a court to entirely disregard the ordinance's language. Further, the canon cannot be used to sidestep the ordinance's purpose.

Notwithstanding the ordinance's straightforward language and purpose, the majority invokes the free use of land canon to defang a legitimate local regulation of property rights. In doing so, the majority provides no clarity for what level of connectivity is required under the Town's ordinance. For these reasons, I respectfully dissent.

I. The Free Use of Land Canon

Municipal corporations, upon creation, "take[ ] control of the territory and affairs over which [they are] given authority." *Parsons v. Wright*,

223 N.C. 520, 522 (1943). Indeed, the very "object of incorporating a town or city is to invest the inhabitants of the municipality with the government of all matters that are of special municipal concern." *Id.* Zoning ordinances fall into this neat category, and the General Assembly has "delegated [the original zoning power] to the legislative body of municipal corporations." *Allred v. City of Raleigh*, 277 N.C. 530, 540 (1971) (cleaned up); *see also* N.C.G.S. § 160A-174(a) (2023) ("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 . . . ."). Zoning laws are, thus, products of our political processes just like any other type of legislation. They "involve a reciprocity of benefit as well as of restraint" and "balanc[e] public against private interests." *McKinney v. City of High Point*, 237 N.C. 66, 71 (1953) (quoting 8 McQuillin, *The Law of Mun. Corps.* § 25.25 (3d ed. 1949)). Moreover, they are emblematic of legislation dedicated to the public welfare and serve a "fundamental purpose[ ]" in "stabiliz[ing], conserv[ing], and protecting . . . uses and values of land and buildings." *Id.* (quoting *The Law of Mun. Corps.* § 25.25).

That is not to say that "[v]ast property rights are [not] affected by zoning regulations." *Id.* As far back as 1919, this Court took notice of the rule that "all statutes in derogation of the common law are to be construed strictly" unless the common law was "changed by express enactment." *Price v. Edwards*, 178 N.C. 493, 500 (1919) (cleaned up). Among the examples noted by this Court were statutes "impos[ing] restrictions upon the control, management, use, or alienation of private property." *Id.* (cleaned up). For that exact reason, our jurisdiction and others have adopted the rule of construing ambiguous land ordinances "strictly in favor of the free use of real property." *Morris Commc'ns Corp. v. City of Bessemer City Zoning Bd. of Adjustment*, 365 N.C. 152, 157 (2011).

For example, a little under sixty years ago, in *Yancey v. Heafner*, 268 N.C. 263 (1966), we allowed the construction of a high school athletic stadium despite zoning restrictions. *Id.* at 263. Neighbors of the high school were upset about the potential lighting and noise disturbances, so they filed suit challenging the validity of the permit. *Id.* at 263, 265. When the case reached this Court, we concluded that the applicable zoning ordinance was silent as to whether athletic facilities were "forbidden in zones where schools are permitted." *Id.* at 264. To this Court, that silence was dispositive; it signified that the city council did not contemplate prohibiting athletic stadiums and, thus we leaned on the adage that "well-founded doubts as to the meaning of obscure provisions of a [z]oning [o]rdinance should be resolved in favor of the free

use of property." *Id.* at 266 (quoting 1 Yokley, *Zoning Law & Practice* § 184 (2d ed. 1962)).

Notwithstanding this canon, this Court does not find default ambiguity in order to minimize restrictions on the free use of land. *See Westminster Homes, Inc. v. Town of Cary Zoning Bd. of Adjustment*, 354 N.C. 298, 308 (2001) ("While ambiguous zoning statutes should be interpreted to permit the free use of land, . . . no such ambiguity exists here."); *see also* 1 Arthur H. Rathkopf & Daren A. Rathkopf, *Ruthkopf's The Law of Zoning and Planning* § 5:14 (Sara C. Bronin & Dwight H. Merriam eds., 2024) ("The doctrine that zoning ordinances should be construed in favor of the free use of land operates *only* where ambiguity exists." (emphasis added)); *id.* ("[T]his rule of construction favoring the free use of land should not be applied where common sense indicates the result would be contrived, unreasonable, or absurd in view of the manifest object and purpose of the ordinance.").

Indeed, in *Westminster Homes*, we abstained from invoking the free use of land canon where a conditional use permit expressly allowed homeowners to install "fences" but did not mention "gates." 354 N.C. at 300–01. In doing so, we first emphasized the importance of "ascertain[ing] and effectuat[ing] the *intention* of the municipal legislative body." *Id.* at 303–04 (emphasis added) (quoting *George v. Town of Edenton*, 294 N.C. 679, 684 (1978)); *see also Long v. Branham*, 271 N.C. 264, 268 (1967) ("[C]onstruction in favor of the . . . unrestricted use, however, must be reasonable. The strict rule of construction as to restrictions should not be applied in such a way as to defeat the plain and obvious purposes of a restriction." (cleaned up)). We then achieved that goal by simply looking to the ordinance's plain language, which conveyed "a clear desire for privacy through a wide, comprehensive buffer." *Westminster Homes*, 354 N.C. at 307. Because the ordinance's text and intent were clear, there was no need to resort to statutory construction and we concluded that the permit did not allow residents to install gates. *Id.* at 308.

Here, the majority's conclusion contravenes the plain language of Section 3.7.5(B)(2). Under Section 3.7.5(B)(2), the applicant is "required" to provide "vehicular and pedestrian" "[c]onnectivity . . . to surrounding residential areas." UDO § 3.7.5(B)(2) (2013). In the event that "full vehicular connection is impractical," the ordinance indicates that "a multi-use trail connection" is an adequate replacement. The majority takes issue with this provision because "it does not state that connectivity to *all* surrounding residential areas is necessary." But that is, in fact, what this provision does.

The plain language of Section 3.7.5(B)(2) requires an applicant to connect to each residential area surrounding it. As explained earlier, the basic rule of ordinance interpretation "is to ascertain and effectuate the intention of the municipal legislative body." *Westminster Homes*, 354 N.C. at 303–04 (cleaned up). This intent is determined "by examining [the] (i) language, (ii) spirit, and (iii) goal of the ordinance." *Capricorn Equity Corp. v. Town of Chapel Hill Bd. of Adjustment*, 334 N.C. 132, 138 (1993). "When interpreting a municipal ordinance, we apply the same principles of construction used to interpret statutes." *Morris Commc'ns Corp.*, 365 N.C. at 157 (citing *Westminster Homes*, 354 N.C. at 303). "Undefined and ambiguous terms in an ordinance are given their ordinary meaning and significance." *Id.* (citing *Perkins v. Ark. Trucking Servs., Inc.*, 351 N.C. 634, 638 (2000)); *see also The Law of Zoning and Planning* § 5:11 ("Where a word or term is not defined for the purposes of the ordinance, it will usually be given its plain, ordinary, and usually understood meaning."). Thus, it is well accepted that "courts may appropriately consult dictionaries" to "ascertain the ordinary meaning of undefined and ambiguous terms." *Morris Commc'ns. Corp.*, 365 N.C. at 158 (citing *Perkins*, 351 N.C. at 638).

According to several dictionaries, "surrounding" means "*all* around a particular place or thing," *New Oxford American Dictionary* 1751 (3d ed. 2010) (emphasis added), or "enclosing or encircling," *The Random House Dictionary of the English Language* 1916 (2d ed. 1987). Thus, the ordinary meaning of Section 3.7.5(B)(2) requires some type of effort to provide vehicular or bicycle connectivity to *all* residential areas encircling it. And this makes sense considering the plural tense of "residential areas"—the ordinance clearly requires applicants to connect the planned site with adjacent neighborhoods through streets and walkable pathways. But rather than conduct a simple dictionary check, the majority reads in an ambiguity.[1] The city ordinance writers did not include the word "all" in Section 3.7.5(B)(2) because "all" is necessarily implied by the word "surrounding."

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1. The majority offers a dictionary definition for Section 3.7.5(B)(2). But rather than define "surrounding" (the adjective in the ordinance's text), the majority defines "surround"—a verb. The difference is significant here. Using the actual word in the text, it remains the case that there is no need to state "all surrounding residential areas" because "surrounding residential areas" necessarily implies that the ordinance requires connectivity to residential areas "all around [the subdivision]." The majority's reading neither relies on the plain language nor the ordinance's purpose. *See Lanvale Properties, LLC*, 366 N.C. 142, 155–56 (2012) (rejecting the proposition that "an [alleged] lack of specificity" is fatal in light of the legislation's "clear guidance").

Lastly, this reading of the ordinance comports with one of the listed purposes in the Town's Unified Development Ordinance. Section 1.4, entitled "Purpose and Intent," indicates that Section 3.7.5 was adopted to "[f]acilitate walking and biking in the community by providing a well-integrated network of streets, sidewalks, bikeways, walking trails, and greenway trails," among other purposes. UDO § 1.4 (2013). By requiring some sort of connectivity to each neighboring residential area, an applicant may satisfy this prerequisite. And this is no minor consideration—the level of connectivity in a neighborhood plays several roles in our everyday life, such as vehicular traffic, obesity, and happiness. *See* Kevin M. Leyden et al., *Walkable Neighborhoods: Linkages Between Place, Health, and Happiness in Younger and Older Adults*, 90 J. of Am. Planning Ass'n 101, 101 (2024) ("We found that the way neighborhoods are planned and maintained matter[ ] for happiness, health, and trust."); Milan Zlatkovic, et al., *Assessment of Effects of Street Connectivity on Traffic Performance and Sustainability Within Communities and Neighborhoods Through Traffic Simulation*, 46 Sustainable Cities & Soc'y 1, 1 (2019) ("People need to be able to travel within the community in a safe and efficient manner."); Arlie Adkins, et al., *Contextualizing Walkability: Do Relationships Between Built Environments and Walking Vary by Socioeconomic Context?*, 83 J. of Am. Planning Ass'n 296, 296 (2017) ("Supportive built environments for walking, bicycling, and transit use are predictive of a larger share of trips made by active travel modes and higher rates of walking or physical activity."). By reading in an ambiguity and invoking the free use of land canon, the majority disregards this plain reading of the UDO.

The majority also ignores the plain language of Section 3.7.5(A). Section 3.7.5(A) requires the applicant to "demonstrate how [walking and bicycle] accessibility can be achieved," given the residential district's "low density nature." UDO § 3.7.5(A) (2013). The ordinance further provides examples of how this accessibility may be accomplished: "Accommodations may include the construction of additional off-premise sidewalks, multi-use trails/paths or greenways to connect to existing networks." *Id.* Like with Section 3.7.5(B)(2), the majority also concluded this section was ambiguous because "it does not expressly declare that the applicant's plans must provide connectivity to *all* surrounding residential areas." But the majority misses the point: the plain language of Section 3.7.5(A) requires a demonstration of how the applicant plans to achieve accessibility for schoolchildren. It does not require the same proof that Section 3.7.5(B)(2) does. Because this ordinance is not ambiguous, the majority again wrongly invoked the free use of land canon.

II. Schooldev Failed to Meet Its Prima Facie Burden

In one sentence, the majority addresses Schooldev's prima facie burden. Such brevity illuminates how thin Schooldev's argument is. Schooldev presented no affirmative evidence to meet its burden under Sections 3.7.5(A) and 3.7.5(B)(2), and thus, the Court of Appeals' judgment should have been affirmed.

When determining whether to grant or deny a land use permit, the trial court first places a burden on the applicant to establish a prima facie case of entitlement to a conditional use permit. *PHG Asheville, LLC v. City of Asheville*, 374 N.C. 133, 149 (2020) (citing *Humble Oil & Refin. Co. v. Bd. of Alderman*, 284 N.C. 458, 468 (1974)). At this point, the applicant must produce "competent, material, and substantial evidence *tending to establish* the existence of the facts and conditions which the ordinance requires for the issuance of a [conditional] use permit." *Id.* (emphasis in original) (alteration in original) (quoting *Humble Oil*, 284 N.C. at 468). If this *prima facie* case is established, the agency may only deny the application "based upon findings contra which are supported by competent, material, and substantial evidence appearing in the record." *Id.* (quoting *Humble Oil*, 284 N.C. at 468). Those findings must contradict "grounds [ ] expressly stated in the ordinance." *Id.* (quoting *Woodhouse v. Bd. of Comm'rs*, 299 N.C. 211, 218 (1980)). Relevant here, the Town denied Schooldev's permit application because it failed to establish compliance with Sections 3.7.5(A) and 3.7.5(B)(2). Thus, on appeal, the question is whether Schooldev satisfied its prima facie burden to proffer evidence tending to prove compliance with these ordinances.

Schooldev argues that it met its prima facie burden by "presenting evidence that the campus would have a 10-foot-wide multi-use path that connects to a nearby residential neighborhood and an adjoining town park with a network [of] pedestrian paths." But Schooldev's site plan map tells a different story. To the east and west of the planned site lay undeveloped tracts of land. Residential homes along Walridge Road sit north of the school. Across Harris Road from the planned site is a 117-acre park. As the Town points out, the only accessibility or connectivity accommodation provided by Schooldev is a sidewalk that "connect[s] two of the school's driveways at the front of the school on Harris Road." Schooldev's claim that it provides connectivity is misleading, as the site plan does not include any connection to the homes to the north on Walridge Road. Schooldev incorporated no plans to connect those homes, and nothing prevented Schooldev from providing paths within its own property—the pathways did not need to be off-premises.

Statements made during the Town's planning board meeting further supports the conclusion that Schooldev did not meet its prima facie burden. During that meeting, Schooldev's counsel testified about possible conflicts with the ordinance. Everything its counsel addressed concerned the single ten-foot-wide sidewalk at the property's frontage. For biking, Schooldev's counsel asserted that the development plan was "consistent with the policy for bike ways" because it provides a multi-use path for a community currently lacking "any pedestrian or bike way facilities." That "multi-use path" is the one sidewalk to Harris Road and the only connectivity on any of the four sides of the school. Aside from that sidewalk, Schooldev's counsel argued vaguely that "[s]tem streets . . . offer some connectivity to the adjacent undeveloped parcels if there is future development and the connectivity is possible." To Schooldev's counsel, "[t]he project *seeds* Harris Road with the multi-use pathway . . . for a walkable and bikeable community." (Emphasis added.) Because no sidewalk currently exists from the property to Harris Road, Schooldev's counsel essentially argued its plan was better than nothing and that it "begins the connection." But that is not what the ordinance plainly requires.

It is worth reiterating that ordinances are products of our political processes. Like any other legislation, a zoning ordinance "may be repealed in its entirety, or amended as the city's legislative body determines from time to time to be in the best interests of the public." *Zopfi v. City of Wilmington*, 273 N.C. 430, 434 (1968) (citing *In re Markham*, 259 N.C. 566 (1963)). It "is not a contract with the property owners of the city and confers upon them no vested right . . . to demand that the boundaries of each zone or the uses to be made of property in each zone remain as declared in the original ordinance." *Id.* at 434 (citing *McKinney v. City of High Point*, 239 N.C. 232 (1954)). In other words, if a property owner is upset with an existing ordinance, they may engage with their local legislative body. Like with many laws, any necessary fix should be primarily legislative, not judicial.

III. Conclusion

It is worth reiterating that ordinances are products of our political processes. Like any other legislation, a zoning ordinance "may be repealed in its entirety, or amended as the city's legislative body determines from time to time to be in the best interests of the public." *Zopfi v. City of Wilmington*, 273 N.C. 430, 434 (1968) (citing *In re Markham*, 259 N.C. 566 (1963)). It "is not a contract with the property owners of the city and confers upon them no vested right . . . to demand that the boundaries of each zone or the uses to be made of property in each zone remain as declared in the original ordinance." *Id.* at 434 (citing

McKinney v. City of High Point, 239 N.C. 232 (1954)). In other words, if a property owner is upset with an existing ordinance, they may engage with their local legislative body. Like with many laws, any necessary fix should be primarily legislative, not judicial.

In sum, because the ordinance is not ambiguous and because Schooldev failed to meet its burden of production, I respectfully dissent from majority's decision to reverse the judgment of the Court of Appeals.

Justice EARLS joins in this dissenting opinion.

STATE OF NORTH CAROLINA
v.
SEAGA EDWARD GILLARD

No. 316A19

Filed 13 December 2024

1. Evidence—prior bad acts—murder trial—prior armed assaults and rapes—common scheme or plan—temporal proximity and similarity

In a capital murder prosecution arising from the fatal shooting of a prostitute and her protector at a hotel by defendant and another man, the trial court did not err in admitting evidence from two women who related separate incidents that each took place less then two months before the fatal shooting in which each woman, while working as a prostitute at a hotel, was raped and robbed at gunpoint by defendant and a second man. The incidents were admissible under Evidence Rule 404(b) as evidence of defendant's identity, motive, and a common plan or scheme to rape and rob the murder victim because there was sufficient temporal proximity and similarity between those incidents and the one that gave rise to the murder charges. Given that the evidence demonstrated a common plan or scheme, its admission was not unfairly prejudicial so as to outweigh any probative value under Evidence Rule 403. Further, the trial court's limiting instruction regarding the prior incidents was not in error or, even if there was any error, it was invited error since the instruction was given at defendant's request.

2. Evidence—murder trial—gun never recovered—prior assault with a firearm—relevance

In a capital murder prosecution arising from the fatal shooting of a prostitute and her protector at a hotel, in which the gun defendant used to shoot one of the victims was never recovered, the trial court did not commit plain error by admitting evidence from a woman about a prior incident involving defendant making a threat to her by putting his gun up to her mouth and telling her if she didn't comply with his demands, then her blood would be on the walls. The prior incident was relevant to the question of whether defendant possessed a firearm and, even if the evidence was not relevant, defendant failed to show that the jury probably would have reached a different result absent the evidence.

3. Evidence—witness testimony—background information—past experience of abuse—plain error review

In a capital murder prosecution arising from the fatal shooting of a prostitute and her protector at a hotel, the trial court did not commit plain error by admitting personal background information from two witnesses during the guilt-innocence phase of the trial and from two other witnesses during the sentencing phase, where the evidence was relevant and more probative than prejudicial. Testimony from the sister of one of the victims about the victim's past experience of abuse was limited in scope, provided an explanation for how the victim ended up as a prostitute, and did not constitute impermissible character testimony. Testimony from the other witness during the guilt-innocence phase detailing her abusive upbringing similarly served to provide context as to why she was working as a prostitute on the night she was attacked by defendant. For each of the two witnesses who detailed their experiences of abuse during the sentencing phase—in which less restrictive standards apply—their testimony introduced each of them to the jury and related to the aggravating circumstance of showing a course of conduct by defendant engaging in violent acts. Finally, the trial court properly instructed the jury that all of the evidence in both phases of the trial could be considered during sentencing deliberations.

4. Evidence—photographs—murder victims and scene—not repetitive or cumulative

In a capital murder prosecution arising from the fatal shooting of a prostitute and her protector at a hotel, the trial court did not abuse its discretion by admitting nearly one hundred photographs of the victims and the crime scene, only nine of which defendant challenged at trial. The challenged photos were not unnecessarily repetitive and cumulative where they depicted different angles

of the victims' bodies and injuries—as well as the distance between the bodies, shell casings, and bloody footprints in the context of the general layout of the room and hallway where the incident took place—and were illustrative of what officers observed when they arrived on the scene.

5. Homicide—first-degree murder—felony murder—underlying felony—sufficiency of evidence

In a capital murder prosecution arising from the fatal shooting of a prostitute and her protector at a hotel by defendant and another man, the State presented substantial evidence of first-degree murder based on felony murder, where the evidence—including testimony about prior rapes and robberies committed by defendant against other women, which was submitted pursuant to Evidence Rule 404(b) as evidence of a common plan or scheme—supported an inference that defendant intended to rape the female victim or rob her at gunpoint, and took overt steps to do so, before he was interrupted when his accomplice shot the other victim in the hallway outside the hotel room.

6. Homicide—first-degree murder—premeditation and deliberation—sufficiency of evidence

In a capital murder prosecution arising from the fatal shooting of a prostitute and her protector at a hotel by defendant and another man, the State presented substantial evidence from which a jury could conclude that defendant acted with premeditation and deliberation to support the first-degree murder charge regarding the female victim, including that defendant arrived at the hotel with a loaded weapon, there was no evidence of provocation by the female victim based on video surveillance, and the victim was unarmed when she was shot. Further, the two shots defendant fired at the victim, both of which hit her, constituted evidence of intent to kill.

7. Homicide—first-degree murder—acting in concert—murder committed in pursuit of a common plan

In a capital murder prosecution arising from the fatal shooting of a prostitute (a female) and her protector (a male) by defendant and another man, the State presented substantial evidence that defendant and his accomplice were acting in concert when the accomplice shot and killed the male victim. Specifically, there was sufficient evidence from which the jury could determine that the murder of the male victim occurred during the pursuit, and as a natural and probable consequence of the two men's common plan to

rob and rape the female victim; therefore, the charge of first-degree murder of the male victim based on theories of premeditation and deliberation and felony murder was properly submitted to the jury.

8. Sentencing—murder trial—aggravating circumstance—murder perpetrated during commission of felonies

In the sentencing phase of a capital murder prosecution arising from the fatal shooting of a prostitute and her protector at a hotel by defendant and another man, the State presented sufficient evidence that the murders occurred during the commission of the attempted rape or armed robbery of the female victim to support the submission of this aggravating circumstance to the jury.

9. Criminal Law—jury instructions—capital murder trial—culpability for killing by accomplice—major participant in events leading to death

In a capital murder prosecution arising from the fatal shooting of a prostitute and her protector (a male) at a hotel by defendant and another man, there was no plain error with regard to defendant's argument that, since he was not the one who killed the male victim and therefore could not have had the requisite intent to kill for imposition of the death penalty, the trial court should have included a culpability requirement in its jury instruction pursuant to *Enmund v. Florida*, 458 U.S. 782 (1982), and *Tison v. Arizona*, 481 U.S. 137 (1987). The instruction was not required because defendant was convicted of first-degree murder for the killing of the male victim on both theories of felony murder and premeditation and deliberation based on evidence showing that defendant was a major participant in the male victim's death by actively planning, arranging, and perpetrating an armed, violent felony that was likely to lead to a person's death.

10. Sentencing—capital murder trial—jury instructions—aggravating factors—multiple factors supported by same evidence

In the sentencing phase of a capital murder prosecution arising from the fatal shooting of a prostitute and her protector at a hotel by defendant and another man, the trial court did not commit plain error by failing to instruct the jury that it could not use the same evidence to support more than one aggravating factor. There was not a complete overlap in the evidence supporting the aggravating circumstance that the murders occurred during the attempt to commit rape or armed robbery and the evidence used to support the aggravating circumstance that the murders were part of a course of conduct by defendant engaging in violent acts against the victims.

There was substantial separate evidence that defendant subjected prior victims to the same type of violence perpetrated on the night in question.

11. Identification of Defendants—capital murder trial—sentencing phase—pre-trial identification—not induced by State action

In the sentencing phase of a capital murder prosecution arising from the fatal shooting of two victims, there was no violation of defendant's due process rights from the admission of a witness's pretrial identification of defendant as the perpetrator of a prior armed assault and robbery committed against her, where the identification did not result from any State action. Although the witness was contacted by a detective who was investigating whether a link existed between the murders and her prior reported attack, the witness did her own independent research and recognized defendant from a photograph in a news article. Any questions about the reliability of her testimony were for the jury to determine and went to the weight rather than the admissibility of the evidence.

12. Criminal Law—jury instructions—capital murder trial—felony murder—final mandate—felony elements not repeated

In a capital murder prosecution arising from the fatal shooting of two victims, the trial court did not plainly err when, in its final mandate to the jury on first-degree murder based on felony murder, it failed to repeat the elements for the underlying felonies—attempted first-degree rape and attempted robbery with a dangerous weapon—because the instructions, taken as a whole, included thorough and correct instructions regarding each element of those felonies and, therefore, there was no reasonable cause to suggest that the jury was misled or misinformed.

13. Criminal Law—capital murder trial—no error—no cumulative error

In a capital murder prosecution arising from the fatal shooting of two victims, defendant failed to show that cumulative prejudicial error deprived him of a fair trial and required reversal of his convictions and a new trial or sentencing hearing. Where the Supreme Court addressed each of defendant's substantive claims on appeal and found no error by the trial court, there could be no cumulative error.

14. Jury—selection—capital murder trial—excusal for cause—views on death penalty

During jury selection for a capital murder prosecution arising from the fatal shooting of two victims, the trial court did not abuse

its discretion by excusing three prospective jurors for cause based on their answers to questions about their ability to consider imposing a penalty of death—the one who stated that he didn't think that he could vote for (or would have a hard time voting for) the penalty; a second who stated unequivocally that she did not believe in the death penalty and would not vote for it; and a third who equivocated but then agreed that he would automatically vote for life without parole. In each case, the court's determination that the prospective jurors' stated views would substantially impair the performance of their duties to impartially apply the law was not manifestly unreasonable and, further, there was no abuse of discretion in the trial court's decision not to allow further questioning of each prospective juror by defendant in light of the improbability that different answers would be given.

15. Sentencing—capital murder trial—mitigating circumstances —peremptory instructions not required

During the sentencing phase of a capital murder prosecution arising from the fatal shooting of two victims, the trial court did not err by failing to give peremptory instructions to the jury regarding three out of forty mitigating circumstances, which would have directed the jury to find that a particular mitigating circumstance had been established if the jury found the facts presented to be true. Contrary to defendant's assertion, the evidence supporting each of the three non-statutory mitigating factors (that defendant's asthma as a child prevented him from engaging in sports, that his home life impacted his ability to succeed in school, and that he suffered from other specified trauma and related stressor disorder) was not uncontroverted.

16. Constitutional Law—capital murder trial—pretrial motion to strike death penalty—prosecutorial discretion

In a capital murder prosecution arising from the fatal shooting of two victims, the trial court did not err by denying defendant's pretrial motion to strike the death penalty because the decision to seek a particular sentence or to engage in plea bargaining is within the exclusive and discretionary power of the district attorney and does not impermissibly burden a defendant's constitutional rights.

17. Constitutional Law—Eighth and Fourteenth Amendments—death penalty—method of lethal injection—substantial and imminent risk not shown

In a capital murder prosecution arising from the fatal shooting of two victims in which defendant received a sentence of death,

defendant failed to meet his burden of demonstrating that the state's method of lethal injection involved a substantial risk of serious harm (severe pain over and above death itself) and that an alternative method was available that would entail significantly less risk of needless suffering. Therefore, defendant's argument that the state's method of punishment was cruel and unusual and unconstitutional under the Eighth and Fourteenth Amendments was rejected.

18. Criminal Law—capital murder trial—preservation issues

In a capital murder prosecution arising from the fatal shooting of two victims, arguments presented by defendant as preservation issues—that the death penalty should be invalidated and that the indictment was insufficient to elevate the crime of murder from second-degree to first-degree and did not allege aggravating circumstances—did not include compelling reasons to depart from well-established precedent.

19. Constitutional Law—effective assistance of counsel—capital murder trial—premature consideration on direct appeal

In a capital murder prosecution arising from the fatal shooting of two victims, where defendant's claims that his counsel provided ineffective assistance—by failing to object at numerous points throughout the trial and sentencing—could not be determined on the cold record, those claims were dismissed without prejudice to defendant's right to raise them in a subsequent proceeding.

Justice EARLS concurring in part and dissenting in part.

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

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by Judge Paul C. Ridgeway on 4 March 2019 in Superior Court, Wake County, upon a jury verdict finding defendant guilty of two counts of first-degree murder. Heard in the Supreme Court on 31 October 2023.

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

Glenn Gerding, Appellate Defender, by Amanda Zimmer, Assistant Appellant Defender, and Aaron Johnson, Assistant Appellate Defender, for defendant-appellant.

BERGER, Justice.

Defendant was convicted of two counts of first-degree murder and sentenced to death. He raises several issues on appeal, including admission and use of Rule 404(b) evidence, adequacy of jury instructions, and improper challenges for cause during jury selection, along with other perfunctory arguments. We address each in turn and conclude that defendant received a fair trial free from error. In addition, the trial court's judgment that defendant should be sentenced to death based upon the jury's recommendation during the sentencing phase was free from error.

I. Factual and Procedural Background

In the early morning hours of 2 December 2016, Dwayne Garvey and April Holland were shot and killed at a Raleigh hotel. Surveillance footage showed two men were the perpetrators. Raleigh Police released still photographs of the suspects, and an anonymous tip reported that defendant and Brandon Hill were involved. Police arrested defendant in his home on 3 December 2016.

Text messages showed that at approximately 3:30 a.m. on 2 December 2016, defendant contacted Holland[1] stating that he was seeking sexual services. Holland replied with her price and provided defendant with the address for the hotel. Defendant informed Holland of his arrival around 4:38 a.m., and Holland responded with her room number.

Surveillance footage showed defendant and Hill enter the hotel through a side door, and they began walking towards Holland's room. The two men were seen pacing in the hallway prior to defendant entering Holland's room. The footage showed Garvey, who served as Holland's protector, walk past defendant and Hill in the hallway. An extraction report of Garvey's phone showed that he texted Holland "I saw two dudes. . . . Let me know you good."

Approximately four minutes later, the footage showed Garvey banging on the door to Holland's room. Hill then reentered the hallway carrying a gun and Garvey tried swatting at it before putting his hands in the air. The footage showed Hill shoot Garvey several times. Defendant exited Holland's room and fired two shots into the room.

Both Garvey and Holland sustained multiple gunshot wounds and were dead when officers arrived. The autopsy of Garvey showed that

1. Holland and Garvey both received the text messages using Google Voice.

the fatal shot severed his aorta. Holland's autopsy revealed that she was twelve weeks pregnant at the time and had suffered two gunshot wounds, one to the right side of her face and a fatal shot to her chest.

As part of their investigation, police obtained a search warrant for defendant's home. During the search, officers seized two cell phones. An extraction report of defendant's phones showed he had conducted an internet search for female escorts on the morning of the murders, followed by a search for the address of the hotel where Garvey and Holland were located. His browsing history also showed that shortly after the murders occurred, defendant searched multiple times for "man wanted for shooting," "man wanted for shooting, Raleigh, NC," "two men wanted in Raleigh," and "[h]ow much can you face for double homicide?" He also accessed a webpage concerning state laws on fetal homicide.

On 23 January 2017, defendant was indicted by a Wake County grand jury on two counts of first-degree murder, and the State subsequently announced its intent to seek the death penalty. Defendant filed numerous pretrial motions seeking to prohibit the State from introducing evidence of prior criminal activity by defendant against multiple victims, to suppress witnesses' pretrial identifications of defendant, and to prohibit the imposition of the death penalty on various grounds.

A Wake County jury found defendant guilty of two counts of first-degree murder, and he was sentenced to death on 4 March 2019 following the jury's recommendation. Defendant timely appealed to this Court pursuant to N.C.G.S. § 7A-27(a). We find no prejudicial error in defendant's conviction and affirm the trial court's death sentence.

II. Analysis

A. Admission of 404(b) Evidence of Prior Acts Against Bessie A. and Rachel B.[2]

[1] Defendant first argues that the trial court erred in admitting the State's 404(b) evidence regarding prior criminal acts that defendant committed against Bessie A. and Rachel B.

Approximately two months before the murders of Garvey and Holland, Bessie A. was contacted by a man who was seeking sexual services. Bessie A. agreed to meet the man at a low-budget hotel in Raleigh, and she was ambushed when two men entered her room

2. Throughout this opinion, we have chosen to use first names and initials to identify sexual assault victims who provided 404(b) evidence to ensure that their experiences are not anonymized or diminished, while at the same time respecting their privacy.

brandishing firearms. The men forced Bessie A. to remove her clothes and then stole her purse, bank card, driver's license, tablet, and cell phone. One of the men, whom Bessie A. recalled wearing a red hat and having a tattoo on his hand, raped her at gunpoint. The men then tied Bessie A.'s feet and hands together using pillowcases, threw blankets on top of her, and fled the scene. Bessie A.'s license was discovered by police in Hill's possession, and she later identified both defendant and Hill as the perpetrators. Bessie A. specifically named defendant as the individual who had raped her.

Less than two weeks later, on 28 October 2016, Rachel B. was also contacted by a man who planned to meet her at a low-budget hotel for sexual services. When Rachel B. opened the door to greet the man, she was ambushed by two men with guns. The two men began going through her personal items, forced her to undress, tied her hands and feet together, and then took turns raping her. The men then strangled her with a phone cord and took turns kicking her in the face. The two men stole Rachel B.'s ID, Social Security card, birth certificate, cell phone, clothes, and other personal items before leaving the hotel room. During this incident, Rachel B. noticed one man had a foreign accent and spider tattoos on his calf. She later identified this individual as defendant.

After the State disclosed its intent to call Bessie A. and Rachel B. as witnesses, defendant filed motions in limine to exclude this evidence. In its order on the admissibility of 404(b) evidence concerning the Bessie A. incident, the trial court made the following findings of fact:

> 11. On October 16, 2016, [Bessie A.] was raped and robbed in a hotel. The night of the rape, [Bessie A.] had been prostituting herself and had agreed to meet up with a potential "John." To [Bessie A.]'s surprise, two black males arrived and forced her into the hotel bedroom.
>
> 12. Both assailants had pistols, one silver and one black, and told her to get on the hotel bed. The men continued to yell at [Bessie A.] and demand for her to tell them where her money and belongings were. They took her I.D. and her debit card from her purse and forced her to reveal her PIN.
>
> 13. The men stripped her of her clothes, bound her hands and feet with the telephone cord, and the first man proceeded to rape her.

> 14. After the first man was finished, he disposed of the condom in the toilet. The second man was unwilling to penetrate because he did not have a condom. The two men then wrapped [Bessie A.] in a blanket and left her naked and restrained on the bed.
>
> 15. [Bessie A.] was able to make her way downstairs to the hotel lobby and was aided by the staff, and later, the police.
>
> 16. [Bessie A.] was able to identify Defendant and Co-Defendant Hill as her assailants with 80% certainty from a properly-administered police photo lineup.
>
> 17. Through further police investigation, [Bessie A.]'s I.D. and debit card were found in the car used by co-defendant Brandon Hill.
>
> 18. Defendant and co-defendant Brandon Hill are known associates, having been identified as such by the video of the Holland/Garvey crime scene . . . .
>
> 19. As to the victims, [Bessie A.] and Holland were both prostitutes in Raleigh who agreed to have sex with a single male in exchange for payment.
>
> 20. Rather than a single male, two black males showed up to the scene where [Bessie A.] and Holland were assaulted.
>
> 21. In each instance, the two assailants were armed with pistols used to threaten [Bessie A.] and Holland.
>
> 22. Both of the assaults took place in low-budget hotels in Raleigh, North Carolina.
>
> 23. The criminal activity against [Bessie A.] and Holland/Garvey occurred 47 days apart in Raleigh, North Carolina.

The trial court then concluded that this evidence was admissible pursuant to Rule 404(b) of the North Carolina Rules of Evidence, for the following reasons:

> 4. The similarities in the events between [Bessie A.] and Holland show motive and a common scheme or plan: a plan that starts with the luring of a prostitute

> into a low-budget hotel room and ends with a robbery and sexual assault, and sometimes violence, if Defendant's plan meets a hurdle as apparently it did with Holland.
>
> 5. The two events are close enough in proximity of time and similarity of facts that this Court concludes that the evidence of the robbery and sexual assault of [Bessie A.] is probative of a motive and common scheme or plan of Defendant, as well as Defendant's identity, with respect to the crimes charged in this trial.

In a similar 404(b) order concerning the admissibility of Rachel B.'s testimony, the trial court made the following findings of fact:

> 11. On October 28, 2016, [Rachel B.] reported she had been raped in the early morning hours in a Microtel hotel in Morrisville, NC by two black males.
>
> 12. The morning of the rape, [Rachel B.] had been prostituting herself by using a website called "Backpage." After a smoke break outside of the hotel, [Rachel B.] was grabbed by two men and forced back into her hotel room.
>
> 13. Both assailants had pistols, one silver and one black, and told her to get on the hotel bed. The assailants continued to yell at [Rachel B.] and demanded her to tell them where her money and belongings were. They took her I.D. and her Social Security card from her bag.
>
> 14. The assailants stripped [Rachel B.] of her clothes, "hogtied" her hands and feet with the telephone cord, covered her head with a pillow case and stuffed her underwear in her mouth. Threatening her with hand guns, both men raped her and perpetrated other sexual offenses against her. After the assailants were finished, they told [Rachel B.] to stay put and said they were going to get their friends to have "more fun with her." After the assailants left, [Rachel B.] was able to escape and make her way downstairs to the hotel lobby where she was aided by the staff, and later, the police.

> 15. [Rachel B.] reported that the assailants were black males and that one, the more violent of the two, had a foreign accent and had a tattoo of three spiders on his lower right leg, and a tattoo of a sunset on his lower left leg. She further reported that the assailants had a black "camera case" styled box that was full of firearms.
>
> 16. Defendant, a native of St. Lucia, has a Caribbean Island accent. He also has a tattoo of three spiders on his lower right leg and a tattoo of a sunset on his lower left leg.
>
> . . . .
>
> 20. As to the victims, [Rachel B.] and Holland were both prostitutes in Wake County, North Carolina (Raleigh/Morrisville) who agreed to have sex with different men in exchange for payment and utilized the Backpage website to solicit clients.
>
> 21. Two assailants were involved in the assaults on both [Rachel B.] and Holland/Garvey, and both involved unprovoked violence.
>
> 22. Both assailants were armed with pistols used in the commission of the crimes against [Rachel B.] and Holland.
>
> 23. Both of the assaults took place in low-budget hotels in Wake County, North Carolina.
>
> 24. The criminal activity against [Rachel B.] and Holland/Garvey occurred 35 days apart.

The trial court concluded that the evidence regarding Rachel B. was admissible pursuant to Rule 404(b), because:

> 4. The similarities in the events between [Rachel B.] and Holland/Garvey show motive and a common scheme or plan: a plan that starts with the confinement of a prostitute in a low-budget hotel room and ends with a robbery and sexual assault, and sometimes violence, if Defendant's plan meets a hurdle as it apparently did with Holland/Garvey.

> 5. The two events are close enough in proximity of time and similarity of facts that this Court concludes that the evidence of the robbery and sexual assault of [Rachel B.] is probative of a motive and common scheme or plan of Defendant, as well as Defendant's identity, with respect to the crimes charged in this trial.

The trial court also considered the proffered evidence of both witnesses in light of Rule 403, concluding that,

> [a]fter weighing the probative value of the proffered evidence against the danger of unfair prejudice, confusion of the issues, misleading the jury, and considerations of undue delay, waste of time, or needless presentation of cumulative evidence . . . the proffered evidence should not be excluded under Rule 403.

Both Bessie A. and Rachel B. subsequently testified at defendant's trial. Defendant requested that the trial court give a limiting instruction related to their testimony, and the trial court gave essentially the same limiting instruction to the jury for both witnesses, stating:

> This evidence was received solely for the following purposes: the identity of the person who committed the crime charged in this case, if committed; that the defendant had a motive for the commission of the crime charged in this case, if committed; and that there existed in the mind of the defendant a plan, scheme, system, or design involving the crime charged in this case, if committed. If you believe this evidence, you may consider it but only for the limited purposes for which it was received. You may not consider it for any other purpose.

On appeal, defendant raises several arguments contesting the admissibility of this evidence. First, defendant contends that the admission of the evidence of the prior acts with Bessie A. and Rachel B. did not fall within the proper bounds of Rule 404(b) evidence. Second, defendant asserts that even if this evidence was proper under Rule 404(b), it should have been excluded under Rule 403 for its cumulative prejudicial impact. Third, defendant argues that the trial court's limiting instructions did not appropriately limit the jurors' use of the evidence. And fourth, defendant asserts that the focus on this "highly disturbing evidence" derailed the jurors' consideration of the actual events, influencing the jury's verdict. We disagree.

1. 404(b) Evidence

Rule 404(b) is a "general rule of inclusion of relevant evidence of other crimes, wrongs or acts by a defendant." *State v. Coffey*, 326 N.C. 268, 278–79 (1990) (cleaned up); *see also State v. Carpenter*, 361 N.C. 382, 386 (2007). While this type of evidence may not be admitted "to prove the character of a person in order to show that he acted in conformity therewith," such evidence may be admitted "for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident." N.C.G.S. § 8C-1, Rule 404(b) (2023).

But because there lies a risk of the jury "giv[ing] excessive weight to the vicious record of [a] crime," *State v. Al-Bayyinah*, 356 N.C. 150, 154 (2002) (quoting 1A John H. Wigmore, *Evidence* § 58.2 (Peter Tillers ed. 1983)), there are safeguards in place to ensure that evidence admitted under Rule 404(b) is proper. Specifically, 404(b) evidence is "constrained by the requirements of similarity and temporal proximity." *Al-Bayyinah*, 356 N.C. at 154 (citing *State v. Lloyd*, 354 N.C. 76, 88 (2001); *State v. Lynch*, 334 N.C. 402, 412 (1993)).

Prior acts are sufficiently similar under Rule 404(b) if the facts "tend to support a reasonable inference that the same person committed both the earlier and later acts." *State v. Stager*, 329 N.C. 278, 304 (1991). These facts need not "rise to the level of unique and bizarre." *State v. Beckelheimer*, 366 N.C. 127, 131 (2012) (cleaned up). Rather, the ultimate question is one of "logical relevancy." *State v. McClain*, 240 N.C. 171, 177 (1954) (explaining that there must be a logical connection between the prior bad act and the crime charged); *see also State v. Fowler*, 230 N.C. 470, 473 (1949) ("The touchstone is logical relevancy."); *State v. Felton*, 283 N.C. 368, 372 (1973); *State v. Hunt*, 305 N.C. 238, 246 (1982).

Once a trial court determines that the requirements of Rule 404(b) have been met, it must then "balance the danger of undue prejudice against the probative value of the evidence, pursuant to Rule 403." *Carpenter*, 361 N.C. at 388–89. "When the trial court has made findings of fact and conclusions of law to support its 404(b) ruling, we look to whether the evidence supports the findings and whether the findings support the conclusions." *Beckelheimer*, 366 N.C. at 130. "We review de novo the legal conclusion that the evidence is, or is not, within the coverage of Rule 404(b)." *Id.*

Here, defendant contests several of the trial court's findings of fact and conclusions of law in both 404(b) orders. First, defendant asserts that finding of fact No. 21 in the Bessie A. Order is not supported by the

evidence.[3] Specifically, defendant contends that because the hotel surveillance footage did not show defendant entering Holland's room with a gun in his hand or otherwise threaten Holland prior to Hill shooting Garvey, and because there were no signs of struggle or restraint against Holland, "the evidence did not support a finding that [defendant] used his gun to threaten Holland after entering the room."

But defendant reads into the finding that he threatened Holland *before* Hill shot and killed Garvey. This finding does not distinguish the point in time defendant used his weapon to threaten Holland, whether before or after Hill shot Garvey, and is overwhelmingly supported by competent evidence as the surveillance footage alone showed defendant stepping out of Holland's hotel room with his gun in hand, and then shooting and killing her.

Defendant next argues that finding of fact No. 21 in the Rachel B. Order was not supported by competent evidence. Defendant concedes that there was no provocation for the crimes committed against Rachel B., but he argues that his shooting of Holland was provoked by Hill's shooting of Garvey in the hallway.

Provocation "must ordinarily amount to an assault or threatened assault by the victim against the perpetrator." *State v. Watson*, 338 N.C. 168, 176 (1994), *cert. denied*, 514 U.S. 1071 (1995), *overruled in part on other grounds by State v. Richardson*, 341 N.C. 585 (1995). Thus, finding of fact No. 21 in the Rachel B. Order was supported by competent evidence as neither the shooting of Garvey by someone acting in concert with defendant nor defendant's shooting of Holland were committed in response "to an assault or threatened assault by the victim[s]." The surveillance footage showed Garvey banging on Holland's hotel door when he was approached by Hill, who was brandishing a firearm. In response, Garvey attempted to swat at the gun, but then put his hands up in the air and backed up against the wall in submission to Hill before he was shot and killed. Garvey's actions resulted exclusively from Hill's escalation of force by the introduction of a firearm into this encounter. Thus, as Garvey neither threatened nor assaulted Hill, it cannot be said that Hill's actions were provoked by the victim's response. *See Watson*, 338 N.C. at 176. This evidence alone was sufficient to support the challenged finding.

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3. In his brief, defendant concedes that the trial "court's finding as to [Rachel B.] is more accurate as it states at finding [of fact No.] 22 that '[b]oth assailants were armed with pistols used in the commission of the crimes against [Rachel B.] and Holland.' "

But even assuming *arguendo* that Hill's killing of Garvey was sufficiently "provoked" by Garvey's actions, the killing of an individual by a co-defendant cannot amount to legal provocation to kill another person when there is no evidence that the second victim posed any threat. Holland was naked and defenseless at the time of her murder, and there is no evidence that she threatened or assaulted defendant such that she provoked her murder.

Defendant next challenges three portions of the trial court's 404(b) conclusions of law in the Bessie A. Order. First, defendant argues that the portion of conclusion of law 4—that each victim was lured to a low-budget hotel—is not supported by the evidence. Defendant essentially asserts that the women could not have been lured to a hotel because they were already located there for their work as prostitutes.

First, we note that this portion of conclusion of law No. 4 is more properly categorized as a finding of fact, and as such we review whether competent evidence supports this finding. *State v. Johnson*, 269 N.C. App. 76, 81–82 ("[F]indings of fact normally involve logical reasoning through the evidentiary facts." (cleaned up)), *aff'd*, 378 N.C. 236 (2021); *Williams v. Marchelle Isyk Allen, P.A.*, 383 N.C. 664, 672–73 (2022) ("Any determination reached through logical reasoning from the evidentiary facts is more properly classified a finding of fact." (cleaned up)); *Beach v. McLean*, 219 N.C. 521, 525 (1941) ("If it is a mixed question of fact and law it is likewise conclusive, provided there is sufficient evidence to sustain the element of the fact involved.").

Defendant is correct that both Bessie A. and Holland were located at low-budget hotels by nature of their work as prostitutes. However, we disagree with his contention that because the women were already located at low-budget hotels, his actions could not constitute "luring." Defendant contacted both women on the pretext of obtaining consensual prostitution services for himself. Thus, defendant was the cause of their presence at each location at the relevant, agreed upon times.

Moreover, neither woman was aware that defendant would arrive with a companion and that the two men would rob them and perpetrate violent acts against them. The evidence of the pretextual initiations of these visits to both Bessie A. and Holland as one which would include consensual sexual services with one man sufficiently support the trial court's finding that defendant enticed or otherwise caused these women to utilize hotels for the purposes of robbing and sexually assaulting them. *See State v. Howell*, 343 N.C. 229, 236 (1996) ("These facts are so strikingly similar as to permit [the victim's friend, a fellow prostitute, to

testify] for the purpose of proving defendant's identity as well as showing a common opportunity, plan, and *modus operandi* to defendant's attacks."). *See also State v. Pruitt*, 94 N.C. App. 261, 267 (1989) (concluding that testimony from the defendant's former lovers was admissible to prove the defendant's modus operandi, plan, motive and intent concerning defendant's actions to lure his victims by pretextually befriending them before assaulting them); *State v. Morrison*, 85 N.C. App. 511, 514 (1987) (stating that defendant lured his victims to the crime scene on the pretext of changing clothes before they went out on a date).

Defendant also challenges additional portions of conclusion of law No. 4 for both the Bessie A. and Rachel B. Orders, asserting that the evidence does not support a finding that the common scheme "ends with a robbery and sexual assault, and sometimes violence, if [d]efendant's plan meets a hurdle as it apparently did with Holland." Defendant contends that because "[n]o hurdles came up in the [Bessie A.] and [Rachel B.] incidents," the State could not show that "Hill and [defendant] had a plan to use violence if someone other than the woman they were meeting showed up and presented an obstacle to their activity." Defendant concedes that he and Hill "used violence to control" both Bessie A. and Rachel B.

As with the portion of the Bessie A. Order conclusion of law No. 4 discussed above, these portions of the Bessie A. and Rachel B. Orders are better categorized as findings of fact, as they demonstrate the trial court's "logical reasoning from the evidentiary facts." *See Williams*, 383 N.C. at 672–73. Thus, we analyze to determine whether competent evidence supports the finding that defendant's actions against both Bessie A. and Rachel B. would end with "violence, if [d]efendant's plan meets a hurdle."

One could argue that defendant's narrow reading of the finding—that these encounters would "sometimes" end in "violence if [d]efendant's plan me[t] a hurdle as apparently it did with Holland"—may not be supported by the evidence. Defendant concedes, however, that these incidents *always* involved violence regardless of whether defendant's plan met a hurdle. We therefore "examine whether the remaining findings support the trial court's determination" that both Bessie A.'s and Rachel B.'s encounters "show[ed] motive and a common scheme or plan" under Rule 404(b).

Defendant argues that the trial court erred in concluding that there was sufficient similarity between the Bessie A., Rachel B., and Holland incidents "to show a common scheme or plan." Defendant concedes that

there were many similarities between the events, such as the facts that "all three women were working as prostitutes out of cheap hotels, . . . using Backpage to set up meetings, and" only expecting a single male client when two men appeared armed with pistols. But defendant argues that these "do not show that the events leading to Holland's death were part of a common scheme or plan." Rather, defendant encourages us to focus on the differences in the incidents, arguing that because defendant and Hill both immediately forced their way into Rachel B.'s and Bessie A.'s rooms, while only defendant entered Holland's room in this case, and because there were no signs of struggle or injury to Holland before she was shot, these prior acts should not have been admitted under Rule 404(b).

But the trial court correctly concluded that defendant's prior acts against Bessie A. and Rachel B. and the charged crime were "close enough in proximity of time and similarity of facts" to demonstrate a common scheme or plan.

While defendant is correct in his assertion that there are a few minor differences between these three occurrences, "the correct analysis for the admissibility of Rule 404(b) evidence involves focusing on the similarities and not the differences between the two incidents." *State v. Pickens*, 385 N.C. 351, 359 (2023). "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." *Id.* But all that is required is some logical connection in both the prior bad act and the charged crime. *See McClain*, 240 N.C. at 177; *Fowler*, 230 N.C. at 473.

Here, all three women were prostitutes working out of low-budget hotels in the Raleigh and Wake County areas; they were operating through Backpage; defendant and Hill appeared together at the hotels before each crime took place; and both men were armed with pistols which were used to threaten the women in some capacity. Further, Bessie A., Rachel B., and Holland were contacted by one man, who then unexpectedly arrived with a companion. These facts are sufficient in both temporal proximity and similarity to demonstrate a common plan or scheme to rape and rob Holland on the night she was murdered. And because "Rule 404(b) allows the use of extrinsic conduct evidence so long as the evidence is relevant for *some purpose* other than to show . . . propensity," we need not consider whether this evidence was also sufficient to demonstrate motive. *State v. Cummings*, 326 N.C. 298, 310 (1990) (emphasis added) (quoting *State v. Morgan*, 315 N.C. 626, 637 (1986)).

2. Rule 403 Analysis

Once it is established that "a prior bad act is both relevant and meets the requirements of Rule 404(b), the trial court must balance the danger of undue prejudice against the probative value of the evidence, pursuant to Rule 403." *Carpenter*, 361 N.C. at 388–89. Otherwise admissible evidence may be excluded under Rule 403 "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." N.C.G.S. § 8C-1, Rule 403 (2023).

It goes without saying that "evidence probative of the State's case is always prejudicial to the defendant," *Stager*, 329 N.C. at 310 (citing *Coffey*, 326 N.C. at 281), but this is not the threshold for exclusion. Rather, it must be unfairly prejudicial in that it has "an undue tendency to suggest decision on an improper basis." *State v. DeLeonardo*, 315 N.C. 762, 772 (1986) (cleaned up). We review a trial court's Rule 403 determination for abuse of discretion and will only disturb it when it is "manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Richardson*, 385 N.C. 101, 133 (2023) (quoting *State v. Hennis*, 323 N.C. 279, 285 (1988)).

Defendant contends that the trial court abused its discretion because the "prejudicial impact of the evidence on the jury cannot be viewed separately as to each incident, but rather must be viewed as to the cumulative impact of the evidence" regarding Bessie A. and Rachel B. Further, defendant contends that the emotional impact of Bessie A.'s and Rachel B.'s testimonies was unfairly prejudicial because it most likely influenced "[a]ny juror who might have harbored a reasonable doubt that [defendant] acted with premeditation and deliberation in shooting Holland, or a reasonable doubt that [defendant] had attempted to rape or rob Holland" on the night she was murdered.

But this evidence was not unfairly prejudicial, nor did it substantially outweigh the highly probative value, because it was introduced to establish defendant's common scheme or plan. A review of the record shows that the trial court carefully considered the Rachel B. and Bessie A. evidence, and then provided multiple limiting instructions to the jury during trial, as will be discussed below. As such, it cannot be said that the trial court's ruling is "manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *Richardson*, 385 N.C. at 133 (quoting *Hennis*, 323 N.C. at 285).

3. Limiting Instruction

Defendant next asserts that the trial court plainly erred in its limiting instructions regarding Bessie A.'s and Rachel B.'s Rule 404(b) evidence.

Specifically, defendant contends that because the limiting instructions did not sufficiently advise the jury that the 404(b) evidence could only be considered on the issues of attempted robbery or rape, the jury was permitted to consider the evidence for purposes of defendant's state of mind when shooting Holland.

However, not only did defendant fail to object to these limiting instructions, but to the contrary, he requested them. After review, there was no error in the trial court's limiting instructions. But even if there was error, it was invited error as "[a] criminal defendant will not be heard to complain of a jury instruction given in response to his own request." *State v. Duke*, 360 N.C. 110, 124 (2005) (alteration in original) (quoting *State v. McPhail*, 329 N.C. 636, 643 (1991)); *see also State v. Wilkinson*, 344 N.C. 198, 214 (1996) ("Since defendant asked for the exact instruction that he now contends is prejudicial, any error was invited error." (cleaned up)); *State v. Miller*, 289 N.C. App. 429, 433 (2023) ("[T]he invited error doctrine [applies] when a defendant's affirmative actions directly precipitate error.").

B. Evidence of a Prior Assault with a Firearm on Kara L.

[2] Next, defendant argues that the trial court plainly erred under Rules 401 and 403 of the Rules of Evidence by admitting evidence at trial regarding a prior assault on Kara L. Defendant filed a motion in limine to exclude the evidence but failed to renew this objection at trial. As such, defendant's unpreserved claim is subject to plain error review. *See State v. Lawrence*, 365 N.C. 506, 516 (2012).

1. Kara L.'s Testimony

In November 2016, Kara L. met defendant through a website on which she was advertising herself for prostitution. Kara L. and defendant met at defendant's home and had consensual sex. At the time, defendant introduced himself as "Carlos" online, but Kara L. later discovered his identification card with the name "Seaga Gillard" listed on it.

After three days of being together, defendant told Kara L. that he was going to advertise her online for prostitution and that she was going to make money for him and his friend, "B." When Kara L. protested, defendant threatened to kill her family. Over the course of the next few days, defendant transported Kara L. to a hotel in Raleigh and told her to call him after she made $1,000.00.

Once Kara L. informed defendant that she had earned sufficient money, defendant and "B" picked her up, took her back to defendant's home, and told her that she was required to make an additional $5,000.00

for them. Kara L. objected to this request and asked to be taken home. In response, defendant took out his gun, told Kara L. to show her teeth, and placed the gun up to her mouth. Defendant told Kara L. that she did not have a choice, and that "if he did not love her[,] her blood would be all over the room." During this time, Kara L. heard defendant refer to his gun by the name of "Lemon Squeeze."

Prior to defendant's trial, the State noticed its intent to introduce evidence of the incident between defendant and Kara L. In response, defendant filed a pretrial motion to prohibit the State from introducing this evidence during both the guilt-innocence and sentencing phases of trial. The trial court held a hearing to determine whether the proposed evidence was admissible and entered an order that permitted the State to elicit testimony from Kara L. to identify defendant and/or the weapon he used on the night she was assaulted. However, the trial court excluded evidence that may have constituted the offenses of human trafficking, kidnapping, assault, and other wrongs because the evidence was "too dissimilar to the charges" of first-degree murder.

At trial, Kara L. testified regarding her experience with defendant. Defendant did not object to Kara L.'s testimony, but instead requested that the trial court give the State a cautionary instruction based upon the order limiting Kara L.'s testimony. The trial court instructed the State and Kara L. that Kara L. should not testify about defendant forcing her to engage in prostitution or taking money in connection with prostitution.

During Kara L.'s trial testimony, she vaguely recounted meeting defendant online, staying at his house for a few days, and then subsequently discovering that his name was "Seaga Gillard." Kara L. confirmed that during her stay at defendant's house, she met defendant's friend named "B," and that both defendant and "B" had guns. Kara L. further testified as follows:

> [The State]. Did he have a name for his gun?
>
> [Kara L.]. Lemon Squeeze.
>
> . . . .
>
> [The State]. At some point, did an incident occur with his gun and you?
>
> [Kara L.]. Yes, ma'am.
>
> [The State]. What did he do with his gun?
>
> [Kara L.]. He put the gun to my face, told me to show

> [my] teeth, and said, "If [I] d[idn]'t love [him], my blood would be all over the walls."
>
> [The State]. And you said he told you to show your teeth?
>
> [Kara L.]. Yes, ma'am.
>
> [The State]. What did he do with his gun when you showed your teeth?
>
> [Kara L.]. He put it up to my mouth.

Kara L. then identified defendant and "B" as the two perpetrators in the still photographs taken from the hotel surveillance footage on the night of the murders.

Defendant did not object to Kara L.'s testimony or the identification, but instead requested a limiting instruction "concerning the gun to the mouth" incident. The trial court granted this request, giving the following limiting instruction to the jury:

> All right. Ladies and gentlemen, I'll give you a brief instruction regarding a portion of the evidence you heard. Evidence has been received tending to show that this defendant held a firearm in the face of this witness, and this evidence was received solely for the following purposes: for the purpose of showing the identity of the person that committed the crime charged in this case, if it was committed, and the identity of a firearm used in the crime charged in this case, if it was committed. If you believe this evidence, you may consider it but only for the limited purposes for which it was received. You may not consider it for any other purpose.

The trial court gave this limiting instruction once again during the final jury charge as well, stating:

> Evidence has been received tending to show that the defendant assaulted or threatened Kara [L.] with a firearm. This evidence was received solely for the purposes of showing, A, the identity of the person who committed the crimes charged in this case and, B, the identity of a firearm which may have been related to the crimes charged in this case. If you believe the evidence, you may consider it but only for the limited

> purposes for which it was received. You may not consider it for any other purpose.

Defendant now contends that the trial court committed plain error by permitting Kara L. to testify that defendant assaulted her with a firearm. Specifically, defendant argues that Kara L.'s testimony that defendant had a gun, and that he used the gun to threaten her, "had no relevance to identifying the gun used in the shooting of Holland, and hence did not meet the requirements of Rule 401" or Rule 403. Defendant argues that this amounted to plain error because "[a] juror who had not been swayed by the emotional impact of the evidence of the assault of [Kara L.] might well have convicted [defendant] of second-degree murder."

2. Plain Error Review

This Court applies the plain error standard of review for "unpreserved instructional or evidentiary error[s]" which occur at trial. *Lawrence*, 365 N.C. at 518. Plain error is an extreme remedy and "should be used sparingly, only in exceptional circumstances, to reverse criminal convictions on the basis of unpreserved error." *Id.* at 517 (quoting *State v. Odom*, 307 N.C. 655, 661 (1983)).

Recently, this Court reiterated the standard for plain error review, clarifying that for a defendant to succeed, three things must be shown:

> First, the defendant must show that a fundamental error occurred at trial. Second, the defendant must show that the error had a probable impact on the outcome, meaning that absent the error, the jury probably would have returned a different verdict. Finally, the defendant must show that the error is an exceptional case that warrants plain error review, typically by showing that the error seriously affects the fairness, integrity or public reputation of judicial proceedings.

State v. Reber, 386 N.C. 153, 158 (2024) (cleaned up).

This exacting standard demands that even if error exists under step one, a defendant must still demonstrate "that a jury *probably would have* reached a different result," which "requires a showing that the outcome is significantly more likely than not." *Id.* at 159. Even then, defendant must show that this is the exceptional case in which plain error review is warranted because the purported error affects "the fairness, integrity or public reputation of judicial proceedings." *Id.* at 158 (quoting *Lawrence*, 365 N.C. at 518).

Further, plain error review is unavailable for issues that fall "within the realm of the trial court's discretion," *State v. Steen*, 352 N.C. 227, 256 (2000), such as Rule 403 determinations. *See State v. Murillo*, 349 N.C. 573, 602 (1998) (holding exclusion of evidence under Rule 403 "is a matter left to the sound discretion of the trial court"); *see also State v. Norton*, 213 N.C. App. 75, 81 (2011) ("Because our Supreme Court has held that discretionary decisions of the trial court are not subject to plain error review, we need not address [defendant]'s argument on this issue." (cleaned up)); *State v. Smith*, 194 N.C. App. 120, 126–27 (2008) ("Our Supreme Court has held, however, that discretionary decisions by the trial court are not subject to plain error review."); *State v. Cunningham*, 188 N.C. App. 832, 837 (2008) ("[W]e do not apply plain error 'to issues which fall within the realm of the trial court's discretion.' " (quoting *Steen*, 352 N.C. at 256)).

We, therefore, decline to address defendant's Rule 403 argument for plain error. However, because a "trial court's rulings on relevancy are technically not discretionary," we must review defendant's challenge under Rule 401. *State v. Lane*, 365 N.C. 7, 27 (2011).

Evidence is "relevant" to a case 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 (2023). "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by the Constitution of North Carolina, by Act of Congress, by Act of the General Assembly or by" our Rules of Evidence. N.C.G.S. § 8C-1, Rule 402 (2023). While a trial court's relevancy determinations are not discretionary, "we accord them great deference on appeal." *Lane*, 365 N.C. at 27.

As a general rule "[w]eapons may be admitted in evidence where there is evidence tending to show that they were used in the commission of a crime." *State v. Wilson*, 280 N.C. 674, 678 (1972). And in cases where "no weapon is found in a defendant's possession at the time of his arrest or thereafter, testimony that defendant had once owned or possessed a weapon becomes *especially* relevant." *State v. Mlo*, 335 N.C. 353, 376 (1994) (emphasis added); *see also State v. Smith*, 357 N.C. 604, 614 (2003) ("Because the weapon used to murder the victim was never found, evidence that defendant carried a knife with him at times had some relevance to the case.").

Here, defendant's argument that the trial court committed plain error under Rule 401 is without merit. First, the gun used by defendant

to shoot Holland was never recovered. Therefore, Kara L.'s testimony about defendant's possession of, preference for, and prior assault with a firearm was relevant as it made the fact that defendant possessed and used the weapon to kill Holland more probable. *See Mlo*, 335 N.C. at 376. Thus, the trial court did not err in admitting relevant evidence, and because there was no "fundamental error," there can be no plain error. *Reber*, 386 N.C. at 158.

However, even if the admission of Kara L.'s statement regarding defendant's assault with a firearm was not relevant, defendant cannot show that a jury "probably would have reached a different result," or that this purported error affects "the fairness, integrity or public reputation of judicial proceedings." *Reber*, 386 N.C. at 158–59. At trial, the State presented overwhelming evidence of defendant's guilt—including video footage of Hill and defendant shooting Garvey and Holland. Thus, defendant cannot demonstrate plain error in the trial court's admission of this evidence.

C. Evidence of the Abusive Backgrounds of Prior Women Victimized by Defendant

[3] Defendant next argues that the admission of testimony regarding background information of witnesses Angel Holland, Rachel B., Keyona T., and Keyana M. was plain error because it was irrelevant and highly prejudicial. The evidence regarding the personal background information of Holland and Rachel B. was introduced during the guilt-innocence phase of trial, while the evidence related to Keyona T. and Keyana M. was introduced during the capital sentencing phase. We address each in turn.

1. Guilt-Innocence Phase

Among the many witnesses called by the State during the guilt-innocence phase of trial were Rachel B. and the victim's sister, Angel Holland. Angel Holland was asked on direct examination if something had happened when she and her sister were young "that kind of put April on a . . . downward spiral." Defendant objected and requested to be heard outside the presence of the jury, arguing that the question solicited victim-impact testimony in violation of a pretrial order. According to defendant, testimony regarding the victim's childhood was irrelevant and violative of this Court's precedent in *State v. Hembree*, 368 N.C. 2 (2015).

The State responded to the objection, arguing that it was not

> asking her about how this has affected her or anything like that. I think that what has been clear in this trial

> is that April was at a point in her life where she was prostituting, and I think, as part of that story, kind of understanding what got her there would make some sense to this jury and would be relevant. I don't plan on going very far into that but just kind of where she was and how that got her to a point where she began to prostitute.
>
> We've had no evidence so far that she actually was prostituting, and this is actually where the police found this out . . . from her family, which is exactly why we then start researching crimes against prostitutes. It kind of starts that whole spiral into this investigation.

The trial court responded that

> the fact that this victim was engaged in prostitution . . . i[s] relevant to the jury to give some context to get to how she came to be at the place she was that night, engaging with a stranger over the Back Page ad. I think its probative to give the context of why she was engaged in that type of conduct.
>
> I will caution the witness that characterizations of your sister as, you know, a kind person or a loving person or all of those things . . . would not be relevant at this stage of the proceedings. So I'll ask you to listen carefully to the questions that are asked of you and answer them—answer specifically what's being asked of you . . . .

The direct examination of Angel Holland continued:

> [Angel:] When she was around seven or eight, she was molested, and from there things started changing with her, in a couple years of the incident.
>
> [The State:] And as far as, kind of, as that starts to change her, did she begin to date much older men?
>
> [Angel:] Yes, she did.
>
> [The State:] Would you say that those relationships were abusive?
>
> [Angel:] Yes.

> [The State:] Yes?
>
> [Defendant:] Objection.
>
> The Court: Overruled.
>
> [The State:] Did you know that your sister began to prostitute?
>
> [Angel:] It took a while for me to find out, but she did —told — within a year, sort of.

On appeal, defendant again argues that "[t]he evidence that April Holland was sexually abused as a child, engaged in abusive relationships with older men, and began sex work as a teenager . . . had no relevance to the issues before the jury." Because defendant preserved his argument, which does not relate to a federal constitutional right, we review pursuant to N.C.G.S. § 15A-1443(a). Thus, defendant has the burden of demonstrating that the trial court erred, and "there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial." N.C.G.S. § 15A-1443(a) (2023).

During the guilt-innocence phase of trial, evidence concerning a victim's character is generally not relevant. *See Hembree*, 368 N.C. at 16 ("Evidence of a victim's character, or the effect of the victim's death on others, is only rarely relevant when making a determination of guilt."). On the other hand, this Court has held that evidence of a victim's history or habits may be "relevant to explain the particular circumstances of the crime." *See State v. Barden*, 356 N.C. 316, 349 (2002) (holding that evidence that a victim worked late nights and kept cash in his wallet was relevant to explaining why he was robbed and killed at his workplace in the middle of the night). However, even if evidence is deemed to meet the low threshold for relevance, it must "still be excluded when its probative value is substantially outweighed by the danger of unfair prejudice." *Hembree*, 368 N.C. at 17 (citing N.C.G.S. § 8C-1, Rule 403).

Here, Angel's testimony about her sister's abusive background and subsequent prostitution was not character evidence, as it did not relate to April Holland's disposition or traits. In fact, the trial court cautioned Angel to avoid testifying about any "characterizations of your sister as, you know, a kind person or a loving person or all of those things." Instead, the evidence revealed the factual circumstances of April Holland's life relevant to explaining why she was engaging in prostitution on the night she was murdered by defendant at the hotel. *See Barden*, 356 N.C. 316. Further, because Angel Holland was the first witness for the State to

directly reveal that April Holland was engaging in prostitution, coupled with the fact that her testimony was extremely limited in scope, the probative value of this testimony was not substantially outweighed by the risk of unfair prejudice against defendant. Thus, because there was no error, there can be no plain error. *Reber*, 386 N.C. at 158.

Defendant next argues that the trial court plainly erred by allowing Rachel B. to testify about her abusive childhood and subsequent experience as a prostitute. Specifically, defendant contends that portions of Rachel B.'s testimony were irrelevant "to proving Gillard's identity, whether he acted as part of a common scheme or plan or his motive in the events that led to Holland's murder." Because defendant failed to object to this portion of Rachel B.'s testimony at trial, we review for plain error. *See Reber*, 386 N.C. at 158.

As discussed above, Rachel B.'s 404(b) testimony was "probative of a motive or common scheme or plan of [d]efendant, as well as [d]efendant's identity." But before recounting defendant's prior acts against her, Rachel B. testified that she was put into foster care and lived in group homes or with other family members when she was a child due to her mother's drug addiction. Rachel B. also testified that she discovered that a family member had been filming her while she was showering or using the bathroom, and then masturbating to the videos of her. Rachel B. also testified that as a child, her mother trafficked her in exchange for drugs. As a result of these events, Rachel B. stated that she turned to stripping and prostitution where she was subjected to physical violence. After discussing her background, Rachel B. then testified about her encounter with defendant in October of 2016.

While defendant objected to Rachel B.'s 404(b) testimony, he did not object to the testimony concerning her abusive childhood, subsequent prostitution, and the violence she experienced as a sex worker. This may have been part of defendant's trial strategy because defense counsel cross-examined Rachel B. regarding the violence she experienced as a prostitute, probing beyond the State's line of questioning. Defendant now argues that this testimony was irrelevant and highly prejudicial, such that it constitutes plain error.

But a defendant cannot raise the issue of plain error on appeal for evidence which he elicited during cross-examination of the witness. *See State v. Rivers*, 324 N.C. 573, 575–76 (1989) ("It is clear . . . that the testimony of which the defendant now complains was elicited by counsel for the defendant during cross-examination of the witness and that he did not object to the testimony in any way or move to have it stricken at

trial. 'Any error thus was invited and defendant cannot complain of such error on appeal.' " (quoting N.C.G.S. § 15A-1443(c) (1988))).

Even so, "[i]t is elementary that when a witness has been sworn and takes the stand, preliminary questions are properly put to him as to name, residence, knowledge of the case, etc." *State v. Sports*, 41 N.C. App. 687, 690, *disc. rev. denied*, 298 N.C. 205 (1979) (holding that evidence of a witness's orphan status, epileptic history, scholarship assistances and summer employment was relevant for "introductory and general purposes [and] as an explanation as to why the witness was . . . walking home alone on the night in question"); *see also* 1 Kenneth S. Broun et al., *Brandis & Broun on North Carolina Evidence* § 167 (8th ed. 2018). Introductory evidence of a witness is relevant if it helps identify the witness, their knowledge of the case at hand, or to give context as to why they were in a particular situation. *See Pittman v. Camp*, 94 N.C. 283, 284–85 (1886) ("The question 'where do you live?' . . . was not irrelevant, because it tended to identify the witness, and to show in some slight degree, his opportunity to be informed in respect to the matter about which he was testifying.").

The reviewable portions of Rachel B.'s testimony relate to Rachel B. being removed from her mother's care at age ten, being sold out to men in exchange for drugs by her mother, the incident of being secretly filmed by a family member, and her living in group and foster homes for most of her childhood. This introductory evidence—though lengthy—provided context to the jury for how Rachel B. crossed paths with defendant on the night he attacked her and was relevant. As such, there is no error. Moreover, because defendant failed to object at trial, we cannot review this evidence for whether the risk of unfair prejudice substantially outweighed its probative value under Rule 403. *See Steen*, 352 N.C. at 256.

2. Sentencing Phase

Keyona T. and Keyana M. were among the witnesses called during the sentencing phase, both of whom testified as to defendant's prior violence against them. Similar to the testimony of Rachel B. and Angel Holland, Keyona T. and Keyana M. shared information with the jury regarding the difficult circumstances of their childhoods before testifying about defendant's violence against them. Defendant objected to their background testimony as irrelevant and unfairly prejudicial, preserving the issues for appeal.

But "[t]he rules of evidence do not apply in sentencing proceedings, and any competent evidence which the court deems to have probative value may be received." *State v. Augustine*, 359 N.C. 709, 731 (2005)

(cleaned up) (citing N.C.G.S. § 8C-1, Rule 1101(b)(3) (2003); N.C.G.S. § 15A-2000(a)(3) (2003)); *see also State v. Smith*, 352 N.C. 531, 557 (2000); *State v. Atkins*, 349 N.C. 62, 94 (1998). These less restrictive standards afford the trial court "considerable leeway and discretion in governing the conduct of a sentencing proceeding." *Smith*, 352 N.C. at 557. "Evidence may be presented as to any matter that the court deems relevant to sentenc[ing], and may include matters relating to any of the aggravating or mitigating circumstances." *State v. Golphin*, 352 N.C. 364, 464 (2000) (quoting N.C.G.S. § 15A-2000(a)(3) (1999)). Because of this considerable leeway, "trial courts are not required to perform the Rule 403 balancing test during a sentencing proceeding." *Id.* (quoting *State v. Flippen*, 349 N.C. 264, 273 (1998), *cert. denied*, 526 U.S. 1135 (1999)). Further, during the sentencing phase, "the jury is properly permitted to consider all the evidence presented during the guilt-innocence phase." *State v. Moseley*, 338 N.C. 1, 41 (1994).[4]

a. Keyona T. & Keyana M.

The State called Keyona T. and Keyana M. to testify at the sentencing hearing about their prior violent encounters with defendant. This evidence was presented to establish the aggravating factor: "The murder for which the defendant stands convicted was part of a course of conduct in which the defendant engaged and that included the commission by the defendant of other crimes of violence against another person or persons." N.C.G.S. § 15A-2000(e)(11) (2023). However, before testifying about the violence they had endured at defendant's hands, both witnesses briefly recounted details of their troublesome upbringings. On appeal, defendant contests the admission of the background information as irrelevant and unfairly prejudicial.

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4. The dissent expresses disagreement with North Carolina's established procedures in the sentencing phase, preferring instead to limit consideration by the jury of relevant evidence that may be beneficial in reaching a sentencing recommendation. Although the dissent acknowledges that use of this evidence does not violate North Carolina law, the dissent contends specifically that the death sentences here should be overturned. More generally though, the dissent asserts that the sentencing scheme imposed by the General Assembly and sanctioned by this Court should be cast aside based primarily on citation to law review articles.

We also note that the dissent attempts to engage in a proportionality review of defendant's death sentence by incorporating arguments from his pretrial Motion to Strike Death Penalty because the Death Penalty Violates the Evolving Standards of Decency in this Community. This motion included a host of irrelevant information, including polling results. The motion was denied by the trial court and defendant failed to object to the trial court's ruling. Defendant failed to preserve this argument, and the issue is not properly before the Court. N.C. R. App. P. 28.

Keyona T. testified that she was raised by her mother, but that her mother was not present during her upbringing. Keyona T. stated that she was sexually abused by one of her mother's boyfriends, and both she and her siblings were physically abused by another. As a result, DSS removed Keyona T. from the home three times. She further testified that she suffered from PTSD and became a prostitute after she was forced to drop out of college. Ultimately, Keyona T. identified defendant in court and testified about a violent encounter she had with him while she was a prostitute.

Keyana M. likewise discussed her difficult childhood before ultimately testifying about a night when she was tied up, raped, and robbed by defendant at a hotel. Keyana M. briefly testified that as a child, her parents left her to be raised by her grandmother, and that around age twelve she was sexually assaulted. She then stated that at around age eighteen, she began engaging in prostitution, which is how she met defendant.

The challenged testimony was used to introduce each witness to the jury, and it related to the aggravating circumstance under N.C.G.S. § 15A-2000(e)(11) as it showed a course of conduct by defendant of engaging in violent acts against vulnerable women and prostitutes. *See Golphin*, 352 N.C. at 464. Because of the highly deferential standard in which trial courts are afforded "considerable leeway and discretion" during the sentencing phase, we find no error. *See Smith*, 352 N.C. at 557.

b. Permitted to Consider Evidence from Guilt Phase

Defendant argues that because the jury was told they could consider the evidence from the guilt phase of trial during their sentencing deliberations, Gillard's right to a fair capital sentencing hearing was undermined by the "the unfairly inflammatory evidence of the traumatic and abusive backgrounds of Holland, [Rachel B.], [Keyona T.], and [Keyana M.]."

But there is "nothing in the instant case to suggest that the jury's decision to recommend a sentence of death was based on any unfair prejudice that may have been created by [admission of this evidence]." *State v. Moody*, 345 N.C. 563, 572 (1997). The trial court instructed the jury during the sentencing phase that "[a]ll of the evidence which you hear[d] in both phases of the case is competent for your consideration in recommending punishment." Defendant did not object to this instruction, and as such, this unpreserved claim is subject to plain error review. *See Reber*, 386 N.C. at 158. However, because an instruction during the sentencing phase "to consider all the evidence presented during the guilt-innocence phase," *Moseley*, 338 N.C. at 41, is not erroneous, there can be no plain error. *Reber*, 386 N.C. at 158.

D. Admission of Photographic Evidence

[4] Defendant next argues that the trial court abused its discretion in admitting nine photos as part of nearly one hundred photos in the State's Exhibit 3 over defense counsel's objection in light of other evidence admitted at trial. Specifically, defendant argues that photos 63, 64, 66, 69, 70, 71, 72, 75, and 76 were "unnecessarily repetitious and cumulative," and that their probative value, in light of the rest of the photos and the crime scene video, was so substantially outweighed by the danger of inflaming the passions of the jury that they should have been excluded under Rule 403. *See* N.C.G.S. § 8C-1, Rule 403.

When tasked with determining whether photographic evidence should be admitted, "the trial court must weigh the probative value of the photographs against the danger of unfair prejudice to defendant." *State v. Blakeney*, 352 N.C. 287, 309 (2000) (citing *State v. Goode*, 350 N.C. 247, 258 (1999)). Because this determination lies within the sound discretion of the trial court, "the trial court's ruling should not be overturned on appeal unless the ruling was manifestly unsupported by reason or was so arbitrary that it could not have been the result of a reasoned decision." *Id.* (cleaned up).

Generally, "[p]hotographs 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." *Hennis*, 323 N.C. at 284 (citing *State v. Murphy*, 321 N.C. 738 (1988)). "The number of photographs alone is an insufficient measure of their capacity to prejudice and inflame the jury." *State v. Phipps*, 331 N.C. 427, 454 (1992). And while there is "no definitive test for the admissibility of photographs alleged to be inflammatory and unduly prejudicial," *Mlo*, 335 N.C. at 374, this Court has discussed certain factors which may be helpful in making this determination. "What 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," *Hennis*, 323 N.C. at 285, and "whether the photographs are unnecessarily duplicative of other testimony," *Richardson*, 385 N.C. at 133, must be considered when determining whether a photograph's probative value is substantially outweighed by its prejudicial impact.

This Court has emphasized that "[w]hen a photograph adds nothing to the State's case, then its probative value is nil, and nothing remains but its tendency to prejudice." *Hennis*, 323 N.C. at 286 (cleaned up) (quoting

State v. Temple, 302 N.C. 1, 14 (1981)). However, the State is permitted to present, consistent with the rules, evidence which it contends conveys a full perspective of the victim's injuries and a defendant's actions. Thus, when photographs are admitted which show different angles of a victim's injuries and the surrounding crime scene, they are not unnecessarily duplicative and excessive—even if similar—so long as they contribute individual value to the State's case. *See State v. Kandies*, 342 N.C. 419, 443 (1996) (multiple photographs, including autopsy photographs, were admissible to show "various angles of the lacerations to the head as well as the injuries to the vaginal area and properly illustrated the nature of the wounds and the manner of killing"); *Richardson*, 385 N.C. at 139–46 (holding that eighty-eight photographs of a victim's body were admissible because they "accurately reflected the reality of the crimes with which [the] defendant was being tried and were probative to the issues before the jury"); *State v. Pierce*, 346 N.C. 471, 488 (1997) ("Given 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."); *State v. Haselden*, 357 N.C. 1, 16 (2003) ("[E]ach photograph was taken at a different angle, offering a unique perspective on the nature and location of [the victim]'s wounds.").

Defendant argues that photos 63, 64, 66, 69, 70, 71, 72, 75, and 76 in State's Exhibit 3 were unnecessarily repetitive and cumulative because other evidence presented at trial showed that Holland was found naked by the door of the hotel room, that her cause of death was a bullet wound to the chest, and that shell casings were found near her body. Ultimately, defendant asserts that because these photographs "depicted substantially the same scene" as other photographs, their probative value was "nil." We disagree.

At trial, the State presented all of the color photographs by displaying a PowerPoint onto a small television for the jury to view. Photographs 63 and 64 were not unnecessarily duplicative of photograph 62. Photograph 62 was taken from the hallway into the hotel room, and illustrated how Holland's body was partially blocking the door upon entry into the room. Photograph 63 was the first close-up of Holland's body lying in a pool of blood, which demonstrated the scene that first-responders observed upon arrival. Photograph 64 was a different angle from both 62 and 63 and was used to illustrate the distance between Holland's body and the main portion of the hotel room where the bed was located.

We likewise reject defendant's argument that photograph 66 was unnecessarily duplicative of photograph 65. Photograph 65 provided an all-encompassing view of Holland's body and surrounding footprints,

whereas photograph 66 only showed a portion of Holland's body and zoomed in on the footprints found in the blood next to Holland's body.

Further, photographs 69, 70, and 71, while similar, demonstrated different angles of Holland's injuries. Photograph 69 was a close-up of the bullet wound and surrounding blood splatter on Holland's chest and was the only close-angle photograph taken of Holland's chest at the crime scene. Photograph 70 was a close-up of the bullet wound to Holland's face and did not show Holland's chest at all. Photograph 71 was taken from a side-angle and illustrated both bullet wounds and their locations in relation to each other.

Finally, photographs 72, 75, and 76 were properly admitted as well. Photograph 72 depicted Holland's body relative to the discovery of a shell casing between her body and the door. Photograph 75 depicted crime scene markers placed beside the footprints in the blood to the right of Holland's body, and photograph 76 depicted a marker placed beside an additional footprint which was discovered by the door.

The trial court overruled defendant's objection to these photographs, determining that it was "satisfied that each [photograph had] independent evidentiary value that shows the different angles or provides scale, distances, location of items of evidence, and specifically what the officers observed when they were on the scene." Thus, these photographs provided sufficiently distinct information of independent value to the State's case, making them neither unnecessarily duplicative nor excessive, *see Kandies*, 342 N.C. at 443, and the admission of these photographs was not "manifestly unsupported by reason or . . . so arbitrary that it could not have been the result of a reasoned decision." *Blakeney*, 352 N.C. at 309 (cleaned up).

E. Failing to Dismiss Charges for First-Degree Murder of Holland

Defendant next argues that the trial court erred by denying defendant's motion to dismiss the charge of first-degree murder against Holland on both theories of felony murder and premeditation and deliberation on the basis of insufficient evidence. The trial court denied this motion, and defendant was thereafter found guilty of first-degree murder of Holland on both theories. We address each theory in turn.

When ruling on a motion to dismiss, "the trial court need determine only whether there is substantial evidence of each essential element of the crime and that the defendant is the perpetrator." *State v. Golder*, 374 N.C. 238, 249 (2020) (quoting *State v. Winkler*, 368 N.C. 572 (2015)).

Put another way, "[i]f there is more than a scintilla of competent evidence to support the allegations in the warrant or indictment, it is the court' s duty to submit the case to the jury." *State v. Horner*, 248 N.C. 342, 344–45 (1958). "The terms 'more than a scintilla of evidence' and 'substantial evidence' are in reality the same and simply mean that the evidence must be existing and real, not just seeming or imaginary." *State v. Earnhardt*, 307 N.C. 62, 66 (1982).

The trial court must consider the evidence "in the light most favorable to the State, giving the State the benefit of all reasonable inferences." *State v. Fritsch*, 351 N.C. 373, 378–79 (2000). "In other words, if the record developed at trial contains substantial evidence, whether direct or circumstantial, or a combination . . . the case is for the jury and the motion to dismiss should be denied." *Golder*, 374 N.C. at 250 (cleaned up). Whether the State presented substantial evidence to support each element of a crime is a question of law, and thus, we review a trial court's denial of a motion to dismiss de novo. *Id.*

1. Felony Murder

[5] Defendant first argues that there was insufficient evidence to prove that Holland was murdered during the commission of an attempted rape or robbery. Specifically, defendant contends that the State failed to show that he intended to rape or rob Holland and the use of circumstantial evidence under Rule 404(b) could not remedy this alleged error.

A killing which is "committed in the perpetration or attempted perpetration of any arson, rape or a sex offense, robbery, kidnapping, burglary, or other felony committed or attempted with the use of a deadly weapon shall be deemed to be murder in the first degree." N.C.G.S. § 14-17(a) (2023). As is relevant here, "[t]he elements of an attempt to commit a crime are: (1) the intent to commit the substantive offense, and (2) an overt act done for that purpose which goes beyond mere preparation, but (3) falls short of the completed offense." *State v. Baker*, 369 N.C. 586, 595 (2017) (cleaned up).

Because "[i]ntent is an attitude or emotion of the mind and is seldom, if ever, susceptible of proof by direct evidence, it must ordinarily be proven by circumstantial evidence, i.e., by facts and circumstances from which it may be inferred." *State v. Gammons*, 260 N.C. 753, 756 (1963). This Court has upheld the use of Rule 404(b) evidence for proving the intent of a defendant to commit an underlying felony. *See State v. Williams*, 355 N.C. 501, 581–82 (2002) (affirming a trial court's denial of defendant's motion to dismiss when, among other things, "Rule 404(b) evidence tended to show that defendant lured his victims to isolated

locations where he would assault them . . . while raping or attempting to rape them"); *Al-Bayyinah*, 359 N.C. at 748 (evidence of a defendant's statement that he "wanted to go back to prison" was "substantially probative of defendant's motive and intent" to commit the underlying robbery).

Further, in proving an overt act, the State must demonstrate that a defendant has taken a "direct movement towards the commission [of the offense] *after* the preparations are made." *State v. Melton*, 371 N.C. 750, 760 (2018) (cleaned up) (emphasis added). This threshold has been defined as a "subsequent step in a direct movement towards the commission of the offense after the preparations are made," but it need not be "the last proximate act" before the crime occurs. *Id.* at 757 (quoting *State v. Miller*, 344 N.C. 658, 668 (1996)). Instead, it is sufficient once a defendant has "begun to execute the criminal design that he helped concoct." *Id.* at 762 (cleaned up).

We turn first to the attempted crime of rape. To prove intent, the State must produce evidence that the "defendant intended to gratify his passion on the person of the woman." *Gammons*, 260 N.C. at 755. "Sexual intent may be proved circumstantially by inference, based upon a defendant's actions, words, dress, or demeanor." *State v. Cooper*, 138 N.C. App. 495, 498 (2000) (citing *State v. Robbins*, 99 N.C. App. 75, 80, *aff'd*, 327 N.C. 628 (1990)). Giving the State the benefit of all reasonable inferences based on the evidence presented at trial, a reasonable juror could believe that defendant intended to rape Holland on the night she was murdered.

First, contrary to defendant's assertion, 404(b) evidence may be considered when determining whether the State has presented sufficient evidence of a defendant's intent to commit an underlying crime. *See Williams*, 355 N.C. at 581–82. Here, Bessie A.'s and Rachel B.'s 404(b) testimonies demonstrated that defendant had a common scheme or plan to rape and rob prostitutes. This plan began with either defendant or Hill contacting the women over Backpage, posing as an individual man seeking sexual services, and ended with both men arriving at low-budget hotels armed with pistols, forcing the women to undress, tying them up, and raping them. In addition to the 404(b) evidence, the State also provided evidence that on the morning Holland and Garvey were murdered, defendant sent a text to Hill after setting up his appointment with Holland that he had "got one." Considering the evidence in the light most favorable to the State and giving it all reasonable inferences, a reasonable juror could accept that defendant intended to rape Holland before he was interrupted by Hill's shooting of Garvey in the hallway.

Next, based on this same evidence, a rational juror could believe that defendant intended to rob Holland prior to being interrupted by the shooting of Garvey. "An 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 this result." *Miller*, 344 N.C. at 667–68 (quoting *State v. Allison*, 319 N.C. 92, 96 (1987)).

Bessie A.'s and Rachel B.'s 404(b) evidence demonstrated that defendant had a particular scheme or plan associated with raping and robbing prostitutes. Both Rachel B. and Bessie A. testified that they were forced to undress, were tied up with bedsheets, and were raped by the men, who would rummage through the women's personal items either before or after raping them.[5] While there was no direct evidence that Holland's personal items had been pillaged through or taken, this is not a requirement for proving intent. *See State v. Davis*, 340 N.C. 1, 12–13 (1995) (concluding that intent existed even though defendant did not demand money or take any money or valuables from the scene after shooting the victim).

Defendant entered the room with a loaded weapon and a sheet was found near Holland's body, evidence from which the jury could infer that defendant was executing a similar plan as he had before with Bessie A. and Rachel B. Additionally, at the time that the murders occurred, defendant had only been in Holland's room for approximately four minutes, suggesting that had Garvey not interrupted and subsequently been shot by Hill, defendant and Hill would have proceeded with the robbery and rape of Holland. Thus, considering this evidence in the light most favorable to the State and giving it the benefit of every reasonable inference, the State provided substantial evidence of defendant's intent to rob Holland with his firearm on the night she was murdered.

Finally, the State's evidence also demonstrated defendant's overt acts toward the commission of both the attempted rape and robbery of Holland. Defendant argues that although his scheduling of the meeting with Holland, his arrival at the hotel, and his entry of the room support a

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5. The dissent takes issue with the admission of what it terms, "unadjudicated offenses" under Rule 404(b), even though the dissent concedes that use of this evidence does not violate any rule or statute. Instead, the dissent relies on two law review articles in an effort to impose a new per se restriction on the use of relevant evidence. But the simple fact that an individual was not charged with an offense or convicted of a crime does not mean that the incident did not occur. Rule 404(b) thus focuses on logically connected conduct, not convictions.

finding that he "devised the means necessary for the commission of the offense," it was only proof of mere preparation, not the overt act.

However, defendant's actions went beyond mere preparation. Defendant and Hill traveled to the hotel armed with weapons, and surveillance footage showed defendant and Hill pacing in the hallway outside of Holland's room, engaging in a brief discussion. Even if we assume defendant's travel to the hotel did not constitute an overt act, defendant's entry into Holland's room was a "direct movement towards the commission of the offense" necessary to constitute an overt act, *Melton*, 371 N.C. at 757 (cleaned up), as it would have "result[ed] in the commission of the offense in the ordinary and likely course of things." *Id.* at 762 (cleaned up). As such, defendant's argument is without merit.

2. Premeditated Murder

[6] In addition to felony murder, the jury was also instructed on the theory of premeditation and deliberation. Defendant asserts that because the killing of Garvey and Holland "lasted less than 30 seconds," there was no time for him to sufficiently "weigh the consequences of his actions" to deem this premeditated and deliberate. As such, he asserts there was insufficient evidence for this theory to be submitted to the jury. We disagree.

"First-degree murder is the intentional and unlawful killing of a human being with malice and with premeditation and deliberation." *State v. Thomas*, 350 N.C. 315, 346 (1999). "[M]alice is presumed where the defendant intentionally assaults another with a deadly weapon, thereby causing the other's death." *State v. McNeill*, 346 N.C. 233, 238 (1997). Premeditation occurs when "the act was thought over beforehand for some length of time, however short." *State v. Leazer*, 353 N.C. 234, 238 (2000) (cleaned up). A killing is deliberate when it is "carried out in a cool state of blood" and is not "under the influence of a violent passion, suddenly aroused by legal provocation or lawful or just cause." *State v. Trull*, 349 N.C. 428, 448 (1998).

Because premeditation and deliberation are "mental processes that are not readily susceptible to proof by direct evidence," they are often proven through circumstantial evidence. *State v. Childress*, 367 N.C. 693, 695 (2014) (quoting *State v. Sierra*, 335 N.C. 753, 758 (1994)). This Court has provided examples of evidence which may support a finding of premeditation and deliberation, including the absence of provocation on the part of the deceased, the nature and number of the victim's wounds, a defendant's arrival at the scene with a weapon, and whether a defendant discharged or otherwise utilized a weapon multiple times. *See*

Childress, 367 N.C. at 695–96; *State v. Olson*, 330 N.C. 557, 565 (1992); *State v. Taylor*, 362 N.C. 514, 531 (2008). Further, "lack of provocation by the victim supports an inference of premeditation and deliberation." *Miller*, 339 N.C. 663, 682 (1995); *see also Olson*, 330 N.C. at 565.

Here, there was more than sufficient evidence for the charge of first-degree murder on the basis of premeditation and deliberation to be submitted to the jury. To begin, malice is "presumed" because defendant's shooting of Holland was intentional. *See McNeill*, 346 N.C. at 238. Further, defendant arrived at the hotel with a loaded weapon, suggesting not only that he anticipated the potential need to use the weapon, but also that he was prepared to use it. *See Taylor*, 362 N.C. at 531.

In addition, there was no provocation on the part of Holland as she was unarmed at the scene and surveillance footage did not show that she posed any threat to defendant. *See Childress*, 367 N.C. at 695. Defendant ultimately fired two shots at Holland, one striking her in the face and the other in the chest, with each shot sufficient to demonstrate an intent to kill on the part of defendant. *See Olson*, 330 N.C. at 565–66 (concluding that evidence that "the wounds were fatal in nature" supported a finding of premeditation and deliberation); *State v. DeGregory*, 285 N.C. 122, 130 (1974) ("The deadly shots through the heart after each victim had been felled . . . almost require[ ] the legitimate inference of premeditation and deliberation."). Given the extent of this evidence and viewing it in the light most favorable to the State, a rational juror could have concluded that defendant's killing of Holland was premeditated and deliberate, and therefore, defendant's argument is without merit.

F. Failing to Dismiss Charges for First-Degree Murder of Garvey

[7] Defendant argues that the trial court erred by failing to dismiss the first-degree murder charge against him for co-defendant Hill's killing of Garvey on the theories of felony murder and premeditation and deliberation. Defendant contends that the State failed to provide substantial evidence that defendant and Hill were acting in concert when Hill shot and killed Garvey.

"The acting in concert doctrine allows a defendant acting with another person for a common purpose of committing some crime to be held guilty of a murder committed in the pursuit of that common plan . . . ." *State v. Roache*, 358 N.C. 243, 306 (2004). Concert of action may "be shown by circumstances accompanying the unlawful act and conduct of the defendant subsequent thereto." *In re J.D.*, 376 N.C. 148, 156 (2020) (cleaned up).

In *State v. Blankenship*, this Court, straying from over 160 years of established precedent on acting in concert, held that "one may not be criminally responsible under the theory of acting in concert for a crime like premeditated and deliberated murder, which requires specific intent, unless he is shown to have the requisite specific intent." 337 N.C. 543, 558 (1994). Nonetheless, just three years later in *State v. Barnes*, this Court explicitly overruled *Blankenship* and returned to the "well established principle" that where

> two persons join in a purpose to commit a crime, each of them . . . 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 or probable consequence thereof.

345 N.C. 184, 232–33 (1997) (cleaned up) (emphasis added).

Defendant asks this Court to overrule *Barnes* and reinstate *Blankenship*. But *Blankenship* was an outlier, and we decline defendant's invitation to abandon the "well established principle" in *Barnes*.

1. Felony Murder

The State presented sufficient evidence that defendant and Hill had engaged in a common plan or scheme to commit rape and robbery with a dangerous weapon against Holland through the State's Rule 404(b) evidence. Even though Garvey was not the intended victim of this common scheme or plan, he was killed in pursuit thereof. Because a defendant can be "held guilty of a murder committed in the pursuit of [a] common plan," *Roache*, 358 N.C. at 306, we conclude that the trial court properly submitted this issue to the jury.

2. Premeditated Murder

Defendant also argues that the State failed to produce sufficient evidence that he intended to kill Garvey, and that the trial court erred by submitting the charge of first-degree murder on the theory of premeditation and deliberation to the jury.

During execution of the plan to rape and rob Holland, Garvey sought to intervene and was shot and killed by Hill in the hallway. The surveillance footage showed Hill threaten Garvey with the gun, and he ultimately fired nine rounds at Garvey, despite Garvey putting his hands in the air in submission. Hill's violence against Garvey was unprovoked, Garvey was unarmed, and nine separate rounds were fired by Hill, with

multiple gunshot wounds to Garvey's body. Thus, the evidence demonstrates that Garvey's murder resulted from premeditation and deliberation on the part of Hill. *See Leazer*, 353 N.C. at 238; *Barnes*, 345 N.C. at 233.

It is certainly foreseeable that a prostitute would have another individual monitoring business-related activity for safety and protection. Regardless of whether defendant knew of Garvey's presence, because Garvey's murder occurred in the pursuit of and as a natural and probable consequence of defendant and Hill's plan to rob and rape Holland, this charge was properly submitted to the jury. *Barnes*, 345 N.C. at 233.

G. Finding of the Aggravating Circumstance that the Murders were Committed During the Commission of an Attempted Rape and Attempted Robbery

[8] Defendant next argues that the State's evidence was insufficient to submit the aggravating circumstance that the murders occurred during the "commission of, or flight after committing, the Attempted First-Degree Rape of April Holland and the Attempted Robbery with a Firearm of April Holland" to the jury. Defendant again contends that because the State's evidence was insufficient to demonstrate an attempted rape or armed robbery of Holland, it was similarly insufficient to submit this aggravating factor to the jury during the sentencing phase of trial.

Defendant failed to object to the introduction of this aggravating circumstance. Rule 10(a)(1) of the North Carolina Rules of Appellate Procedure ordinarily requires that a party present "to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling" in order to preserve an issue for appellate review. N.C. R. App. P. 10(a)(1). However, despite defendant's failure to object, this issue is nonetheless preserved for appeal pursuant to *State v. Canady*, 330 N.C. 398 (1991), and *State v. Meadows*, 371 N.C. 742 (2018), because the trial court knew or should have known that defendant was contesting the aggravating factor. *Canady*, 330 N.C. at 402 (holding that the issue was preserved because "[t]he defendant did not want the court to find the aggravating factor and the court knew or should have known it"); *Meadows*, 371 N.C. at 746–47 (holding that the sentencing issue was preserved because "the danger of gamesmanship was not present" and "the sentencing court knew or should have known defendant sought the minimum possible sentence" (cleaned up)).

But, again, the evidence of the attempted rape and armed robbery of Holland was sufficient for its submission to the jury as an aggravating factor. Subsection 15A-2000(e)(5) of our General Statutes permits the jury to find as an aggravating factor that "[t]he capital felony was

committed while the defendant was engaged, or was an aider or abettor, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any homicide, robbery, [or] rape." N.C.G.S. § 15A-2000(e)(5) (2023). The evidence presented by the State, discussed at length above, was sufficient to persuade a rational juror that the murders occurred while the defendant was engaged in the commission of an attempted rape and armed robbery.

H. Trial Court's Failure to Submit the *Enmund/Tison* Issue to the Jury for the Murder of Garvey

[9] Next, defendant argues that because he did not kill Garvey, the trial court erred by failing to submit an instruction to the jury under *Enmund v. Florida*, 458 U.S. 782 (1982), and *Tison v. Arizona*, 481 U.S. 137 (1987). Because defendant failed to request the *Enmund/Tison* instruction, he is limited to plain error review. *Golphin*, 352 N.C. at 472; N.C. R. App. P. 10(c)(4).

This Court has succinctly explained the culpability requirements which the jury must consider for imposition of the death penalty as established by *Enmund* and *Tison*:

> In *Enmund*, the United States Supreme Court held that the Eighth Amendment forbids the imposition of the death penalty on a defendant who aids and abets in the commission of a felony in the course of which a murder is committed by others, when the defendant does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed. In a later case [*Tison*], however, the Court further construed its holding in *Enmund* and held that major participation in the felony committed, combined with reckless indifference to human life, is sufficient grounds for the imposition of the death penalty.

Golphin, 352 N.C. at 473 (cleaned up).[6]

The defendant in *Enmund* was the getaway driver for co-defendants who shot and killed two victims and robbed them of their money. It was undisputed that the defendant was not present at the time of the robbery

6. The dissent incorrectly suggests that *Enmund-Tison* is an "and" test, rather than an "or" test. A defendant is not required to meet the intent requirement in *Enmund and* the major participant and reckless indifference requirements in *Tison*. Either is sufficient to satisfy state and federal constitutional concerns.

and murder. *Enmund*, 458 U.S. at 786, 788. The Supreme Court determined that imposition of the death penalty on those who had not manifested an intent to kill violates the Eighth Amendment. *Id.* at 798 ("The question before us is not the disproportionality of death as a penalty for murder, but rather the validity of capital punishment for [defendant]'s own conduct. The focus must be on *his* culpability, not on . . . those who . . . shot the victims . . . .").

The facts in *Tison*, however, are similar to those of the case *sub judice*. There, three brothers helped their father and another inmate escape from prison. *Tison*, 481 U.S. at 139. The group robbed and abducted a family in a highway encounter in the Arizona desert. *Id.* at 139–40. The father and inmate then killed the family of four, while the brothers watched, but declined to help the victims. *Id.* at 141.

The Supreme Court stated that merely looking at a defendant's intent to kill for Eighth Amendment purposes

> is a highly unsatisfactory means of definitively distinguishing the most culpable and dangerous of murderers. Many who intend to, and do, kill are not criminally liable at all—those who act in self-defense or with other justification or excuse . . . . On the other hand, some nonintentional murderers may be among the most dangerous and inhumane of all—the person who tortures another not caring whether the victim lives or dies, or the robber who shoots someone in the course of the robbery, utterly indifferent to the fact that the desire to rob may have the unintended consequence of killing the victim as well as taking the victim's property. This reckless indifference to the value of human life may be every bit as shocking to the moral sense as an 'intent to kill.' . . . [W]e hold that the reckless disregard for human life implicit in knowingly engaging in criminal activities known to carry a grave risk of death represents a highly culpable mental state, a mental state that may be taken into account in making a capital sentencing judgment when that conduct causes its natural, though also not inevitable, lethal result.

Tison, 481 U.S. at 157–58.

Both *Enmund* and *Tison* "explore[ ] the degree of culpability necessary for the imposition of capital punishment in cases involving

felony-murder convictions." *Gilson v. Sirmons*, 520 F.3d 1196, 1212 (10th Cir. 2008). While *Enmund* focuses on the intent of minor participants, *Tison* is more concerned with "the intermediate case of the defendant whose participation is major and whose mental state is one of reckless indifference to the value of human life." *Tison*, 481 U.S. at 152. The Supreme Court essentially concluded that major participation in felonious conduct in which there is a significant risk of death is no different for Eighth Amendment purposes than the intent to kill issue that *Enmund* confronted. *See Ross v. Davis*, 29 F.4th 1028, 1043–44 (9th Cir.), *cert. denied sub nom. Ross v. Bloomfield*, 143 S. Ct. 375 (2022) (holding that the Eighth Amendment allows the death penalty to be imposed on "felony murderers" (1) "who actually killed, attempted to kill, or intended to kill," or (2) "whose participation in the felony is major and whose mental state is one of reckless indifference to the value of human life." (cleaned up)).

Consistent with the direction from the Supreme Court, this Court has clarified that an *Enmund/Tison* instruction is not required when a defendant is "found . . . guilty of first-degree murder on the basis of premeditation and deliberation under the theory that [he] committed all the elements or that he acted in concert." *Golphin*, 352 N.C. at 473. *See also State v. Fletcher*, 354 N.C. 455, 479 (2001); *State v. Gaines*, 345 N.C. 647, 682 (1997). Moreover, in *State v. Robinson*, this Court determined that an *Enmund/Tison* instruction is not required when a defendant is convicted "of first-degree murder upon the theory of premeditation and deliberation in addition to the felony murder theory." 342 N.C. 74, 88 (1995).

Here, as noted above, defendant was convicted of first-degree murder for the killing of Garvey based on both theories of felony murder and premeditation and deliberation. Unlike the defendant in *Enmund*, here, defendant was not a minor participant. Rather, like the brothers in *Tison*, he was a major participant in criminal conduct known to carry a grave risk of death. Defendant was actively involved in planning, arranging, and perpetrating an armed, violent felony that was likely to result in the loss of life. In addition to possessing and using a firearm, defendant was physically present throughout the commission of these violent crimes, and his conduct was part of a prolonged criminal scheme.

Therefore, even if we assume that the trial court erred, defendant has not demonstrated plain error because a rational juror could find that defendant was not merely a minor participant in the crimes detailed herein.[7] The United States Supreme Court in *Tison* noted that there was

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7. We also note that the trial court provided the jury with an instruction on malice. Specifically, the trial court informed the jury, "Malice means not only hatred, ill will, or

"apparent consensus that substantial participation in a violent felony under circumstances likely to result in the loss of innocent human life may justify the death penalty even absent an 'intent to kill.' " 481 U.S. at 154 (cleaned up). As stated above, defendant was "a major participa[nt] in the felony committed" and demonstrated "a reckless indifference to human life, [which] is sufficient to satisfy the *Enmund* culpability requirement." *Id.* at 158. "[T]he reckless disregard for human life implicit in knowingly engaging in criminal activities known to carry a grave risk of death represents a highly culpable mental state, a mental state that may be taken into account in making a capital sentencing judgment . . . ." *Id.* at 157–58. Defendant's actions underscore the notion that "the more purposeful is the criminal conduct, the more serious is the offense, and, therefore, the more severely it ought to be punished." *Id.* at 156.

Thus, any purported error did not have a probable impact on the outcome of his sentencing hearing and cannot satisfy the plain error standard set forth in *Reber*.

I. Jury Instructions Regarding the Use of the Same Evidence to Support More Than One Aggravating Factor

[10] Defendant next argues that the trial court erred by failing to instruct the jury that it could not use the same evidence to support more than one aggravating factor. Defendant failed to request that the jury be given this instruction, and as such, he must show plain error. *See Lawrence*, 365 N.C. at 518.

"In a capital case the trial court may not submit multiple aggravating circumstances supported by the same evidence." *State v. Lawrence*, 352 N.C. 1, 29 (2000). "This Court has held that the trial court should instruct the jury that it cannot use the same evidence as a basis for finding more than one aggravating circumstance." *State v. Conaway*, 339 N.C. 487, 530 (1995). However, "[a]ggravating circumstances are not considered redundant absent a *complete overlap* in the evidence supporting them." *State v. Moseley*, 338 N.C. 1, 54 (1994) (emphasis added). Moreover, a

> trial court's failure to instruct the jury that it could not use the same evidence to support more than one

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spite, as it is ordinarily understood. To be sure, that is malice. But it also means the condition of mind which prompts a person to take the life of another intentionally or to intentionally inflict serious bodily harm which proximately results in another person's death without just cause, excuse, or justification." Thus, though not required for the reasons stated above, the trial court instructed the jury on the substance of an *Enmund/Tison* instruction. *See State v. Augustine*, 359 N.C. 709, 729 (2005) (holding that an instruction to the jury is sufficient if the substance of the instruction is provided).

> aggravating circumstance does not rise to the level of plain error. . . . [When there is] substantial separate evidence supporting each aggravating circumstance, it is improbable that the jury would have reached a different result . . . .

Conaway, 339 N.C. at 531.

Here, the trial court instructed the jury that it could consider the subsection (e)(5) and subsection (e)(11) aggravating circumstances, and while these two aggravating factors are supported by similar evidence, there was not a complete overlap. *See* N.C.G.S. § 15A-2000(e)(5), (11). The subsection (e)(5) aggravating factor—that the murders of Holland and Garvey occurred during the attempt or flight after the attempt to commit first-degree rape or armed robbery against Holland—was supported by the 404(b) evidence of defendant's prior rapes and robberies of Bessie A. and Rachel B. under similar circumstances. Even though defendant's attempt to rape and rob Holland fell short of completion, additional facts, such as defendant's confirmation text to Hill that he had "got[ten] one" and the bedsheet found on the floor beside Holland's body, suggested that these killings occurred during the attempt and/or flight from the attempted rape and robbery of Holland.

On the other hand, the subsection (e)(11) factor—that the murders of Holland and Garvey were part of a course of conduct in which defendant was engaged—was supported by substantial separate evidence from additional victims that were subjected to the ongoing course of conduct that defendant was similarly engaged in on the night Holland and Garvey were murdered. Specifically, in both the guilt and sentencing phases of trial, the State presented evidence of additional women, Kara L., Keyona T., Keyana M., Serena S., and Asia G., all of whom were victimized by defendant.

At trial, Kara L. testified that she had consensual relations with defendant until it turned violent with defendant holding a gun to her mouth threatening to kill her and her family. During the sentencing phase, Keyona T. testified that while prostituting herself at a low-budget hotel, she was attacked and tied up, sexually assaulted, and robbed by defendant and Hill. Keyana M. testified to a similar experience with defendant, stating that she was tied up with a phone cord, raped, and robbed of her personal possessions and money by defendant and his companion. Also, Serena S. testified that she was contacted by a single man but then was attacked by two armed men at the hotel, who tied her up and forced her to contact additional male clients whom the

perpetrators could rob, and then was robbed herself. Asia G. testified that on the same morning Serena S. was attacked, she was tied up and robbed by defendant's companion, Hill, while defendant remained in the room with Serena S.

Therefore, while the 404(b) evidence of defendant's prior rapes and robberies of Bessie A. and Rachel B. was used to support aggravating circumstances under subsections (e)(11) and (e)(5), the subsection (e)(11) factor was supported by substantial additional evidence, and there is no error.

J. Trial Court's Denial of Defendant's Motion to Suppress Keyona T.'s In-Court Identification

[11] Defendant next argues that the trial court erred in denying his motion to suppress Keyona T.'s identification of defendant in court. Specifically, defendant contends that Keyona T.'s in-court identification violated his due process rights.

Keyona T. testified during the sentencing phase that while working as a prostitute out of a low-budget motel in April of 2016, her friend, Lynda P., who was also working as a prostitute, was contacted by a man who set up an appointment with Lynda P. Keyona T. stated that her motel room shared a wall with Lynda P.'s and that as soon as the "client" arrived, she heard knocking and beating sounds coming from Lynda P.'s room. A few minutes later, two men entered Keyona T.'s room with Lynda P., holding Lynda P. at gunpoint. The two men forced Keyona T. and Lynda P. to undress, tied their hands with pillowcases, began rummaging through Keyona T.'s belongings, and then one of the men sexually assaulted her with a firearm. Keyona T. stated that she reported this incident to the police, but no action was ever taken.

Before Keyona T. testified at defendant's sentencing hearing, the trial court allowed voir dire regarding her identification of defendant. Keyona T. testified that in December of 2018, she was contacted about the incident by Detective Eric Gibney with the Raleigh Police Department. Gibney informed Keyona T. that he was investigating a homicide that might have been related to her earlier reported attack, and he described the crime as involving a pregnant mother and a father who had been killed. Keyona T. testified that Gibney did not show her a lineup or any photos of defendant but that he gave her a name of someone involved in the crime. Keyona T. stated that after her conversation with Gibney, she researched the crime on her own. Keyona T. stated that she recognized defendant in the Google photos based on his "familiar face" from her previous encounter with him.

At the close of the voir dire, defendant objected to Keyona T. testifying at the sentencing hearing, arguing that the "government action . . . taint[ed] the identification in this case" and that it was not reliable. The trial court determined that Keyona T. was permitted to testify, as she "took it upon herself to . . . view the newspaper and, in looking at the photograph that was published in connection with this story, . . . she believed [defendant] was the person that committed these offenses," but the court reserved ruling on Keyona T.'s in-court identification.

At the sentencing hearing, Keyona T. testified to many of the same facts as she did on voir dire. In addition, she stated that she did not know defendant's name but that one of the perpetrators had an "island accent." Keyona T. also testified that she recognized defendant in the photos based on his "eyes and . . . nose," and knew him to be the man with the island accent who had sexually assaulted her and robbed her in April of 2016. Defendant's renewed objection to Keyona T.'s in-court identification was overruled. The trial court stated:

> I'm going to allow the in-court identification. I first find that the circumstances of this witness viewing the photograph were not the result of State action and so that there was no constitutional violation occasioned by that procedure.
>
> Secondly, the witness had significant opportunity to view the defendant or the perpetrator of the April 2016 events clearly, and she on her own accord viewed photographs in news media accounts and was able to identify the defendant.
>
> In listening to her testimony, I infer that the identification was relatively certain. She described the features that she found to be distinctive. It is also — the reliability of that identification is also bolstered by the fact that the person she identified also has a distinctive island accent, as was elicited from prior testimony. So I find this goes to the weight, not the admissibility that safeguards the cross-examination and instructions to the jury about the — I will instruct the jury during the charge that it is the State's burden to identify the defendant as the perpetrator of these alleged acts that are used in the sentencing phase beyond a reasonable doubt. I will so instruct the jury with respect to that.

> And for all of those reasons, I believe that the safeguards that are inherent in our adversarial trial process are sufficient to test the reliability of her identification in this case. So I'm going to allow the in-court identification.

As a general rule, the reliability of evidence is for the jury, not the trial court, to decide. *State v. Malone*, 373 N.C. 134, 146 (2019). However, "due process considerations do place limitations upon the admission of eyewitness identification evidence obtained as the result of impermissible official conduct." *Id.* When tasked with determining whether impermissible official conduct has occurred, a court must "utilize a two-step process." *Id.* First, the court must "determine whether the identification procedures were impermissibly suggestive." *State v. Fowler*, 353 N.C. 599, 617 (2001). If so, the court must then determine "whether the procedures created a substantial likelihood of irreparable misidentification." *Id.* However, a court need not reach this two-step analysis if it first determines that the witness's pretrial identification of the defendant did not arise from State action, as "suggestive pretrial identification procedures that do not result from state action do not violate [a] defendant's due process rights." *State v. Fisher*, 321 N.C. 19, 24 (1987).

Here, Detective Gibney did not show Keyona T. photographs of defendant, he did not refer her to any news articles containing defendant's pictures, he did not instruct nor encourage Keyona T. to conduct her own research, nor was he present or on the phone with Keyona T. when she researched the crime. Rather, Gibney merely provided a vague overview of the crimes committed against Holland and Garvey and informed Keyona T. that evidence from her reported attack had been recovered. And as Keyona T. confirmed in her testimony, "[she] looked it up on [her] own." Thus, given the attenuation between Gibney's phone call with Keyona T. and her subsequent independent research, Keyona T.'s identification was not a result of State action and does not violate defendant's due process rights. Questions concerning Keyona T.'s identification go to the weight to be given to her testimony, not its admissibility, and defendant's argument is without merit.

K. Trial Court's Final Mandate for First-Degree Murder

[12] Defendant next argues that the trial court erred in its final mandate to the jury for first-degree murder under the theory of felony murder because the instruction failed to repeat the elements for the underlying felonies of attempted first-degree rape and attempted robbery with a dangerous weapon. Defendant failed to object to the trial court's alleged

omission but argues that the argument is still preserved for appeal. To support this contention, defendant cites *State v. Ross*, 322 N.C. 261 (1988), and *State v. Keel*, 333 N.C. 52 (1992), for the proposition that an alleged instructional error is preserved for appeal if the instruction was "promised" by the trial court but then never given to the jury.

In *Ross*, this Court held that, notwithstanding a defendant's failure to object at trial, a challenge to a jury instruction is preserved "where the requested instruction is subsequently promised but not given." 322 N.C. at 265. Likewise, in *Keel*, this Court held that "[t]he State's request [for a pattern jury instruction], approved by the defendant and agreed to by the trial court, satisfied the requirements of . . . the North Carolina Rules of Appellate Procedure and preserved this question for review on appeal." 333 N.C. at 56–57.

However, these two cases are inapposite. Here, during the charge conference, the trial court informed both parties that it planned to give the pattern instruction for first-degree murder found in North Carolina Pattern Jury Instructions for Criminal Cases (N.C.P.I.—Crim. 206.14). Both parties were given draft copies of the proposed jury instructions which contained the language that defendant now argues was improper. The State's only proposed changes were clerical, not substantive. Defendant had access to the specific language that was to be used by the trial court but concedes that he never proposed new instructions nor objected to them at the conclusion of the conference. The State also did not object to nor request any specific instructions. Therefore, both *Ross* and *Keel* are inapplicable, as there was no requested instruction by either the State or defendant which was promised by the trial court but then was not given to the jury. As such, we review the trial court's final mandate to the jury for plain error. *See Lawrence*, 365 N.C. at 516.

Because the "[u]se of the pattern instructions is encouraged, but is not required," *State v. Garcell*, 363 N.C. 10, 49 (2009), the failure of a trial court to follow these instructions does not automatically constitute error, *State v. Bunch*, 363 N.C. 841, 846 (2010). Rather, an instruction is proper "as long as [it] adequately explains each essential element of an offense." *Id.* When reviewing a charge to the jury, it "is to be construed as a whole." *State v. McKinnon*, 306 N.C. 288, 300 (1982). In addressing the adequacy of a final mandate, this Court held that if the trial court "explained the underlying elements of the crimes [charged] just prior to the final mandate" and "it is sufficiently clear that no reasonable cause exists to believe that the jury was misled or misinformed," then a final mandate is sufficient even if it does not repeat the essential elements. *Id.*

The trial court instructed the jury on the requisite elements of first-degree murder under both premeditation and deliberation and felony murder. For the count of first-degree murder of Holland, the trial court explained that to find defendant guilty of first-degree murder on the basis of malice, premeditation, and deliberation, the State must have proved five things beyond a reasonable doubt:

> First, that the defendant intentionally and with malice killed April Holland with a deadly weapon. Malice means not only hatred, ill will, or spite, as it is ordinarily understood. To be sure, that is malice. But it also means that condition of mind which prompts a person to take the life of another intentionally or to intentionally inflict a wound with a deadly weapon and which proximately results in her death without just cause, excuse, or justification.
>
> If the State proves beyond a reasonable doubt the defendant intentionally killed the victim with a deadly weapon or intentionally inflicted a wound upon the victim with a deadly weapon that proximately caused her death, you may infer, first, that the killing was unlawful and, second, that it was done with malice, but you are not compelled to do so. You may consider the inference along with all other facts and circumstances in determining whether the killing was unlawful and whether it was done with malice.
>
> I instruct you that a firearm is a deadly weapon.
>
> Second, the State must prove that the defendant's act was a proximate cause of the victim's death. A proximate cause is a real cause, a cause without which the victim's death would not have occurred, and one that a reasonably careful and prudent person could foresee would probably produce such injury or some similar injurious result.
>
> Third, that the defendant intended to kill the victim. Intent is a mental attitude seldom provable by direct evidence. It must ordinarily be proved by circumstances from which it may be inferred. An intent to kill may be inferred from the nature of the assault, the manner in which it was made, the conduct of the parties, and other relevant circumstances.

> Fourth, that the defendant acted after premeditation, that is, that the defendant formed the intent to kill the victim over some period of time, however short, before the defendant acted.
>
> And, fifth, that the defendant acted with deliberation, which means the defendant acted while the defendant was in a cool state of mind. This does not mean that there had to be a total absence of passion or emotion. If the intent to kill was formed with a fixed purpose, not under the influence of some suddenly-aroused, violent passion, it is immaterial that the defendant was in a state of passion or excited when the intent was carried into effect.

The trial court also instructed the jury that in order to find defendant guilty of first-degree murder of Holland on the basis of felony murder, the State must have proved three things beyond a reasonable doubt:

> First, that the defendant committed the offense of attempted robbery with a firearm and/or attempted first-degree rape of April Holland. To establish this first element, the State must prove two things beyond a reasonable doubt:
>
> A, that the defendant intended to commit the crime of robbery with a firearm of April Holland. Robbery with a firearm occurs when one has in his possession a firearm and takes and carries away property from the person or presence of a person without her voluntary consent by endangering or threatening her life with the use or threatened use of a firearm, the perpetrator knowing that he was not entitled to take the property and intending to deprive the victim of its use permanently.
>
> And, B, that at the time the defendant had this intent the defendant performed an act which was calculated and designed to bring about robbery with a firearm but which fell short of the completed offense and which in the ordinary and likely course of things the defendant would have completed that crime had the defendant not been stopped or prevented from completing the defendant's apparent course of action. Mere preparation or mere planning is not

> enough to constitute such an attempt, but the act need not be the last act required to complete the crime.
>
> Alternatively, the State may prove this first element by establishing beyond a reasonable doubt the following:
>
> That the defendant intended to commit the crime of first-degree rape of April Holland. First-degree rape occurs when one engages in vaginal intercourse with the victim by force and against her will while the perpetrator is displaying or employing a deadly or dangerous weapon.
>
> And, B, that at the time the defendant had this intent, the defendant performed an act which was calculated and designed to bring about first-degree rape but which fell short of the completed offense and which, in the ordinary and likely course of things, the defendant would have completed that crime had the defendant not been stopped or prevented from completing the defendant's apparent course of action. Mere preparation and mere planning is not enough to constitute such an attempt, but the act need not be the last act required to complete the crime.
>
> The second element the State must prove beyond a reasonable doubt to establish felony murder is that, while committing the offense of attempted robbery with a firearm or the offense of attempted first-degree rape, the defendant killed April Holland.
>
> And, third, that the defendant's act was a proximate cause of April Holland's death. A proximate cause is a real cause, a cause without which the victim's death would not have occurred.

The trial court then gave nearly identical instructions to the jury regarding the requisite elements for the count of first-degree murder of Garvey on the basis of felony murder, with the exception of changing the language to include "defendant or a person with whom the defendant was acting in concert" and further instructing the jury on the theory of acting in concert.

Upon recitation of the required elements for each basis of first-degree murder, the trial court then gave the final mandates for both

counts of first-degree murder. Defendant only contests the trial court's final mandate as to felony murder, which was as follows:

> Whether or not you find the defendant guilty of first-degree murder on the basis of malice, premeditation, and deliberation, you will also consider whether the defendant is guilty of first-degree murder under the first-degree felony murder rule. If you find from the evidence beyond a reasonable doubt that on or about the alleged date the defendant committed the offense of attempted robbery with a firearm *as that offense is defined above* or attempted first-degree rape *as that offense is defined above* and that, while committing attempted robbery with a firearm or attempted first-degree rape, the defendant killed [the victim] and that the defendant's act was a proximate cause of [the victim's] death, it would be your duty to return a verdict of guilty of first-degree murder under the felony murder rule.

(Emphasis added.) Similarly, the trial court's final mandate for the first-degree murder of Garvey under the theory of felony murder was as follows:

> Whether or not you find the defendant guilty of first-degree murder on the basis of malice, premeditation, and deliberation, you will also consider whether the defendant is guilty of first-degree murder under the first-degree felony murder rule. If you find from the evidence beyond a reasonable doubt that on or about the alleged date the defendant, acting either by himself or acting together with other persons, committed attempted robbery with a firearm or attempted first-degree rape and that while committing either or both of these offenses the defendant or a person with whom the defendant was acting in concert killed the victim and that the defendant's act or the act of the person with whom Defendant was acting in concert was the proximate because of Dwayne Garvey's death, it would be your duty to return a verdict of guilty of first-degree murder under the felony murder rule. If you do not so find or have a reasonable doubt as to one or more of these things, you will not return a verdict of guilty of first-degree murder under the felony murder rule.

Defendant contends that "the lack of definition of attempted robbery and attempted rape in the final mandate probably impacted the jury's decision to find [defendant] guilty of first-degree murder." However, "constru[ing] [it] as a whole," *McKinnon*, 306 N.C. at 300, our review of the transcript shows that the trial court thoroughly and correctly instructed the jury as to the elements of the underlying felonies. Therefore, "it is sufficiently clear that no reasonable cause exists to believe that the jury was misled or misinformed," *see id.*, and the final mandate was not improper.

L. Cumulative Error in Denying Defendant a Fair Trial and Sentencing Hearing

[13] Defendant argues that the cumulative prejudicial impact of "the erroneous admission of extensive character evidence, irrelevant victim impact evidence, and repetitive, graphic photo evidence; unsupported and incomplete instructions; and improper closing argument" entitle him to a new trial or sentencing hearing.

"Cumulative errors lead to reversal when taken as a whole the errors by the trial court deprived the defendant of his due process right to a fair trial free from prejudicial error." *State v. Wilkerson*, 363 N.C. 382, 426 (2009) (cleaned up); *see also State v. Johnson*, 334 S.C. 78, 93 (1999) ("[Defendant] must demonstrate more than error in order to qualify for reversal on [cumulative error] ground[s]. Instead, the errors must adversely affect his right to a fair trial."). However, when "none of the issues present error, [appellate courts will] decline to consider defendant's cumulative error argument." *State v. Betts*, 377 N.C. 519, 527 (2021). *See also State v. Thompson*, 359 N.C. 77, 106 (2004) (holding that because there was no error, defendant's cumulative error argument should not be considered); *Maldjian v. Bloomquist*, 275 N.C. App. 103, 125 (2020) (concluding that where an appellate court can "discern no error . . . , [a] trial court's rulings cannot cumulatively be deemed prejudicial error."); *see also Pham v. State*, 177 So. 3d 955, 962 (Fla. 2015) ("[W]here the alleged errors urged for consideration in a cumulative error analysis are individually either procedurally barred or without merit, the claim of cumulative error also necessarily fails." (cleaned up)). Indeed, cumulative error requires there be multiple significant errors before an appellate court can conclude that a defendant has met the high bar of demonstrating that he has been wholly "deprived . . . of his due process right to a fair trial free from prejudicial error." *Wilkerson*, 363 N.C. at 426 (cleaned up).

Here, however, there can be no cumulative error because the trial court did not err. *See Betts*, 377 N.C. at 527 ("Since we hold that none of

the issues present error, we decline to consider defendant's cumulative error argument."); *see also State v. Spangler*, 314 N.C. 374, 388 (1985); *Thompson*, 359 N.C. at 106.[8]

M. Excusing Jurors for Cause Based on Their Views on the Death Penalty

[14] Defendant next asserts that the trial court abused its discretion when it excused prospective jurors McIlvane, Daniels, and Youngquist-Thurow for cause based on their death penalty views. Defendant argues that the three prospective jurors' hesitation in personally imposing a death sentence "did not show [that] they were substantially impaired."

"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). 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), because it is the trial court "who has the opportunity to see and hear the juror on voir dire and to make findings based on the juror's credibility and demeanor," *Kennedy*, 320 N.C. at 26. Thus, the trial court's determination is only an abuse of discretion if it was " 'manifestly unsupported by reason' and is 'so arbitrary that it could not have been the result of a reasoned decision.' " *State v. Cummings*, 361 N.C. 438, 447 (2007) (quoting *State v. Lasiter*, 361 N.C. 299, 301–02 (2007)).

Criminal defendants are guaranteed the right to trial by an impartial jury under the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 24 of our State Constitution. *See Richardson*, 385 N.C. at 205 ("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."); *see also State v. Crump*, 376 N.C. 375, 381 (2020) (citing N.C. Const. art. I, § 24). The State also has a right to an impartial jury. *State v. Chandler*, 324 N.C. 172, 185–86 (1989); *see also State v. Garcia*, 358 N.C. 382, 407 (2004) ("The basic concept in jury selection is that each party to a trial has the right to present his case to an unbiased and impartial jury." (quoting *State v. Carey*, 285 N.C. 497, 506 (1974))). A crucial portion of crafting an impartial jury occurs during voir dire, where the parties "typically may inquire into prospective jurors' morals, attitudes, and beliefs." *Crump*, 376 N.C. at 381. "The primary goal of juror voir dire

8. The only arguable error committed by the trial court concerns the *Enmund-Tison* instruction. As we have discussed above, there can be no cumulative error.

is to ensure that only those persons are selected to serve on the jury who could render a fair and impartial verdict." *Kennedy*, 320 N.C. at 26.

In a capital case, a prospective juror may not be excused because he or she merely "voice[s] general objections to the death penalty." *Witherspoon v. Illinois*, 391 U.S. 510, 522 (1968). But the State has a "legitimate interest in excluding those jurors whose opposition to capital punishment would not allow them to view the proceedings impartially, and who therefore might frustrate administration of a State's death penalty scheme." *Wainwright v. Witt*, 469 U.S. 412, 416 (1985). Thus, the proper standard for determining whether a juror may be excused for his view on the death penalty is "whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.' " *Id.* at 424. This standard does not require that a juror's bias be "proved with 'unmistakable clarity.' " *Id.*

This Court has declined to find an abuse of discretion where jurors' voir dire "responses are inconsistent or when jurors' answers regarding their ability to follow the law are equivocal." *Garcia*, 358 N.C. at 403; *see also State v. Berry*, 356 N.C. 490, 500 (2002) (holding that the trial court did not abuse its discretion by excusing a prospective juror for cause when his responses were "not consistent during *voir dire*, in that he sometimes stated that he could follow the law, while other times he qualified his answers by adding that he would require more than circumstantial evidence"); *State v. Jones*, 355 N.C. 117, 122 (2002) (concluding that the trial court did not abuse its discretion by excusing a prospective juror for cause when the "equivocating nature of her responses . . . led the trial judge to conclude that [she] would be unable to faithfully and impartially apply the law" (cleaned up)); *Smith*, 352 N.C. at 545 (holding that whether a prospective juror's bias makes him excusable for cause is "the court's decision, in the exercise of its sound discretion and judgment"). Further, "where 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." *State v. Gibbs*, 335 N.C. 1, 35 (1993) (cleaned up).

During voir dire, the trial court questioned prospective juror McIlvaine about his personal views on the idea of sentencing defendant to death. McIlvaine immediately responded that he "would be nervous about making that decision." The State further questioned McIlvaine, asking if he would be able to sentence defendant to death if the facts and circumstances called for it:

[The State]: . . . The main thing that we need to be sure of or convinced of is would you be able to consider this and would you be able to do that if the facts and circumstances called for it.

Prospective Juror McIlvaine: That's a hard question to answer. I suppose so, but, I mean, I would have to be very convinced.

. . . .

[The State]: Okay. Do you believe that you would be more comfortable — you said nervous before about the death penalty. Would you be more comfortable considering a life sentence for this particular defendant?

Prospective Juror McIlvaine: I would, yeah.

[The State]: So then that brings us to the next step though. After going through this process and after considering all the evidence and the circumstances that were involved, if you were convinced beyond a reasonable doubt that the death penalty was appropriate in this particular case, after going through the evidence and the laws [the judge] gives you, do you believe that you would be able to personally vote for that kind of sentence?

Prospective Juror McIlvaine: I just — I just don't know. I really don't think so.

. . . .

Prospective Juror McIlvaine: I just think I would have a hard time with it.

. . . .

[The State]: But what if you thought a death sentence was appropriate? Would you be able to stand up in open court and tell this judge that you thought that that was an appropriate sentence?

Prospective Juror McIlvaine: Yeah, I would have a hard time with that.

[The State]: Do you believe you would be able to do that?

> Prospective Juror McIlvaine: I'm not sure that I would.

Based on these responses, the trial court found that McIlvaine's views "would prevent or substantially impair the performance of [his] duties as a juror in accordance with his instructions and his oath." The trial court also ruled that there was a "lack of probability that further questioning w[ould] produce different answers from this juror" and dismissed him for cause.

Although McIlvaine at one point stated that he "supposed" he could vote for a sentence of death, his equivocal responses was enough to uphold his dismissal. *See Garcia*, 358 N.C. at 403. Further, because many of McIlvaine's responses demonstrated that he would not have been able to set aside his personal views, the trial court did not abuse its discretion by prohibiting defendant from questioning him further. *See Gibbs*, 335 N.C. at 35. Thus, we conclude that there was no abuse of discretion in the trial court's dismissal of McIlvaine.

We turn next to prospective juror Daniels. During voir dire, the State asked Daniels about her feelings on capital punishment:

> [The State]: Have you had some time in the last couple of days to think through [capital punishment]?
>
> Prospective Juror Daniels: Yes. I'm a[n] honest Christian lady, and I've spoken to my pastor about it, and my thought is I don't believe in capital punishment.
>
> . . . .
>
> [The State]: And is this something that you feel like, even if you were asked to go through a process with the jury, that because of these feelings that you hold you just would not ever be able to consider the death sentence?
>
> Prospective Juror Daniels: No, ma'am.
>
> . . . .
>
> Prospective Juror Daniels: No, ma'am, I would not be able to.
>
> [The State]: And that's fair. That's fair. Is it fair to say that, even if you were asked to go through and to consider aggravating factors versus mitigating

> factors, there's really nothing that is going to change your mind? You are never going to say I'm okay with a death sentence?
>
> Prospective Juror Daniels: Correct, I will not say it.

The trial court dismissed Daniels for cause, concluding that her "views would prevent or substantially impair the performance of [her] duties in accordance [with] her instructions and her oath" and that there was a "lack of probability that further questioning w[ould] produce different answers."

We conclude that the trial court properly exercised its discretion in allowing Daniels to be excused for cause. Daniels's unequivocal answers in opposition to the death penalty demonstrated that her personal views "would not allow [her] to view the proceedings impartially." *See Wainwright*, 469 U.S. at 416. And given the absolute nature of her answers, the trial court did not abuse its discretion by prohibiting defendant from questioning her further. *See Gibbs*, 335 N.C. at 35.

Finally, during the voir dire of prospective juror Youngquist-Thurow, the trial court and the State questioned him about his views on the death penalty:

> The Court: So this is a capital case. . . . And so the question that I would ask of you before I pass you on to the lawyers is is there anything that's on your mind that you have said to yourself this is something that I just need the judge and the lawyers to know about me before we go any further? . . .
>
> Prospective Juror Youngquist-Thurow: Well, the death penalty issue is one that I would not want to consider. I have been a pacifist pretty much all of my life, registered as a conscientious objector draft-wise even though it didn't really affect me, but did that anyway. And I've always been more of a right-to-life choice than —
>
> . . . .
>
> [The State]: . . . I think the death penalty issue and capital punishment is one of those things that . . . people have very strong opinions one way or another, and that's fine. But what is required is to have people who will be willing to sit and weigh each option fairly.

And there's people that . . . hold beliefs, whether they be personal, moral, religious, that . . . this is not the issue for them where they can do that.

. . . .

[The State]: . . . And I guess my question to you is is this that issue for you[?]

Prospective Juror Youngquist-Thurow: I think it could be. When he explained the case, I remembered just that sinking feeling that, "Oh, no. I may have to make that decision," and just feeling uncomfortable with that right away. For me, it's a religious thing. I believe that's God's right, not my right to make that decision.

[The State]: Sure. And that's completely fair. Do you think that because of that kind of deep seated religious belief that you just would not be able to make that decision?

Prospective Juror Youngquist-Thurow: I think it would be very, very difficult for me to do that consciously.

. . . .

[The State]: Do you think that even though you have these beliefs that you could sit and go through the process and, if you determined that all of . . . the steps were met, that you could come in and say that the appropriate sentence was death?

Prospective Juror Youngquist-Thurow: I would have a hard time with that, I believe.

. . . .

[The State]: Sure. And is that that you feel like, because of that, you would just automatically lean towards a life without parole?

Prospective Juror Youngquist-Thurow: Correct.

[The State]: Instead of weighing the circumstances, you would automatically go to that?

Prospective Juror Youngquist-Thurow: Yes.

The trial court allowed Youngquist-Thurow to be excused for cause, finding that because he had "stated consistently that the imposition of the death penalty is very difficult for him . . . [and] instead of weighing the circumstances, [he] would automatically go towards a punishment of life without the possibility of parole," these views would "substantially impair the performance" of his duties. The trial court did not allow for further questioning of Youngquist-Thurow due to the "lack of probability that further questioning w[ould] produce different answers."

We conclude that there was no abuse of discretion here because Youngquist-Thurow repeatedly emphasized that he was not comfortable with imposing the death penalty and then stated that even if all of the circumstances were met, he still would automatically impose a sentence of life without parole rather than the death penalty. These answers demonstrated that Youngquist-Thurow's "opposition to capital punishment would not allow [him] to view the proceedings impartially." *See Wainwright*, 469 U.S. at 416. Thus, the trial court properly exercised its discretion in excusing this juror for cause.

N. Peremptory Instructions on Three Mitigating Circumstances

[15] Defendant next contends that the trial court erred by failing to give peremptory instructions on three out of the forty mitigating circumstances presented during the sentencing phase of trial. Defendant argues that uncontroverted evidence supported the following nonstatutory mitigating circumstances, such that the peremptory instructions should have been given:

> Mitigating Circumstance # 11: "Seaga Gillard's childhood asthma prevented him from participating in the same physical activities and sports as his younger brother."
>
> Mitigating Circumstance # 21: "Seaga Gillard's home environment made it difficult for him to succeed in school."
>
> Mitigating Circumstance # 36: "Seaga Gillard suffers from Other Specified Trauma and Stressor Related Disorder."

A peremptory instruction directs the jury that if it finds the facts presented to be true, then it must find that a particular mitigating circumstance has been established. N.C.P.I.—Crim. 150.12. "Where *all* of the evidence in a capital prosecution, if believed, tends to show that a particular mitigating circumstance does exist, the defendant is entitled to

a peremptory instruction on that circumstance." *State v. Gay*, 334 N.C. 467, 492 (1993) (cleaned up) (emphasis added). Nonetheless, where "the evidence is controverted or the evidence supporting the circumstance is not manifestly credible, the trial court *should not* give peremptory instructions." *State v. McLaughlin*, 341 N.C. 426, 449 (1995) (emphasis added) (citing *State v. Green*, 336 N.C. 142, 172–74 (1994)). Thus, we review for whether each mitigating circumstance was supported by uncontroverted evidence. *Id.*; *Golphin*, 352 N.C. at 475.

During the sentencing phase, the State originally stipulated to the three mitigating circumstances at issue, but it later withdrew the stipulations. We address each in turn to determine whether uncontroverted evidence supported each circumstance.

For non-statutory Mitigating Circumstance No. 11, the State withdrew its stipulation concerning defendant's asthma because there was testimony presented that he played soccer as a child. The State said it would agree to the peremptory instruction if the language of the circumstance was changed to "Seaga Gillard's childhood asthma *sometimes* prevented him from participating in the same physical activities and sports as his younger brother," but defendant refused. The trial court then stated that it would not provide a peremptory instruction for Mitigating Circumstance No. 11.

We disagree with defendant's contention that the evidence to support Mitigating Circumstance No. 11 was uncontroverted. Evidence was presented that defendant suffered from asthma as a child and was unable to compete in sports at the same level as his brother, Khalid. Defendant's brother earned a scholarship to play in college. And while evidence was presented that defendant had an asthma attack while playing soccer, he still played sports notwithstanding his asthma. Moreover, defendant's asthma may or may not have had an impact on his ability to participate in similar physical activities as his younger brother; given that his brother was a college athlete, it is equally as likely that defendant simply lacked the athletic ability to participate at the same level. Therefore, even if defendant's asthma tended to flare up when he played soccer, he was not entirely prevented from "participating in the same physical activities and sports as his younger brother." As such, the trial court did not err by failing to provide the peremptory instruction for Mitigating Circumstance No. 11.

For non-statutory Mitigating Circumstance No. 21, the State withdrew its stipulation for the peremptory instruction because evidence was presented that multiple factors purportedly impacted his ability to

succeed in school, not just his home life. Even so, the State offered to stipulate if the language of the circumstances was changed to "Seaga Gillard's home environment *was a factor in making it* difficult for him to succeed in school," but defendant rejected this rephrasing. The trial court found that because the original proposed language of Mitigating Circumstance No. 21 was "stated fairly absolutely," it would permit the State's withdrawal of its stipulation and no peremptory instruction would be provided.

We disagree with defendant that the evidence to support Mitigating Circumstance No. 21 was uncontroverted. While evidence was presented regarding defendant's difficult home life, including that he grew up in extreme poverty, lacked consistent access to food, and often went without proper clothing or books for school, evidence was also presented that defendant began smoking around the age of ten and that he "spent most of his time with his friends on the street."

Thus, there was contradictory evidence presented concerning his ability to succeed in school. Home conditions certainly may be a factor in a child's ability to be successful but failure to attend school, being on the streets, and engaging in behavior that is not age appropriate can also be a contributing factor. Therefore, because the absolute language used in Mitigating Circumstance No. 21 was not uncontroverted, the trial court did not err by declining to submit the peremptory instruction. *McLaughlin*, 341 N.C. at 449.

For non-statutory Mitigating Circumstance No. 36, the State withdrew its stipulation concerning defendant's stressor-related disorder because records from the Ohio Department of Rehabilitation and Correction indicated that defendant did not suffer from "any kind of mental health problems or depression." The trial court agreed and ruled that it would not give a peremptory instruction for Mitigating Circumstance No. 36.

The trial court did not err in its decision to withhold the peremptory instruction as to this mitigating circumstance. During the sentencing phase, Dr. Amy James, a clinical psychologist, testified that she was hired by defendant to provide "an evaluation for a mitigation and sentencing." Dr. James testified that she had diagnosed defendant with "other specified trauma and stressor related disorder." However, Dr. James also admitted that she had reviewed prior medical records from the Ohio Department of Rehabilitation and Correction from March 2012, which indicated that defendant did not suffer from "any kind of mental health problems." This alone demonstrates that there was competing evidence of whether defendant suffered from any mental disorder.

Moreover, this Court has repeatedly held that if evidence is "prepare[d] for testifying at trial, rather than to treat [a] defendant, it lacks the indicia of reliability based on the self-interest inherent in obtaining appropriate medical treatment." *State v. Bishop*, 343 N.C. 518, 557–58 (1996); *see also Barden*, 356 N.C. at 377 ("We have held that the testimony of an expert witness who has prepared an analysis of a defendant in preparation for trial lacks the indicia of reliability . . . and, because not manifestly credible, does not support a peremptory instruction as to this particular mitigating circumstance." (cleaned up)).

Here, even if the evidence concerning defendant's mental health was uncontroverted, Dr. James's testimony lacked the "indicia of reliability" to support the peremptory instruction because her diagnosis was developed in anticipation of trial rather than to aid in the treatment of defendant. *Bishop*, 343 N.C. at 557–58. Thus, defendant's argument is without merit.

O. Defendant's Motion to Strike the Death Penalty

[16] Defendant next argues that the trial court erred by denying his pretrial motion to strike the death penalty. Defendant contends that the State's decision to proceed capitally had a "chilling effect" on the exercise of his Fifth and Sixth Amendment rights under the United States Constitution and Article 1, Sections 23 and 24 of our State Constitution. Specifically, defendant challenges the District Attorney's discretion in seeking the death penalty and engaging in plea bargaining, asserting that it has created "a death penalty system that is functionally the same as when now repealed N.C.G.S. § 15-162.1 was in effect."[9]

Defendant's argument—that the State's prosecutorial discretion to seek a particular sentence or to engage in plea bargaining is

9. "Until 1969 North Carolina's death penalty statutes required that unless the jury in its unlimited and unbridled discretion recommended life imprisonment the death penalty would be imposed for convictions of first degree murder, rape, first degree burglary and arson." *State v. McKoy*, 327 N.C. 31, 39–40 (1990). However, under the statutory scheme of former N.C.G.S. § 15-162.1, criminal defendants charged with crimes eligible for the death penalty were permitted to enter a guilty plea in exchange for a sentence of life imprisonment. *State v. Anderson*, 281 N.C. 261, 267 (1972). Nonetheless, "[i]f the defendant plead[ed] not guilty . . . and the jury return[ed] a guilty verdict without recommending life imprisonment, the death sentence bec[ame] mandatory." *State v. Peele*, 274 N.C. 106, 110 (1968). Statutory schemes of this sort were struck down as unconstitutional in *United States v. Jackson*, 390 U.S. 570 (1968), and *Pope v. United States*, 392 U.S. 651 (1968), on the basis that a statutory mandate for the death penalty, absent a guilty plea by a defendant, unnecessarily impinged upon a defendant's constitutional rights to maintain their innocence and to a jury trial. As such, N.C.G.S. § 15-162.1 was repealed by Act of Mar. 25, 1969, ch.117, § 1, 1969 N.C. Sess. Laws 104, 104. *See State v. Niccum*, 293 N.C. 276, 282 (1977).

unconstitutional—is unsupported by this Court's precedent. *See generally State v. Ward*, 354 N.C. 231, 260 (2001); *State v. Smith*, 359 N.C. 199, 225 (2005). Under our current statutory scheme,

> [t]he State, in its discretion, may elect to try a defendant capitally or noncapitally for first degree murder, even if evidence of an aggravating circumstance exists. The State may agree to accept a sentence of life imprisonment for a defendant at any point in the prosecution of a capital felony, even if evidence of an aggravating circumstance exists.

N.C.G.S. § 15A-2004(a) (2023).

Thus, there is no "mandate" for the death penalty here which would impermissibly burden a defendant's constitutional rights. Instead, decisions to seek the death penalty or engage in plea negotiations are left within the "purview of the exclusive and discretionary power of a district attorney," *State v. Diaz-Tomas*, 382 N.C. 640, 649 (2022), and we decline to interfere with the discretion afforded to these constitutional officers. The State is not required to offer a defendant a plea of any sort, and the fact that a plea is offered in which the defendant is given a choice between pleading guilty or having a trial by jury is not a constitutional violation.

P. Lethal Injection as Cruel and Unusual

[17] Defendant asserts that North Carolina's method of lethal injection is cruel and unusual and therefore unconstitutional under the Eighth and Fourteenth Amendments to the United States Constitution and Article I, Section 27 of the North Carolina Constitution. Defendant concedes that "he cannot show how those drugs would cause needless suffering," yet asserts that the unknown risks of the procedure render it unconstitutional.

In North Carolina, "the mode of executing a death sentence must in every case be by administering to the convict or felon an intravenous injection of a substance or substances in a lethal quantity sufficient to cause death and until the person is dead." N.C.G.S. § 15-188 (2023). The specific procedure is "determined by the Secretary of the Department of Adult Correction, who shall ensure compliance with the federal and State constitutions." *Id.*

The Supreme Court of the United States has held that "[w]hen a method of execution is authorized under state law, a party contending that this method violates the Eighth Amendment bears the burden of

showing that the method creates an unacceptable risk of pain." *Glossip v. Gross*, 576 U.S. 863, 884 (2015). To meet this burden, a defendant must (1) "establish that the State's method of execution presents a substantial risk of serious harm—severe pain over and above death itself"; and (2) "identify an alternative method that is feasible, readily implemented, and in fact significantly reduces the risk of harm involved." *Nance v. Ward*, 597 U.S. 159, 164 (2022) (cleaned up).[10] "Only through a comparative exercise . . . can a judge decide whether the State has cruelly superadded pain to the punishment of death." *Id.* (cleaned up). To raise constitutional concerns, the method of execution must "present[ ] a risk that is '*sure or very likely* to cause serious illness and needless suffering,' and give rise to 'sufficiently imminent dangers.' " *Glossip*, 576 U.S. at 877 (quoting *Baze v. Rees*, 553 U.S. 35, 50 (2008)). A defendant's challenge fails if they cannot "show that the risks they identified [are] substantial and imminent, and [if] they [have] not establish[ed] the existence of a known and available alternative method of execution that would entail a significantly less severe risk." *Id.* at 878 (citing *Baze*, 553 U.S. at 56–60).

Here, defendant concedes that he has failed to meet his burden under *Glossip* and *Baze*. Instead, he asks this Court to strike down the method of execution under N.C.G.S. § 15-188 based on hypothetical risks. Because defendant has failed to articulate how North Carolina's lethal injection procedure creates a "substantial risk of serious harm" and has failed to "identify an alternative method that is feasible, readily implemented, and in fact significantly reduces the risk of harm involved," *see Nance*, 597 U.S. at 164 (cleaned up), we reject this argument.

Q. Preservation Issues

[18] Defendant raised two issues for preservation which he concedes have been repeatedly rejected by this Court: (1) that this Court should invalidate the death penalty in this State on the basis of international norms, human rights, and prevailing standards of decency; and (2) that the indictment was insufficient to make this a capital case because it did not include any elements which elevate the crime of murder from second-degree to first-degree or allege aggravating circumstances. Defendant presents these issues in order to "permit[ ] this Court to reexamine its prior holdings and to preserve these arguments for any possible further judicial review." *See Golphin*, 352 N.C. at 485.

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10. The Supreme Court held that N.C.G.S. § 15-188, in addition to fourteen similar state statutes that "authorize only the use of lethal injection[,]" is a "more humane way[ ] to carry out death sentences." *Nance*, 597 U.S. at 163 (quoting *Glossip*, 576 U.S. at 868).

We have thoroughly considered defendant's arguments as to these issues and find no compelling reason to depart from our prior holdings in *State v. Allen*, 360 N.C. 297 (2006), and *Golphin*, 352 N.C. 364. *See Golphin*, 352 N.C. at 397 ("[A]n indictment need not contain the aggravating circumstances the State will use to seek the death penalty and the trial court may not order the State to disclose the aggravating circumstances upon which it intends to rely." (citing *State v. Young*, 312 N.C. 669, 675 (1985); *Holden*, 321 N.C. at 153; *State v. Hunt*, 357 N.C. 454 (2003))).

Defendant has also raised two issues which he does not identify as preservation issues but which we consider to be of this sort. First, defendant urges us to hold that death qualification of the jury is unconstitutional. Specifically, defendant argues that death qualification violates his rights to a jury representative of fair cross-section of the community and to an impartial jury under the Sixth and Fourteenth Amendments to the United States Constitution and coordinate rights under Article I, Sections 19, 23, and 27 of the North Carolina Constitution.

However, the Supreme Court of the United States has explicitly stated that "the [United States] Constitution does not prohibit the States from 'death qualifying' juries in capital cases." *Lockhart v. McCree*, 476 U.S. 162, 173 (1986). This Court has likewise held that the North Carolina Constitution does not prohibit " 'death qualification' of juries in capital trials." *State v. Barts*, 316 N.C. 666, 677 (1986); *State v. King*, 316 N.C. 78, 80 (1986) (rejecting the defendant's argument that "the practice of 'death-qualifying' the jury deprives defendants of their right to be tried by a representative cross-section of the community"); *see also Holden*, 321 N.C. at 133 ("Defendant has given us no reason to disregard or overrule our decisions in *King* and *Barts*."); *State v. Waring*, 364 N.C. 443, 494 (2010) ("Although defendant asks that we reconsider *Barts*, we decline to do so."). Similarly here, there is no compelling reason to depart from these long-standing precedents.

Second, defendant argues that in light of evolving standards of decency, the death penalty is unconstitutional. Specifically, defendant argues that the death penalty violates the Eighth and Fourteenth Amendments to the United States Constitution and Article I, Section 27 of the North Carolina Constitution because it is cruel and unusual punishment; that North Carolina's capital sentencing scheme is vague, overbroad, and overly discretionary; and that capital punishment is applied arbitrarily to discriminatory effects.

However, the Supreme Court of the United States considers settled the issue of whether the death penalty is unconstitutional under the

United States Constitution: "[W]e have time and again reaffirmed that capital punishment is not *per se* unconstitutional." *Glossip*, 576 U.S. at 881. In addition, "[t]his Court has previously considered and rejected these arguments." *State v. Maness*, 363 N.C. 261, 294 (2009) (citing *Duke*, 360 N.C. at 142); *State v. Hurst*, 360 N.C. 181, 205 (2006) ("This Court has held that the North Carolina capital sentencing scheme is constitutional."); *State v. Powell*, 340 N.C. 674, 695 (1995) (reiterating that the Court "ha[s] consistently rejected defendant's contention" that "North Carolina's death penalty statute is unconstitutional"). As there is nothing cruel and unusual under the Eighth Amendment or cruel or unusual under Article I, Section 27 about the imposition of the death penalty, standing alone, we find no compelling reason to depart from our exhaustive precedents.

R. Ineffective Assistance of Counsel

[19] Lastly, defendant asserts that his trial counsel provided ineffective assistance of counsel in violation of the Sixth Amendment to the United States Constitution. Specifically, defendant asserts that his trial counsel was "ineffective in failing to make legitimate objections" to: (1) Kara L.'s testimony regarding defendant's assault with a firearm; (2) the trial court's limiting instruction as to the jury's consideration of the Rule 404(b) evidence regarding Bessie A. and Rachel B. when determining whether defendant had the intent to commit rape or robbery; (3) the submission of the N.C.G.S. § 15A-2000(e)(5) aggravating circumstance that Gillard committed the murders during an attempted rape and attempted robbery of Holland; (4) Rachel B.'s testimony regarding her violent childhood which subsequently led to her involvement in prostitution; (5) the State's closing argument regarding defendant's plan or scheme to rape and rob prostitutes; (6) the trial court's lack of an instruction to the jury that it was not permitted to consider the same evidence for more than one aggravating circumstance; and (7) the trial court's lack of an *Enmund/Tison* instruction. Defendant takes the position that these issues are "premature for decision on direct appeal" and requests that this Court dismiss these claims without prejudice so that he may reassert them during a subsequent MAR proceeding.

A criminal defendant's right to counsel pursuant to the Sixth Amendment to the United States Constitution "includes the right to the effective assistance of counsel." *State v. Braswell*, 312 N.C. 553, 561 (1985). "When a defendant attacks his conviction on the basis that counsel was ineffective, he must show that his counsel's conduct fell below an objective standard of reasonableness." *Id.* at 561–62. To make such a showing, a defendant must satisfy a two-part test:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Strickland v. Washington, 466 U.S. 668, 687 (1984). "Prejudice is established by showing 'that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' " *State v. Campbell*, 359 N.C. 644, 690 (2005) (quoting *Strickland*, 466 U.S. at 694). "There exists a 'strong presumption that counsel's conduct falls within the wide range of professional assistance,' " but this presumption is rebuttable. *State v. Oglesby*, 382 N.C. 235, 243 (2022) (quoting *Strickland*, 466 U.S. at 689).

Because "[i]t is not the intention of this Court to deprive criminal defendants of their right to have [ineffective assistance of counsel] claims fully considered," IAC claims should only be decided on the merits in a direct appeal when "the cold record reveals that no further investigation is required, i.e., claims that may be developed and argued without such ancillary procedures as the appointment of investigators or an evidentiary hearing." *State v. Fair*, 354 N.C. 131, 166–67 (2001). Because the "reasonableness" of counsel's performance at trial is a fact-intensive inquiry, "the proper course is generally to dismiss the claim without prejudice to allow for a hearing and further factfinding." *Oglesby*, 382 N.C. at 243 (citing *Fair*, 354 N.C. at 166).

Given the lack of information in the "cold record" relating to defendant's counsel's trial strategy and in keeping with this Court's general policy of affording defendants the opportunity to rebut the reasonableness of their counsels' action, we dismiss these claims without prejudice.

III. Conclusion

For the foregoing reasons, we conclude that defendant received a fair trial and capital sentencing proceeding free of error, and the judgment of the trial court is affirmed.

AFFIRMED.

Justice EARLS concurring in part and dissenting in part.

I completely concur with the majority's judgment that Gillard's convictions for first-degree murder were proper. The overwhelming evidence presented at trial showed that Gillard was responsible for the tragic loss of two lives, those of a twelve-week pregnant woman and the man who was trying to protect her. These murders were heinous acts corroborated by more than enough evidence to establish Gillard's guilt. Evidence from other victims—victims who never got justice for the offenses committed against them individually—was rightly admitted to show Gillard's criminal scheme. Gillard preyed on sex workers by luring them to low-budget hotel rooms where he and an accomplice would rob them and sexually assault them, using violence when necessary, as happened in this case. Thus, I agree with the majority's decision to affirm the trial court on Gillard's conviction for these two murders.

But as the majority describes, there were two phases to this trial: a guilt phase and a sentencing phase. At sentencing, the jury had to choose how to penalize Gillard for the murders it just convicted him of. It could have chosen death or life imprisonment without parole. My grounds for this partial dissent, then, are narrow. I have specific concerns that Gillard did not receive a fair sentencing hearing, in light of errors across both phases of his trial. The majority differs and finds no errors with Gillard's sentencing proceeding. Thus, I dissent only on these narrow grounds and would remand this case for a second sentencing hearing free from those compounding errors.

The death penalty is our "most severe punishment." *Miller v. Alabama*, 567 U.S. 460, 475 (2012). It is "qualitatively different from a sentence of imprisonment, however long." *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976). It is final and irreversible. *Furman v. Georgia*, 408 U.S. 238, 289 (1972) (Brennan, J., concurring). Once a person is executed, guilty or innocent, their punishment cannot be amended. *See id.*; *Woodson*, 428 U.S. at 305. Perhaps most salient is that "[t]he calculated killing of a human being by the State involves, by its very nature a denial of the executed person's humanity" in a way a term of imprisonment does not. *Furman*, 408 U.S. at 290 (Brennan, J., concurring). This is because while an incarcerated person retains certain rights, the person executed is denied "the right to have rights." *Id.*

The United States Supreme Court has determined that for the death penalty to be constitutional,[1] its application must be "consistent," and

1. Because I would find that the cumulative effect of the errors in this case warrants a new sentencing proceeding, I do not reach the issue Gillard raises of whether the death

the procedures used must ensure "fairness to the accused." *Eddings v. Oklahoma*, 455 U.S. 104, 111 (1982). The reviewing court's "duty to search for constitutional error with painstaking care is never more exacting than it is in a capital case." *Kyles v. Whitley*, 514 U.S. 419, 422 (1995) (quoting *Burger v. Kemp*, 483 U.S. 776, 785 (1987)). If a trial court fails to take careful measures in its rulings, the risk of an arbitrary death sentence rises. An erroneous ruling which exacts unfair prejudice on the defendant can be the difference between life and death. *See State v. Sanderson*, 336 N.C. 1, 9 (1994) (noting the heightened need for fair and proper procedure "where the issue before the jury is whether a human being should live or die").

The risk of an arbitrary death sentence in Seaga Gillard's case is high. This case is riddled with procedural errors by way of: (1) unreliable witness identification; (2) erroneously admitted evidence, such as repetitive photos and irrelevant evidence about the lives of victims of other unprosecuted crimes; (3) the failure to give the jury proper instructions on mitigating and aggravating circumstances; and (4) the failure to give a proper jury instruction regarding Gillard's eligibility for the death penalty for Dwayne Garvey's murder pursuant to *Enmund v. Florida*, 458 U.S. 782 (1982), and *Tison v. Arizona*, 481 U.S. 137 (1987). Additionally, the use of unadjudicated offense evidence during the sentencing phase of trial raises serious questions about the constitutionality of Gillard's death sentence and further increases the risk that his punishment was imposed arbitrarily and capriciously. *See Godfrey v. Georgia*, 446 U.S. 420, 428 (1980). Put simply, sentencing a person to death based in part on incidents for which that person has not been convicted is in tension with our legal system's commitment to the presumption that all persons are innocent until proven guilty.

This concern for an arbitrary death sentence is compounded when Gillard's crimes are compared alongside other recent Wake County jury decisions in death penalty cases. Following Byron Waring's death sentence in 2007, Wake County juries have rejected the death penalty in nine separate cases. Those cases included the following crimes:

- The murder of five people in separate incidents, and robbery with a dangerous weapon.
- The sexual assault and murder of a ten-month-old stepdaughter.

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penalty as administered in North Carolina is constitutional under the United States Constitution and the North Carolina Constitution.

- The rape and murder of a stranger at the home where she was sleeping, in which the victim was killed with a heavy object.
- The murder of the defendant's ex-girlfriend to prevent her from marrying someone else and seeking custody of the defendant's child.
- The repeated stabbing of the defendant's wife until she died and elaborate efforts to cover-up the crime.
- Numerous armed robberies, which spanned over several months, and one first-degree murder during the course of one robbery as well as one attempted murder during the course of another.
- A murder which occurred during the course of a home invasion robbery, with an accomplice, in which the victim was beaten and stabbed to death.
- The double murder of the defendant's in-laws at their home and the attempted murder of the defendant's wife, who was shot through the heart and pistol whipped, in front of their children. This case also involved allegations that the defendant shot at the police who were trying to apprehend him and violated a restraining order.
- The double murder of two men during the course of a home invasion robbery with an accomplice.

The Court has been clear in its mandate, that capital punishment "is reserved only for the most culpable defendants committing the most serious offenses." *Miller*, 567 U.S. at 476. But there is no reason to believe that the offenses Gillard was convicted of are dissimilar to those committed by defendants in other Wake County cases where the jury rejected that punishment. Instead, that the jury declined the death penalty in those cases yet imposed it here suggests that the procedural errors in this case, when taken together, impacted the jury's decision to sentence Gillard to death. Equally concerning is the State's use of unadjudicated offense evidence relating to other sexual assaults and robberies. Even though rape is not a death penalty eligible crime, *Coker v. Georgia*, 433 U.S. 584, 592 (1977), these offenses were used during sentencing to prove the course of conduct aggravating factor and to sentence Gillard to death.

Without question the State has an interest in bringing Gillard and others accused of serious crimes to trial. *See Sell v. United States*, 539

U.S. 166, 180 (2003). After all, it is through the application of our criminal laws that the government endeavors to protect "the basic human need for security." *Id.* At the same time, we cannot abandon the rule of law, especially in the hardest cases. Procedures must ensure that criminal defendants receive fair trials and sentencing hearings. *See id.*; *Darden v. Wainwright*, 477 U.S. 168, 178–83 (1986); *Gregg v. Georgia*, 428 U.S. 153, 188 (1976). In capital cases, where "a defendant's life is at stake," courts must be "particularly sensitive to ensure that every safeguard is observed." *Gregg*, 428 U.S. at 187 (first citing *Powell v. Alabama*, 287 U.S. 45, 71 (1932); and then citing *Reid v. Covert*, 354 U.S. 1, 77 (1957) (Harlan, J., concurring in result)). Meaningful appellate review in a capital-sentencing system "serves as a check against the random or arbitrary imposition of the death penalty." *Id.* at 206.

Thus, while I agree with my colleagues that Gillard's convictions are proper under North Carolina law, I disagree that a death sentence is the "appropriate punishment" in this "specific case." *See Woodson*, 428 U.S. at 305. Additionally, although I would not find that any single error in this case meets the plain error standard, the harmless error standard for federal constitutional issues, or the harmless error standard for issues not arising under the United States Constitution, I would hold that when viewed in the aggregate, the cumulative effect of those errors prejudiced Gillard's sentence. He is therefore entitled to a new sentencing hearing.

I. The Trial Court's Admission of Unadjudicated Offenses

In North Carolina, the jury that finds a defendant guilty or innocent of a capital offense is usually the very same jury that then decides whether that defendant receives a sentence of death or life imprisonment. N.C.G.S. § 15A-2000(a)(1)–(2) (2023). During that latter sentencing phase of a capital murder trial, the State may introduce a defendant's unadjudicated criminal offenses: that is, evidence of a crime the defendant allegedly committed, but that has never been proven in a court of law. *See* Phyllis L. Crocker, *Concepts of Culpability and Deathworthiness: Differentiating Between Guilt and Punishment in Death Penalty Cases*, 66 Fordham L. Rev. 21, 29–30 (1997); Steven Paul Smith, Note, *Unreliable and Prejudicial: The Use of Extraneous Unadjudicated Offenses in the Penalty Phases of Capital Trials*, 93 Colum. L. Rev. 1249, 1250 (1993) [hereinafter Smith, *Unreliable and Prejudicial*]. North Carolina allows juries to consider such unadjudicated offense evidence, *in addition to* all evidence earlier presented in the guilt-innocence phase of the proceeding. N.C.G.S. § 15A-2000(a)(3) (2023); *State v. Holden*, 346 N.C. 404, 422 (1997). This means that unadjudicated offense evidence introduced at either phase of a defendant's

capital trial can be prejudicial to the defendant's sentence, since evidence from either stage bears on the jury's recommendation of punishment. *See* N.C.P.I.—Crim. 150.10 (noting jury instructions that evidence submitted in either stage of a death penalty proceeding "is competent . . . [to the jury's] consideration in recommending punishment").

During closing arguments at the sentencing phase of this case, the State relied heavily on unadjudicated offense evidence and urged the jury to "consider all the evidence in this particular case, all of it, all the way back from the beginning." The State guided the jury in remembering the testimony of Bessie A., Rachel B., Kara L., Keyona T., Serena S., Asia G., and Keyana M. This testimony related to unadjudicated offenses separate from the crime Gillard was on trial for and was used to support the course of conduct aggravating factor. *See* N.C.G.S. § 15A-2000(e)(11) (2023). Referring to those offenses, the State labeled Gillard as a "serial rapist" who "preys on the vulnerable" and claimed "[t]here is no doubt that he raped and brutalized seven other women."

While this evidence might have been admissible under our precedent to prove the course of conduct aggravating circumstance, *see State v. Cummings*, 332 N.C. 487, 507–10 (1992), that does not cure its constitutional infirmity. The use of unadjudicated offenses during the sentencing phase of capital trials raises questions regarding prejudice by way of substantive and procedural due process violations, and through the erosion of a defendant's presumption of innocence until proven guilty by a jury of his peers. Smith, *Unreliable and Prejudicial* at 1282–90; *see also In re Winship*, 397 U.S. 358, 363 (1970) ("[T]he presumption of innocence . . . [is a] bedrock axiomatic and elementary principle whose enforcement lies at the foundation of the administration of our criminal law." (cleaned up)); William S. Laufer, *The Rhetoric of Innocence*, 70 Wash. L. Rev. 329, 361 (1995) [hereinafter Laufer, *Innocence*] ("Courts in the jurisdictions where evidence of unadjudicated crimes is used in penalty determinations have denied, ignored, or minimized the fact that all unadjudicated crimes carry a presumption of innocence."). Substantive due process requires that the evidence used to determine a death sentence be reliable.[2] To ensure this, the United States Supreme Court has

2. "Substantive due process asks the question of whether the government's deprivation of a person's life, liberty, or property is justified by a sufficient purpose." Erwin Chemerinsky, *Substantive Due Process*, 15 Touro L. Rev. 1501, 1501 (1999). The key question then is whether there is "a good enough reason for such a deprivation." *Id.* In contrast, procedural due process "asks whether the government has followed the proper procedures when it takes away life, liberty, or property." *Id.*

stated that the death penalty "may not be imposed under sentencing procedures that create a substantial risk that punishment will be inflicted in an arbitrary and capricious manner." *Godfrey*, 446 U.S. at 427 (citing *Furman v. Georgia*, 408 U.S. 238 (1972)); *see also Gregg*, 428 U.S. at 188–89. Yet, a jury's consideration of unadjudicated offenses at sentencing creates a risk that a death sentence will be imposed based on erroneous evidence, which has not been deemed trustworthy through the process of a criminal trial. Smith, *Unreliable and Prejudicial* at 1283; *cf.* David McCord & Hon. Mark W. Bennett, *The Proposed Capital Penalty Phase Rules of Evidence*, 36 Cardozo L. Rev. 417, 472–73 (2014) (proposing the requirement of an offer of proof by the prosecution before admitting unadjudicated offenses as a proposed rule of evidence for a capital penalty phase, in light of the "potential to cause a mistrial" if insufficient proof of such conduct exists). "The nature of [this] risk is compounded by the fact that the criminal history of the defendant is by far the most important factor used by the sentencer in capital trials in evaluating the appropriateness of the punishment." Smith, *Unreliable and Prejudicial* at 1283.

Importantly, because sentencing proceedings are not accompanied by the same procedural protections present during the guilt-innocence phase of trial, there is a heightened risk that a death sentence will be erroneously imposed. *Id.*; *see State v. Warren*, 347 N.C. 309, 325 (1997) (providing that the North Carolina Rules of Evidence do not apply during capital sentencing proceedings); *State v. Golphin*, 352 N.C. 364, 464 (2000) (same). When testimony is damaging to a defendant, our legal system trusts the adversarial process "to sort out the reliable from the unreliable evidence." *Barefoot v. Estelle*, 463 U.S. 880, 901 (1983). Yet during a capital sentencing hearing, this process necessarily requires the defendant to rebut allegations of other offenses by engaging in a series of mini trials before the very same jury that just convicted him of murder. Smith, *Unreliable and Prejudicial* at 1288–89. This process also has the effect of stretching defense counsel thin and raising the risk of a Sixth Amendment ineffective assistance of counsel claim. *Id.* For the more collateral attacks the State brings regarding offenses the defendant has not been convicted of, the more time the defense must devote to rebutting those attacks, necessarily reducing the time spent preparing for other portions of the penalty phase of trial. *See id.*

Moreover, the introduction of unadjudicated offense evidence belittles the criminal defendant's presumption of innocence. *Herrera v. Collins*, 506 U.S. 390, 399 (1993). When the State introduces evidence at sentencing that the defendant allegedly committed these other

offenses, it constructively creates a presumption that those allegations are true. Smith, *Unreliable and Prejudicial* at 1289–90. That is a problem, because the preceding trial and guilty verdict only extinguish the presumption of innocence *for that charged offense*—not for all other offenses the defendant may have allegedly committed. *See Herrera*, 506 U.S. at 399. Nor does the State's presentation of that evidence to a jury absolve the presumption of innocence concerns: the jury that just convicted the defendant of a capital crime cannot then serve as an impartial jury on those separate offenses as required by due process. Smith, *Unreliable and Prejudicial* at 1279 (citing *State v. Bobo*, 727 S.W.2d 945, 952 (Tenn. 1987)); Laufer, *Innocence* at 367–68 (summarizing evidence that suggests "the presumption of innocence is not well understood by jurors" and that at least some jurors "quickly abandon a presumption of innocence when presented with any incriminating evidence" of the defendant). Because the presumption of innocence remains until an offense is adjudicated, it is improper for the jury to base its sentencing decision on such evidence. Smith, *Unreliable and Prejudicial* at 1290.

Ultimately, substantive and procedural due process concerns, as well as the erosion of the presumption of innocence, prejudice the defendant during sentencing by: (1) creating the risk that an inaccurate allegation will not be detected and the jury will base its decision to sentence the defendant to death, in whole or in part, on that erroneous evidence; (2) creating a presumption that the allegations against the defendant are true; (3) forcing the defendant to engage in a series of mini trials before the same non-neutral jury that convicted him of murder; and (4) requiring defense counsel to devote valuable time to rebutting unadjudicated offense allegations, rather than solely preparing for the sentencing hearing. *Id.*

The United States Supreme Court's

> principal concern has been more with the *procedure* by which the State imposes the death sentence than with the substantive factors the State lays before the jury as a basis for imposing death, once it has been determined that the defendant falls within the category of persons eligible for the death penalty.

California v. Ramos, 463 U.S. 992, 999 (1983). Accordingly, it has given states latitude to "prescribe the method by which those who commit murder shall be punished." *Romano v. Oklahoma*, 512 U.S. 1, 7 (1994) (quoting *Blystone v. Pennsylvania*, 494 U.S. 299, 309 (1990)). "This latitude extends to evidentiary rules at sentencing proceedings." *Id.* If the

jury finds a "defendant falls within the legislatively defined category of persons eligible for the death penalty . . . the jury then is free to consider a myriad of factors to determine whether death is the appropriate punishment." *Ramos*, 463 U.S. at 1008.

Nevertheless, the admission of relevant evidence during sentencing cannot be "so unduly prejudicial that it renders the trial fundamentally unfair," and in those cases, "the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief." *Payne v. Tennessee*, 501 U.S. 808, 825 (1991). Unfortunately, the high threshold established by the United States Supreme Court for assessing the admission of improper evidence during capital sentencing renders this constitutional protection effectively unavailable to most, if not all, capital defendants. *See Romano*, 512 U.S. at 10 (holding that admission of evidence regarding the defendant's prior death sentence in a separate and unrelated trial did not "so infect[ ] the sentencing proceeding with unfairness as to render the jury's imposition of the death penalty a denial of due process").

It is perhaps in part for this reason that other states have installed procedural safeguards that protect capital defendants from the use of unadjudicated offense evidence. At least six states have determined unadjudicated offense evidence is not admissible during the capital sentencing phase.[3]

For example, in *State v. Bobo*, 727 S.W.2d 945 (Tenn. 1987), the Tennessee Supreme Court concluded that evidence of the defendant's prior criminal activity must be accompanied by a conviction to be proper under Tennessee's state constitution. *Id.* at 952. The court rested its decision on the Due Process Clause's mandate of "fundamental fairness," concerns about "subjecting a defendant to what is in effect a trial" without substantive and procedural protections, and the bias that is likely to result from review of the defendant's unadjudicated offenses by the same jury that convicted him. *Id.*; *see also State v. Hale*, 840 S.W.2d 307, 312–13 (Tenn. 1992).

In the same vein, Indiana has held it impermissible to introduce evidence of other criminal acts for which the defendant has not been convicted. Namely because of the "prejudice inherent" in the process of first being tried by a jury for the charged offense, and then being tried again by that same jury for another unrelated criminal offense. *State v. McCormick*, 272 Ind. 272, 280 (1979); *see also Lockhart v. State*, 609 N.E.2d 1093, 1101 (Ind. 1993).

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3. These are Tennessee, Indiana, Alabama, Pennsylvania, Florida, and Ohio.

Alabama has recited concerns regarding a defendant's presumption of innocence as a reason not to admit evidence of pending charges during capital sentencing and has held that courts may not rely on unadjudicated offense evidence to negate the existence of a mitigating factor. *Cook v. State*, 369 So. 2d 1251, 1257 (Ala. 1978); *see also Waldrop v. State*, 859 So. 2d 1138, 1147 (Ala. Crim. App. 2000). Pennsylvania has also elected not to allow evidence of unadjudicated criminal acts at the sentencing phase of a death penalty proceeding because admission of such evidence contradicts "the imperative that the death penalty be imposed only on the most reliable evidence." *Commonwealth v. Hoss*, 445 Pa. 98, 118 (1971); *see also Commonwealth v. Hughes*, 581 Pa. 274, 331 (2004).

Moreover, Florida has determined that its statute pertaining to aggravating factors only allows evidence of prior convictions to be admitted during sentencing—not "mere arrests or accusations." *Provence v. State*, 337 So. 2d 783, 786 (Fla. 1976) (citing Section 921.141(5)(b), Florida Statutes); *see also Dougan v. State*, 470 So. 2d 697, 701 (Fla. 1985). In making this finding, the court acknowledged the importance of following the language of its death penalty sentencing statute, which was enacted to cure the constitutional infirmities that arise from limitless discretion, that were previously addressed in *Furman v. Georgia*, 408 U.S. 238 (1972). *Provence*, 337 So. 2d at 786.

Ohio has also identified the disadvantage to the defendant that results from the admission of unadjudicated offense evidence as a reason not to allow this evidence during capital sentencing. *State v. Glenn*, No. 89-P-2090, 1990 WL 136629, at *10 (Ohio Ct. App. 1990). Ohio courts have specifically stated that, "disclosure of 'other acts' types of activities, for which a defendant was not convicted, is fraught with potential problems of prejudicial error, as the cumulative effect of the unadjudicated offenses may well turn a jury against a defendant who ostensibly has no criminal record." *Id.*

Other states that have not fully precluded a jury's consideration of this evidence have placed limitations on how and when it can be used. Arkansas, Georgia, Utah, Nebraska, and California require that unadjudicated offense evidence be proven beyond a reasonable doubt. *Ward v. State*, 338 Ark. 619, 628 (1999) ("[W]hen the prior violent felony has not resulted in a conviction, the State must present evidence showing that the defendant committed the act."); *Fair v. State*, 245 Ga. 868, 871 (1980) ("[T]he fact finder in a presentence trial must determine whether beyond a reasonable doubt any of the statutory aggravating circumstances exist under the evidence presented.") *State v. Maestas*, 299 P.3d

892, 970 (Utah 2012) ("[T]he State bears the burden of proving to the jury that the defendant actually committed the crime."); *State v. Galindo*, 278 Neb. 599, 662 (providing that when an unadjudicated offense is used to support an aggravating factor, "the State must prove the unadjudicated offense beyond a reasonable doubt"); *People v. Letner*, 50 Cal. 4th 99, 200 (2010) ("We previously have concluded that the requirement that such unadjudicated offenses be proved beyond a reasonable doubt before the jury may consider them in aggravation is sufficient to protect a defendant's constitutional rights.").

Louisiana has adopted a clear and convincing evidence standard, which requires "that the evidence of the defendant's commission or connection with the commission of the unrelated criminal conduct [be] clear and convincing." *State v. Comeaux*, 699 So. 2d. 16, 20 (La. 1997). Nevada has limited the use of unadjudicated offenses, stating that this evidence cannot be used to establish an aggravating factor. *Crump v. State*, 102 Nev. 158, 161 (1986). This evidence also cannot be "dubious, tenuous, nor of questionable probative value." *Robins v. State*, 106 Nev. 611, 626 (1990) (quoting *Crump*, 102 Nev. at 161). Similarly, South Carolina has limited the use of unadjudicated offense evidence and requires that the jury "be instructed these offenses may not be used as proof of the statutory aggravating circumstances." *State v. Young*, 305 S.C. 380, 384 (1991) (quoting *State v. Stewart*, 283 S.C. 104, 108 (1984)). Additionally, Wyoming has insisted that only convictions be used to support its aggravating factor that "[t]he [d]efendant was previously convicted of another murder in the first degree or a felony involving the use or threat of violence to the person." *Hopkinson v. State*, 632 P.2d 79, 170 (Wyo. 1981). As the court observed, "the statue refers to 'previous conviction' . . . not the previous commission of those crimes." *Id.*

Seven states allow for the use of unadjudicated offense evidence: Texas, Oklahoma, Missouri, Oregon, Idaho, Arizona, and North Carolina.[4] Resting its decision on the requirement that "all relevant evidence concerning the defendant must be placed before the jury," Texas has found no constitutional issue with the use of unadjudicated offense evidence during sentencing. *Milton v. State*, 599 S.W.2d 824, 827 (Tex. Crim. App. 1980); *see also Cantu v. State*, 939 S.W.2d 627, 648 (Tex. Crim. App. 1997). Missouri has concluded the same, stating that "at the punishment phase [the jury] is entitled to full information about the defendant and his previous conduct." *State v. Jones*, 749 S.W.2d 356, 364

4. Several states appear not to have addressed the issue: Kansas, Kentucky, Mississippi, Montana, and South Dakota.

(Mo. 1988); *see also State v. Cole*, 71 S.W.3d 163, 174 (Mo. 2002). Oklahoma allows unadjudicated offense evidence during sentencing to support the State's submission of an aggravating factor. *Fuston v. State*, 470 P.3d 306, 329 (Okla. Crim. App. 2020). Moreover, Oregon has also allowed the jury to assess this type of evidence when determining whether to impose a death sentence. *State v. Wagner*, 305 Or. 115, 178 (1988); *see also State v. Montez*, 309 Or. 564, 611 (1990).[5] The same is true for Idaho which has "upheld the consideration of prior unconvicted crimes during sentencing." *State v. Hairston*, 133 Idaho 496, 516 (1999). Arizona also allows prior bad acts, which are not accompanied by a conviction to be used to rebut a defendant's lack of a conviction record when it is advanced as a mitigating factor. *State v. Rossi*, 171 Ariz. 276, 279 (1992).

North Carolina has similarly "refused to require a conviction of [a criminal] offense before the State may use that offense to establish the course of conduct aggravating circumstance." *Cummings*, 346 N.C. at 328; *see also State v. Moseley*, 336 N.C. 710, 719 (1994). Under North Carolina law, during capital sentencing, "[e]vidence may be presented as to any matter that the court deems relevant to [the] sentence." *Golphin*, 352 N.C. at 464 (quoting N.C.G.S. § 15A-2000(a)(3) (1999)). This includes evidence relating to aggravating and mitigating circumstances contained in subsections (e) and (f) of N.C.G.S. § 15A-2000. *Id.* Because the Rules of Evidence do not apply to sentencing hearings, and because the State is permitted to present "competent and relevant" evidence to support an enumerated aggravating factor, "trial courts are not required to perform the Rule 403 balancing test during a sentencing proceeding." *Id.* (quoting *State v. Flippen*, 349 N.C. 264, 273 (1998)).

North Carolina's decision to allow unadjudicated offense evidence as it operated in this case raises serious constitutional questions about the reliability of Gillard's death sentence and the procedures used during that sentencing proceeding, which ultimately led the jury to sentence Gillard to death.

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5. While Oregon law allows for the death penalty, an amendment to the state's death penalty statute in 2019 significantly limited the crimes for which capital punishment can be imposed. Act effective Sept. 29, 2019, 2019 Or. Laws ch. 635. Oregon has also had a moratorium on executions since 2011, and in 2022 Governor Kate Brown commuted the death sentences of those on death row to life in prison without the possibility of parole. Governor Kate Brown, *Commutation of Sentence*, https://apps.oregon.gov/oregon-newsroom/OR/GOV/Posts/Post/governor-kate-brown-commutes-oregon-s-death-row-15087 (last accessed Dec. 10, 2024).

A. Evidence of Unadjudicated Offenses

1. Rachel B.

a. Testimony

Rachel B.'s testimony from the guilt-innocence phase recounted an incident, which took place on 28 October 2016 at the Microtel in Morrisville, North Carolina, when she was twenty-three years old. She stated that she was scheduled to meet with a single customer at 4:00 a.m. but two men arrived at her room instead. Upon arrival, the men pushed their way into her room, told her they had been watching her, knew who she was, and demanded to know where her money was located. One of the men threatened her, stating she should think about her kids, "before you die," while the other man searched her belongings. The men then undressed Rachel B., tied her feet together and her hands behind her back, and took turns raping her. The men also forced her to perform oral sex on them.

When Rachel B. tried to get a look at the men, they hit her and put a pillowcase over her head. They also shoved a pair of underwear in her mouth and tied a pillowcase around her neck. After the rape, the men tied a telephone cord around her neck and strangled her. Rachel B. testified that as the men strangled her, she lost consciousness, and each time she regained consciousness the men strangled her again. According to Rachel B., this went on for hours. At one point, Rachel B. got up off the bed and sat up against the wall, only to be kicked in the face.

Rachel B. also testified that the more violent of the two men had a foreign accent and a tattoo with three spiders on his calf. Consistent with this, Rachel B. stated that during her attack, the man without the accent leaned down and told her to pretend to be dead because the other man wanted Rachel B. killed. Rachel B. followed these instructions and prayed for her daughter because she was sure the men were going to kill her. Both men had guns. One of them pointed the gun at the back of Rachel B.'s head and said that he was going to kill her. Once the men left, Rachel B. was able to get up and exit the room, where she began yelling and hotel staff came to her aid.

The men took Rachel B.'s identification, social security card, birth certificate, phone, clothes, and other "random" items. Her driver's license and social security card were later found in connection with the investigation into the April Holland and Dwayne Garvey murders. Rachel B. suffered several injuries during her attack and photos of these injuries were entered into evidence. She explained that her esophagus had been

crushed, that she had ligature marks on her wrists and legs, and that she had an injury on her face where she was kicked. She also testified that as a result of these injuries she was required to wear a neck brace for a month, and that she has since experienced memory problems and post-traumatic stress disorder (PTSD).

While Rachel B. reported the incident to law enforcement, she explained that the officers "didn't care" about what had happened to her and believed that she knew the men who attacked her. Rachel B. later learned about Holland's and Garvey's murders from a friend who was staying at the hotel where the murders occurred. After Googling the news story, Rachel B. identified the men who attacked her and called the Morrisville Police Department on 7 December 2016 to report the same.

The State introduced testimony from the employee of the Microtel who found Rachel B. naked, tied up, and with a pillowcase over her head and around her neck. Testimony from Detective Mullis from the Morrisville Police Department recounted Rachel B.'s statements to police immediately following the event while Rachel B. was in the hospital emergency room. The State also presented into evidence the telephone cord and pillowcase that were used on Rachel B. This evidence was accompanied by testimony from Detective Mullis about Rachel B.'s injuries.

b. Application to Gillard's Case

The defense argued this evidence should be excluded on the grounds that it would "deny Defendant due process . . . and would be highly prejudicial" in violation of the Fourteenth Amendment to the United States Constitution.

As it pertains to the reliability of this evidence, Rachel B. told police that "she couldn't really give a good description of their faces" and that she recognized the perpetrators' races because she could see their legs during the assault. For that reason she also recognized the tattoos on their legs. Yet when Rachel B. called the Morrisville Police Department in December of 2016, she reported she had recognized her attackers from a surveillance photo in an online news story about Holland's and Garvey's murders. This inconsistency is incongruent with "the need for reliability" in imposing the death penalty for a separate offense, *see Woodson*, 428 U.S. at 305, and raises questions about the credibility of Rachel B.'s testimony.

Moreover, the United States Supreme Court has determined that the correct photographic identification procedure involves police showing the witness "pictures of a number of individuals," without indication by

police of whom they suspect. *Simmons v. United States*, 390 U.S. 377, 383 (1968). Although the police did not conduct Rachel B.'s identification procedure, it stands to reason that the use of a single photograph identification procedure, like the one present in this case, is highly suggestive and calls into question the veracity of Rachel B.'s identification. This is especially true given that Rachel B. discovered Gillard's photo in a news article discussing the circumstances of Holland's and Garvey's murders.[6]

Furthermore, two days after making her identification, Rachel B. was arrested in Las Vegas, Nevada, and charged with capital murder in connection with a homicide that occurred in November 2016 in Dallas, Texas. Dallas authorities allowed Rachel B. to plead guilty to robbery in exchange for a sentence of probation. During the course of North Carolina's investigation into Rachel B.'s rape, law enforcement spoke with Rachel B.'s mother, who described her daughter as a pathological liar who had made prior accusations of sexual assault. Although credibility of a witness is a question for the jury, *State v. Moore*, 366 N.C. 100, 108 (2012), the same jury that previously convicted Gillard is poorly positioned to then make those credibility determinations as to Rachel B.—which poses due process problems when that same evidence is considered at sentencing. *Williams v. Lynaugh*, 484 U.S. 935, 938 (1987) (mem.) (Marshall, J., dissenting); *see also Lockhart*, 609 N.E.2d at 1101.

Additionally, Gillard has not been convicted of an offense against Rachel B. Thus, under our laws, the presumption of innocence should remain intact as to the crimes against Rachel B. *See Estelle v. Williams*, 425 U.S. 501, 503 (1976) ("The presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice."). However, when the State introduced evidence about the offense against Rachel B. and stated that "there is no doubt" Gillard had "raped and brutalized seven other women," Gillard was stripped of that presumption of innocence. This undermined the fairness of Gillard's sentencing hearing.

2. Bessie A.

a. Testimony

During the guilt-innocence portion of Gillard's trial, Bessie A. testified that she engaged in sex work and advertised on "Backpage." While staying at America's Best Value Inn, on 16 October 2016, a man solicited

6. Single photograph identification issues are further discussed in Part VII of this opinion in relation to Keyona T.'s identification of Gillard.

her services. Although she expected a single customer to arrive at her hotel room, when she opened the door two men rushed in. One of the men pointed a gun at her. According to Bessie A., the men forced her to remove her clothes and sit on the bed while they asked her for money. The two men stole eighty dollars, a bank card, a tablet, and a cell phone. One of the men used a condom to engage in nonconsensual oral and vaginal sex with Bessie A. When Bessie A. did not have a condom for the second man, he became angry and touched her vaginal area with the gun.

Bessie A. was then tied up with a pillowcase, and the men forced her to give them the pin for her bank card by threatening to kill her and her children. The men subsequently covered her with blankets and left the room. Bessie A. testified that she believed she was going to die. After waiting several minutes, she got up and saw that the men were gone.

Bessie A. did not want to report the incident to the police and only did so after her mother and sister convinced her to. In her statement to police, Bessie A. omitted that she had been engaging in sex work and instead stated that she had been out for drinks with friends. She further explained that upon returning to her hotel room she heard a knock at the door, and when she opened the door, two black men rushed into her room.

While police did not initially investigate her case, they contacted her on 6 December 2016, and told her about what had happened to "the other girl," April Holland. Bessie A. then shared the truth about the work she was engaged in at the time of her attack. Police conducted a photo lineup and Bessie A. identified both Gillard and his co-defendant Brandon Hill. She also identified a photograph of Gillard as the man who raped her and later made an in-court identification of Gillard as well. Bessie A. confirmed the identity of her driver's license and bank card, which were found in Hill's car.

Two members of law enforcement also testified, Officer Lee and Detective Meyers. Officer Lee was at the front desk of the Raleigh Police station when Bessie A. arrived and recounted her story about being raped and robbed. Detective Meyers testified about the photo lineup Bessie A. was shown.

b. Application to Gillard's Case

The defense argued that evidence of Bessie A.'s attack should be excluded for the same reasons the evidence regarding Rachel B. should have been excluded: because "such evidence would deny Defendant due process . . . and would be highly prejudicial," in violation of the Fourteenth Amendment to the United States Constitution.

Questions regarding the reliability of Bessie A.'s testimony exist. Bessie A. provided law enforcement with differing accounts of what occurred on the night of her attack, which could not be corroborated by the friend that she was with for most of that night. Bessie A. also allegedly evaded law enforcement's attempts for follow-up interviews. Just as with the evidence regarding Rachel B.'s attack, Bessie A.'s credibility is an issue for the jury to decide. *Moore*, 366 N.C. at 108. However, the jury addressing Bessie A.'s credibility was not neutral as to Gillard, as it had already found him guilty of Holland's and Garvey's murders. *Williams*, 484 U.S. at 938; *see also Bobo*, 727 S.W.2d at 952. The "prejudice inherent" in this process, *McCormick*, 272 Ind. at 280, makes it difficult for the jury to "sort out the reliable from the unreliable evidence" presented to them, *Barefoot*, 463 U.S. at 901, thereby increasing the risk that Gillard's death sentence was erroneously imposed. *See Eddings*, 455 U.S. at 117–18 (O'Connor, J., concurring) ("Because sentences of death are qualitatively different from prison sentences, this Court has gone to extraordinary measures 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 whim, passion, prejudice, or mistake." (cleaned up)).

Additionally, while Bessie A.'s driver's license was later found in Hill's car, no evidence connecting Gillard and Bessie A. was found on Gillard or his property. There is also no physical evidence linking Gillard to Bessie A.'s rape and Gillard has not been convicted of a crime against Bessie A. Thus the jury's ability to consider this evidence and base its decision to sentence Gillard to death, either in whole or in part on this offense, effectively eliminated the presumption of innocence that Gillard was entitled to. *Herrera*, 506 U.S. at 399; *see also Cook*, 369 So. 2d at 1257. Any claim that Gillard's presumption of innocence as to the offense against Bessie A.—or the six other women the State used to support the course of conduct aggravator—remained intact, is quelled by the State's closing argument, which described Gillard as a "serial rapist" who "preys on the vulnerable."

3. Kara L.

a. Testimony

Kara L. first testified during the guilt-innocence phase of Gillard's trial for the limited purpose of identifying "the person accused of committing the crime charged in this case . . . and also for the purpose of identifying firearms used in the crime charged in this case." At trial, Kara L. stated that she began engaging in prostitution at age 17. In November 2016, at the time of her interaction with Gillard, Kara L. was using a

website called "Plenty of Fish" to meet clients. There she met a man who identified himself as "Carlos." Kara L. later identified Carlos as Gillard, after seeing his identification.

Kara L. testified that after making contact with Gillard, he picked her up and took her to an apartment on Juniper Drive in Wake County, where she stayed for three or four days. Gillard's brother also stayed at that apartment. Kara L. further testified that during the time she stayed with Gillard, the two had a relationship and Kara L. developed feelings for Gillard. At one point during her stay, Kara L. borrowed Gillard's cell phone to text her mother and let her know she was okay.

Kara L. also testified that she saw another man at the residence, named "B," who carried a gun in his waistband. She also stated that Gillard had a gun, which he named "Lemon Squeeze." Kara L. recounted an incident where Gillard put the gun in her face and told her to show her teeth. She testified Gillard warned her that "[i]f you don't love me, my blood would be all over the walls." Once Kara L. returned to her mother's home, she reported the attack to the police. However, she admitted that she continued texting Gillard after the incident because she still had feelings for him.

During Gillard's sentencing hearing, the State referenced Kara L.'s trial testimony, bringing it before the jury once again. The State asserted that although Kara L. had previously only been allowed to testify about evidence that went to "identity and the firearm," Kara L. now wanted to tell the jury "the rest of the story." In response, Kara L. testified that Gillard forced her into sex trafficking by taking her to a hotel in Raleigh, to "sell[ ] my body" and "get [Gillard] money." Kara L. explained that she tried to refuse, but Gillard stated, "You're going to do it anyways."

According to Kara L., Gillard instructed her to make at least $500 and forced her to use her phone to schedule dates with clients. During Kara L.'s testimony, the State asked about the "incident with the firearm," referring to Kara L.'s trial testimony that Gillard previously put a gun in her face. Kara L. explained this incident occurred a day or two after she arrived at the hotel, because she had refused to continue engaging in prostitution. She further testified that Gillard threatened to kill her if she did not comply. Kara L. claimed that in total, Gillard forced her to have sex in exchange for money with six to seven clients and took all the money she made during those encounters.

b. Application to Gillard's Case

Similar to Rachel B.'s and Bessie A.'s testimony, the defense argued that Kara L.'s testimony should be excluded because admission of this

evidence "would deny Defendant due process . . . and be highly prejudicial." Moreover, consideration of this evidence during the sentencing phase of Gillard's trial would, *inter alia*, violate Gillard's Fourteenth Amendment rights under the United States Constitution.

Just like with Rachel B.'s and Bessie A.'s testimony, there are questions regarding Kara L.'s credibility. Namely the defense alleges that Kara L. has been diagnosed with schizophrenia and bipolar disorder, and although she has been prescribed psychiatric medication for these conditions, she has chosen not to take them because of the medication's side effects. *See State v. Whaley*, 362 N.C. 156, 160–61 (2008) (noting that evidence of a witness's psychiatric history may "cast doubt upon the capacity of the witness to observe, recollect, and recount" (quoting *State v. Williams*, 330 N.C. 711, 719 (1992))). To be sure, Kara L.'s mental illness would not render her testimony inherently unreliable. Instead, just like the existence of discrepancies or contradictions in witness testimony, it is a question for the jury to decide. *See Ward v. Carmona*, 368 N.C. 35, 37–38 (2015) ("Jurors are the sole judges of the witness's credibility and have the right to believe all, part, or none of the testimony."). The same is also true about Kara L.'s behavior following her attack, which is inconsistent with her testimony. Specifically, while her sentencing-phase testimony established that Gillard had threatened and coerced her into working as a prostitute, she subsequently sent him a Facebook message stating that she missed him. Because Kara L.'s credibility was assessed by the same jury that convicted Gillard, the fundamental fairness of Gillard's sentencing proceeding is called into question. *See Williams*, 484 U.S. at 938; *see also Bobo*, 727 S.W.2d at 952.

Despite Gillard never having been charged with a crime against Kara L., the State's use of this unadjudicated offense evidence and its description of Gillard as a "serial rapist" who had without a doubt "raped and brutalized seven other women" extinguished Gillard's presumption of innocence as to Kara L.'s attack. This was improper, as the presumption of innocence is to remain intact unless the State proves a defendant guilty beyond a reasonable doubt. *See State v. Pabon*, 380 N.C. 241, 257 (2022); *Herrera*, 506 U.S. at 399.

4. Keyona T.

a. Testimony

Keyona T. was called to testify during the penalty phase of Gillard's trial about an incident, which took place on 16 April 2016. Her testimony was provided in support of the course of conduct aggravating factor. *See* N.C.G.S. § 15A-2000(e)(11). Lynda P., who Keyona T. had met through

a friend, arranged a date through Backpage. Keyona T. and Lynda P. had adjacent rooms at the Motel 6 in Durham. According to Keyona T., Gillard and another man brought Lynda P. and her brothers into Keyona T.'s room at gunpoint. Gillard made everyone sit down, and the other man pistol whipped one of the brothers. They were all made to strip and were tied up. Keyona T. also testified that Gillard put a gun in her vagina and said that he was not going to hurt her. Once the men had taken money, identifications, and other valuables, they told their victims to count to fifteen. After reaching fifteen, Keyona T. got up and found the men were gone.

Following this incident, Keyona T. was initially unable to provide police with a physical description of her attackers. However, after Holland and Garvey were killed, Keyona T. was contacted by a detective from the Raleigh Police Department, who shared information with her about the murders, and told her that the perpetrators in Holland's and Garvey's cases might be the same people who attacked her. This provided Keyona T. with the information necessary to conduct a Google search. Based on this search, Keyona T. identified Gillard as her attacker. Keyona T. noted she "read the article" and "knew it was him." Although Keyona T. did not know Gillard, she referred to him by name during her testimony.

b. Application to Gillard's Case

The defense objected to both Keyona T.'s identification of Gillard and to her testimony. Just like with the evidence concerning Rachel B., Bessie A., and Kara L., the defense indicated that the admission of the evidence pertaining to the Motel 6 robbery in Durham "would deny Defendant due process . . . and would be highly prejudicial." Additionally, introduction of this evidence was prohibited by the Fourteenth Amendment to the United States Constitution.

As will be discussed in Part VII of this opinion, the reliability of this evidence is called into question by the identification procedure used to obtain Keyona T.'s identification of Gillard. *See State v. Malone*, 373 N.C. 134, 146 (2019) (providing a two-part test to determine "whether the identification procedure [at issue] was so suggestive as to create a substantial likelihood of irreparable misidentification" (quoting *State v. Fowler*, 353 N.C. 599, 617 (2001))). Following her assault, Keyona T. was neither able to provide police with a physical description of her attackers, nor was a lineup administered. Crucially, Keyona T.'s initial identification of Gillard in an internet news article followed a conversation in which law enforcement provided Keyona T. with Gillard's name and told her that Holland's and Garvey's murders might be related to her attack.

Moreover, police allegedly had difficulty reaching any of the victims of this offense to conduct a follow-up investigation after the robbery. To the extent this speaks to Keyona T.'s credibility, procedural due process concerns exist regarding the jury's ability to make that credibility determination impartially. *See Williams*, 484 U.S. at 938.

Additionally, on 4 December 2016, two days after Holland and Garvey were killed, Hill abandoned his car in an attempt to evade police. There, law enforcement found the identification of at least one victim of the robbery. No items relating to the robbery were found on Gillard's person or at his property. As with the Rachel B., Bessie A., and Kara L. incidents, there is no physical evidence tying Gillard to the Motel 6 robbery. Although Gillard had never been convicted for a crime against Keyona T., and there was no evidence tying Gillard to these crimes, the State's position was that Gillard should be sentenced to death because he had committed crimes against Keyona T. and six other women.

Just like with the evidence relating to Rachel B., Bessie A., and Kara L., introduction of the unadjudicated offense against Keyona T. implicates Gillard's substantive due process rights because there is no guarantee that the evidence used in his case was reliable. *See Woodson*, 428 U.S. at 305. Moreover, because the Rules of Evidence do not apply at sentencing, *Warren*, 347 N.C. at 325, the risk that Gillard's death sentence was erroneously imposed is elevated. This risk was further increased by the almost inevitable assumption that attaches to unadjudicated offense evidence: that because the State introduced evidence of Keyona T.'s attack, and implicated Gillard in that offense, Gillard is in fact guilty of that crime. *Compare with In re Winship*, 397 U.S. at 363 (stating that the presumption of innocence requires that a defendant's guilt be proven beyond a reasonable doubt).

5. Serena S.

a. Testimony

Serena S. testified in support of the course of conduct aggravating factor during the sentencing phase of Gillard's trial. *See* N.C.G.S. § 15A-2000(e)(11). Serena S. testified that on 28 October 2016, while staying at the Extended Stay America in Durham, she was contacted on Backpage by a man with an island accent for a date. While she believed only one man was coming at around 5:00 or 6:00 a.m., two men showed up and rushed into her room. Both men had guns. Once in the room, the men took her phone and tied her up with a telephone cord. At the time, Serena S. only had fifty dollars with her, which the men said was not enough. To secure more money, the men used Serena S.'s phone

to respond to customers that were contacting Serena S. on Backpage. They lured the customers to the room and beat them with guns. One of the customers, Sherod M., told the men he had money in his room at a nearby hotel. One of the men left Serena S.'s hotel room to obtain Sherod M.'s money.

Another woman, Sherod M.'s girlfriend—Asia G.—also provided testimony about this incident during the sentencing portion of Gillard's trial. She had been staying in Sherod M.'s hotel room at the Econo Lodge. She testified that while she left the room before the man without the accent arrived, she was lured back to the room because the man claimed Sherod M. had been injured. Back at the hotel room, the man tied Asia G. up with a phone cord and took her pocketbook, which contained her social security card, birth certificate, driver's license, money, credit cards, and cell phone. After the man left, Asia G. called the police.

b. Application to Gillard's Case

Similarly to the evidence about the Rachel B., Bessie A., Kara L., and Keyona T. incidents, the defense argued evidence of these assaults should be excluded because its admission would violate due process, "be highly prejudicial," and violate the Fourteenth Amendment to the United States Constitution.

To be sure, there are concerns regarding the reliability of this evidence. First, the defense alleged that the police expressed skepticism of Serena S.'s account of the robbery and that the police seemed to think Serena S. was an accomplice and not a victim. Consistent with this, Asia G. testified that the man without the island accent, who had gone to her hotel room at the Econo Lodge, told her that Serena S. had set Sherod M. up to be robbed. Furthermore, the defense alleged that despite efforts to contact the victims of these robberies, police were unable to reach them in the weeks following the crime. Questions regarding Serena S.'s credibility are for the jury to decide. *See Moore*, 366 N.C. at 108. However, just like with the evidence pertaining to Rachel B., Bessie A., Kara L., and Keyona T., assessment of Serena S.'s credibility by a biased jury—one that already heard evidence on and found Gillard guilty of other offenses—does little to ensure that Gillard's death sentence was not erroneously imposed. *See Williams*, 484 U.S. at 938; *see also Lockhart*, 609 N.E.2d at 1101.

Moreover, while there is evidence linking Hill to the Extended Stay and Econo Lodge robberies, specifically that a victim's identification was found in his car, no items linking Gillard to these crimes were found on Gillard's person or on his property. In short, there is no physical

evidence linking Gillard to these robberies. Because Gillard has not been convicted of a crime against Serena S. or Asia G., he is entitled to a presumption of innocence for those offenses. *See Herrera*, 506 U.S. at 399; *Pabon*, 380 N.C. at 257. When, however, the State introduces evidence of unadjudicated offenses during sentencing, it implicitly signals to the jury that it believes the defendant committed those crimes. Here such signals were explicit: the State referred to Gillard as a "serial rapist" and implored the jury to sentence him to death because he had committed crimes against seven other women.

6. Keyana M.

a. Testimony

Keyana M. testified during the penalty phase of Gillard's trial in support of the course of conduct aggravating factor. *See* N.C.G.S. § 15A-2000(e)(11). On 28 August 2016, at around 3:30 a.m., Keyana M. received a call that a client was coming. The man who arrived had a walkie-talkie, acted like a police officer, and told Keyana M. that he was with the police. Keyana M. begged the officer not to take her to jail. But Keyana M. soon realized the man was not actually a police officer when he became aggressive with her, tied her up with a phone cord, and put a pillowcase over her head. While the man searched Keyana M.'s clothing for money, another man then came into the room, put a gun to Keyana M.'s head, took her clothes off, and raped her. Once the men left, Keyana M. called the police.

After the attack, Keyana M. went to WakeMed Hospital where a rape kit was performed. A Y-STR DNA profile obtained from this exam was matched to Gillard or anyone in his paternal blood line—a particular profile that is statistically unlikely to present in other men.

b. Application to Gillard's Case

Just like with the evidence pertaining to Rachel B., Bessie A., Kara L., Keyona T., Serena S., and Asia G., the defense argued that evidence pertaining to Keyana M.'s attack should be excluded because its consideration by the jury would violate Gillard's due process rights, be "highly prejudicial" and be prohibited by the Fourteenth Amendment to the United States Constitution.

There are questions about the reliability of Keyana M.'s testimony. First, Keyana M. was convicted of numerous assaults in the two years prior to Gillard's trial, including a felony assault with a deadly weapon. She was also allegedly charged for an incident where she bit police officers, spit on them, and kicked out the window of a patrol car. Keyana

M. has also been convicted of receiving stolen goods and malicious conduct by a prisoner. And she has been charged with giving false information to a police officer. Because witness credibility is to be determined by the jury, the review of Keyana M.'s testimony by the same biased jury that convicted Gillard raises procedural due process concerns. *See Williams*, 484 U.S at 938; *see also Bobo*, 727 S.W.2d at 952; *McCormick*, 272 Ind. at 280.

Despite Gillard never having been convicted for crimes against Rachel B., Bessie A., Kara L., Keyona T., Serena S., Asia G., or Keyana M., the State urged the jury to sentence Gillard to death for the crimes against these women. Specifically, the State implored:

> You are in the room with a serial-rapist, convicted killer. What's the appropriate punishment?
>
> He preys on the vulnerable. He doesn't go into stores and rob them. No, he finds the victims that he thinks don't matter.
>
> Sufficiently substantial,[7] let's talk about it.
>
> Forcing oral sex and raping [Bessie A.], throwing those blankets over her head. She told you, "I thought I was going to die so I started to pray." Is that sufficient? Is that substantial enough?
>
> Robbing and terrorizing [Serena S.] and [Asia G.]. You heard they had her hogtied with a cord. You saw the cord, the different cords and methods they used to bind their victims and torture their victims, all of them, leaving the marks behind.
>
> Raping. . . [Keyana M.], she talked to you, and she said they didn't just come to rob, they came to hurt.
>
> . . . .
>
> Trafficking [Kara L.], how many men did he force her to sleep with and then come and steal her money? And when she said, "I don't want to do it anymore,"

7. The State is referring to the portion of pattern jury instruction 150.10, which instructs the jury that to recommend a death sentence it must find, among other things, "that any aggravating circumstances you have found are sufficiently substantial to call for the imposition of the death penalty when considered with any mitigating circumstances." N.C.P.I.—Crim. 150.10.

> he said, "Show me your teeth." And he put the gun to her face, and he tells her, "I'm going to splatter your blood all over this room."
>
> . . . .
>
> Twirling the gun around inside of . . . [Keyona T.'s] vagina, let's talk about that. That is depraved. Why would you do that? You are torturing somebody, just sitting there twirling his gun inside her vagina? That's what this defendant did. She didn't know if he was going to pull the trigger. One can only imagine how terrifying that must have been, how scared. And that's what this defendant did to each and every one of these victims.

There is no doubt that the crimes against Rachel B., Bessie A., Kara L., Keyona T., Serena S., Asia G., and Keyana M. were horrific. Yet the horrific nature of these crimes does not vitiate a defendant's presumption of innocence. *See Herrera*, 506 U.S. at 399; *see also Pabon*, 380 N.C. at 257. Without a trial, and the substantive and procedural due process protections contained therein, it is not correct to conclude that Gillard was guilty of these offenses. Moreover, while it might be tempting to assign guilt in one case based on the DNA sample obtained from Keyana M.'s rape kit, note that this evidence has not been presented at a trial governed by the Rules of Evidence, *see Golphin*, 352 N.C. at 464, nor has an impartial jury determined the credibility of the related witness testimony, weighed alongside other contradictory evidence, and ultimately decided "what the evidence proves or fails to prove," *see Moore*, 366 N.C. at 108.

B. Conclusion Regarding Unadjudicated Offense Evidence

The admission of unadjudicated offense evidence at Gillard's sentencing (1) created a presumption that Gillard was guilty of those offenses despite never having been convicted, (2) allowed the jury to sentence Gillard to death based in whole or in part on evidence that has not been through the rigorous trial process and thus, amounted to nothing more than allegations, and (3) forced Gillard to rebut the allegations against him in a series of mini trials before the same biased jury that convicted him of first-degree murder.

The issues raised by this case, and others like it, support that North Carolina should join the states which exclude evidence of unadjudicated offenses during sentencing, or at the very least, join those states that

demand the evidence meet a reasonable doubt or clear and convincing evidence standard. As it stands, North Carolina's use of unadjudicated offense evidence is in tension with constitutional substantive and procedural due process requirements as well as a defendant's right to be presumed innocent unless convicted. "In capital cases, the finality of the sentence imposed warrants protections that may or may not be required in other cases." *Ake v. Oklahoma*, 470 U.S. 68, 87 (1985) (Burger, C.J., concurring in judgment). In my view, the qualitative difference between death and life imprisonment, and the corresponding heightened need for reliability when a death sentence is imposed, *Woodson*, 428 U.S. at 305, requires that a jury refrain from considering evidence of a defendant's unadjudicated offenses. At the very least, the extensive use of such evidence in the sentencing phase of this case casts doubt on the constitutionality of Gillard's death sentence.

II. The Trial Court's Admission of Victim Impact Evidence

A. Applicable Legal Principles

Victim impact evidence has become a prevalent feature in capital sentencing since the 1970s. Wayne A. Logan, *Through the Past Darkly: A Survey of the Uses and Abuses of Victim Impact Evidence in Capital Trials*, 41 Ariz. L. Rev. 143, 144 (1999). This includes evidence about the victim's personal characteristics and the emotional impact of the murder on their family members. *Payne*, 501 U.S. at 827.

In 1987, the United States Supreme Court decided *Booth v. Maryland*, 482 U.S. 496 (1987), o*verruled by Payne*, 501 U.S. 808, and held that victim impact evidence was "emotionally charged" and thus its admission was "inconsistent with the reasoned decisionmaking . . . require[d] in capital cases." *Id.* at 508–09. Namely because evidence about the victim's personal characteristics, the emotional impact of the crimes on the family, and the victim's family member's opinions and characterizations of the crimes and the defendant, "creates a constitutionally unacceptable risk that the jury may impose the death penalty in an arbitrary and capricious manner." *Id.* at 501–03.

Two years later, the Court extended its holding in *Booth* by determining that prosecutors cannot make inferences about the victim's personal characteristics during closing arguments. *South Carolina v. Gathers*, 490 U.S. 805, 811–12 (1989), *overruled by Payne*, 501 U.S. 808. The Court again echoed the concerns it set forth in *Booth*: "allowing the jury to rely on [information about the victim's characteristics] could result in imposing the death sentence because of factors about which the defendant was unaware, and that were irrelevant to the decision to kill." *Id.* at 811 (cleaned up) (quoting *Booth*, 482 U.S. at 505).

Then in 1991, just two years after *Gathers*, the Court reversed course slightly in *Payne*, 501 U.S. 808. It determined that the Eighth Amendment "erects no *per se* bar" on victim impact evidence. *Id.* at 827. The Court reasoned that evidence about the victim and the impact the murder had on the victim's family could, in some cases, be relevant to the jury's decision of whether or not to impose the death penalty. *Id.* at 827, 831. At the same time, the Court acknowledged that this evidence, even if potentially relevant, could not be "so unduly prejudicial" as to "render[ ] the trial fundamentally unfair." *Id.* at 825. In cases where the evidence admitted is unduly prejudicial, "the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief." *Id.* at 825, 831.

Furthermore, *Payne*'s holding is permissive, rather than mandatory. It does not compel states to include victim impact evidence at the sentencing phase of capital trials, and instead only provides that "a State may" allow the jury to hear this type of evidence during sentencing. *Id.* at 827. Indeed, as Justice O'Connor noted in her concurrence, *Payne* did not hold "that victim impact evidence must be admitted, or even that it should be admitted." *Id.* at 831 (O'Connor, J., concurring).

At least one state, Wyoming, has held that victim impact statements are inadmissible under its laws. *Olsen v. State*, 67 P.3d 536, 595 (Wyo. 2003). Other states, such as Florida, Indiana, Idaho, Illinois,[8] and California, have placed limits on the use of victim impact evidence. *See generally Windom v. State*, 656 So. 2d 432 (Fla. 1995) (victim impact evidence cannot be admitted as an aggravator and instead is only admissible to show the victim's uniqueness and the loss to the community); *Bivins v. State*, 642 N.E.2d. 928 (Ind. 1994) (victim impact evidence is only relevant during capital sentencing hearings if it is relevant to an aggravating circumstance); Idaho Code § 19-5306(3) (limiting testimony to the family of homicide victims); *People v. Hope*, 702 N.E.2d 1282, 1287 (Ill. 1998) (narrowing the definition of "crime victim" to a spouse, parent, child or sibling of the victim); Cal. Penal Code § 1191.1 (West 2008) (providing that only "next of kin" may testify).

As is especially relevant to Gillard's case, at least four states, Oklahoma, Colorado,[9] Illinois, and Nevada, require that victim impact

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8. Illinois is among the twenty-three states that have abolished the death penalty. *See State by State*, Death Penalty Information Center, https://deathpenaltyinfo.org/states-landing (last accessed Dec. 10, 2024); 725 Ill. Comp. Stat. Ann. 5/119-1 (2011).

9. Colorado revised its death penalty statute on 1 July 2020 to prohibit any imposition of the death penalty from that day forward. Act Concerning the Repeal of the Death Penalty by the General Assembly in All Circumstances Charged on or After July 1, 2020, 2020 Colo. Legis. Serv. ch. 61, 204 (West).

evidence relate to the victim in the case for which the defendant is on trial. *See Gilbert v. State*, 951 P.2d 98, 117 (Okla. Crim. App. 1997) ("[T]he type of evidence contemplated by these statutes is restricted to the impact on the family members of the victim of the homicide on trial."); *People v. Dunlap*, 975 P.2d 723, 745 (Colo. 1999) ("Evidence regarding the impact of a capital defendant's prior crimes on the victims of those crimes . . . is not admissible because it is not relevant to the actual harm caused by the defendant as a result of the homicide for which he is being sentenced."); *Hope*, 702 N.E.2d at 1289 ("[E]vidence about victims of other, unrelated offenses is irrelevant and therefore inadmissible."); *Sherman v. State*, 965 P.2d 903, 914 (Nev. 1998) ("[W]e conclude that the impact of a prior murder is not relevant to the sentencing decision in a current case and is therefore inadmissible during the penalty phase.").

North Carolina has chosen to take the *Payne* approach and has determined that "[v]ictim impact statements are relevant and admissible to aid the jury in its decision whether to recommend a sentence of death." *State v. Allen*, 360 N.C. 297, 310 (2006). Consistent with *Payne*, this Court has implicitly acknowledged that the evidence presented at sentencing must relate to the victim of the crime for which the defendant is on trial. *See State v. Thompson*, 359 N.C. 77, 124 (2004) ("While a capital defendant must be permitted to present any aspect of the defendant's character, record, or any other circumstance which a jury could deem to have mitigating value[,] [t]he feelings, actions, and conduct of third parties have no mitigating value as to defendant and, therefore, are irrelevant to a capital sentencing proceeding." (cleaned up)); *see also State v. Smith*, 352 N.C. 531, 554 (2000) (allowing testimony about the victim in the case the defendant was on trial for); *State v. Davis*, 353 N.C. 1, 19–20 (2000) (same). Moreover, the victim impact evidence presented during a capital sentencing proceeding cannot be "so prejudicial that it renders the proceeding fundamentally unfair." *Allen*, 360 N.C. at 310.

Because North Carolina allows the jury to consider all evidence during the capital sentencing phase, regardless of whether it was presented during the guilt-innocence phase or the sentencing phase of trial, evidence introduced at either stage can be prejudicial to a defendant's sentence. *See* N.C.P.I.—Crim. 150.10. Here, the State introduced evidence sure to elicit an emotional response from the jury: evidence of the sexual abuse Keyona T., Keyana M., and Rachel B. suffered as children at the hands of other perpetrators, not Gillard. This evidence was irrelevant, outside the scope of what is permissible under *Payne*, and unduly prejudicial to Gillard's death sentence.

B. Keyona T.

As previously noted, Keyona T. testified for the State at the sentencing phase of Gillard's trial to support an aggravating factor. Her testimony was offered to prove that Holland's and Garvey's murders had been "part of a course of conduct" by Gillard that "included the commission . . . of other crimes of violence against another person or persons." N.C.G.S. § 15A-2000(e)(11). Despite this specific reason for Keyona T.'s testimony, she was permitted to testify about sexual abuse by her mother's boyfriend, which began in second grade and ended when she was in fifth grade. Keyona T. called the abuse "a curse" and explained that after the man was arrested, and Keyona T. testified at the trial that convicted him, her mother continued to support him. Keyona T. also experienced physical abuse by another one of her mother's boyfriends and was later removed from her mother's care by the Department of Social Services.

Keyona T.'s testimony established that while she graduated from the Durham School of the Arts and City of Medicine Academy and enrolled in college, she ultimately left college due to symptoms of PTSD, stress, and anxiety. Keyona T. was introduced to Backpage by her cousin and began advertising there for money. The defense objected to this evidence, but the trial court allowed the evidence because it determined it was relevant to Keyona T.'s credibility as she relayed the events of 16 April 2016 at the Motel 6.

First, the evidence presented about Keyona T.'s abuse was not relevant to Gillard's sentencing. In *Payne*, the victim evidence admitted was about the surviving child victim of the offense for which the defendant was on trial. *Payne*, 501 U.S. at 831–32 (O'Connor, J., concurring). The Court found that evidence relevant because it played a role in the jury's assessment of the defendant's "moral culpability and blameworthiness" in the crime. *Id.* at 825 (majority opinion). Based on this, the Court determined the statements at issue in *Payne* were relevant to the jury's decision of whether to impose a death sentence. *Id.* at 825–26. This Court has similarly allowed victim impact statements to be admitted when they relate to the victim in the case the defendant is on trial for. *See, e.g.*, *Smith*, 352 N.C. at 554.

However, Keyona T. is neither a victim in the case Gillard is on trial for, nor did Gillard perpetrate the abuse she suffered as a child. Thus, it stands to reason that this evidence could not help the jury assess Gillard's "moral culpability and blameworthiness" in the current case. *See Payne*, 501 U.S. at 825. Rather, just like the State suggested during closing arguments at the penalty phase, the only effect this evidence

had was to prejudice Gillard by portraying him as a man who "preys on the vulnerable."

Second, Keyona T.'s testimony is markedly different from the evidence in *Payne*, which was not considered unduly prejudicial to the defendant's sentencing procedure. *See id.* at 831. In *Payne*, the grandmother of the child victim who survived the crime gave "brief" testimony that the child "cried for his mother and baby sister and could not understand why they did not come home." *Id.* at 831–32. In contrast, here, Keyona T., who was not the victim in this case, gave testimony spanning several pages about the abuse she suffered at the hands of her mother's boyfriends, her difficulty with school, and her PTSD, stress, and anxiety. This testimony was irrelevant to Gillard's sentencing proceeding and was "so unduly prejudicial that it render[ed]" Gillard's hearing "fundamentally unfair." *Id.* at 825. This is a violation of Gillard's rights under the Fourteenth Amendment's Due Process Clause. *See id.*

Additionally, while the trial court stated it was allowing the evidence about Keyona T.'s childhood abuse because it was relevant to Keyona T.'s credibility, the court did not explain how her childhood experiences could have any bearing on the credibility of her testimony. Common factors for analyzing witness credibility are: witness demeanor or bias, a witness's motive for testifying, whether the testimony was coerced, and whether the witness has been granted immunity. *State v. Mullis*, 233 N.C. 542, 544 (1951) (witness demeanor); *State v. Singletary*, 247 N.C. App. 368, 377 (2016) (witness bias); *State v. Stoner*, 59 N.C. App. 656, 659 (1982) (witness motive); *State v. Montgomery*, 291 N.C., 235, 244 (1976) (witness coercion); N.C.G.S. § 15A-1055(b) (2023) (impact of grant of immunity on witness credibility). None of these instances apply in this case.

It is true that the Court of Appeals has previously determined that a witness's profession may be relevant in determining witness credibility. In *State v. Staton*, 33 N.C. App. 270 (1977), the Court of Appeals determined that allowing a "witness[ ] to testify as to his occupation, i.e., that he was a probation officer" was relevant because parties "have the right to enhance their witnesses' credibility." *Id.* at 272. However, the facts in that case differ substantially from the facts here. Keyona T.'s occupation is not at issue. Rather, Keyona T.'s testimony offered details on how she became involved in prostitution, and the issue was whether such details "provided a standard for judging [her] credibility." *See id.* There is no reason that a person with Keyona T.'s experiences would be more credible, nor did the defense suggest that women in Keyona T.'s profession are not credible. Rather, the defense's objection was tied to the evidence

not being probative of the reason it was offered—to prove the course of conduct aggravating factor—and because it would be unduly prejudicial to Gillard's sentence. Put simply, Keyona T.'s testimony about her childhood and her experiences of childhood abuse were not relevant to her credibility as a witness. The same is true about Keyona T.'s decisions to leave college or begin advertising on Backpage. Instead, this evidence was unduly prejudicial and violated Gillard's rights under the Fourteenth Amendment Due Process Clause.

C. Keyana M.

Keyana M. was called to testify during the penalty phase of Gillard's trial in support of the course of conduct aggravating factor. *See* N.C.G.S. § 15A-2000(e)(11). But before she testified about her experience with Gillard, she also testified about her childhood. Her testimony established that her parents had put her into foster care and that she then moved to Virginia where she was sexually assaulted. Keyana M. was twelve years old at the time of her assault, and her attacker was later convicted.

The admission of Keyana M.'s testimony poses issues similar to the admission of Keyona T.'s testimony. Namely that because she is not the victim of the crime Gillard was on trial for, her personal characteristics were not relevant to Gillard's "moral culpability and blameworthiness" in the current case. *See Payne*, 501 U.S. at 825. The Court's insistence that victim impact statements be about the victim in the crime charged is evident throughout the *Payne* opinion. The Court described victim impact evidence as a way to inform the "sentencing authority about the specific harm caused by the *crime in question*." *Id.* (emphasis added). In her concurrence, Justice O'Connor also expressly noted that victim impact evidence was designed to prevent the victim in the charged crime from being turned into "a faceless stranger at the penalty phase of a capital trial." *Id.* at 831 (O'Connor, J., concurring). It follows that, at a minimum, any victim impact evidence presented by the State must pertain to Holland or Garvey. *See id.* at 825 (majority opinion). Just like the evidence admitted about Keyona T.'s personal characteristics and her past, the evidence admitted about Keyana M.'s past is outside the bounds of what is permissible under *Payne*. Thus, this evidence served no legitimate purpose, was unduly prejudicial to Gillard's sentence, and violated Gillard's rights under the Fourteenth Amendment's Due Process Clause.[10]

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10. The majority has effectively no response to these points. On the jury's consideration of Keyona T.'s and Keyana M.'s testimony at sentencing, the majority states, without explanation, that "there is 'nothing in the instant case to suggest that the jury's decision to recommend a sentence of death was based on any unfair prejudice that may have been

D. Rachel B.

Although Rachel B.'s testimony was admitted during trial pursuant to Rule 404(b) to establish a common scheme or plan and defendant's identity and motive, the trial court also allowed Rachel B. to testify about her childhood. The evidence elicited established that at age ten, Rachel B. was removed from her mother's care because her mother was addicted to heroin and cocaine. To pay for drugs, Rachel B. testified that her mother "used to sell [her] and [her] sister out." Rachel B. explained that although she went to live with her grandmother for a period of time, the abuse she experienced did not end because her grandfather took videos of her and her cousins through hidden cameras. Rachel B. stated that she caught him masturbating to the videos of them taking showers. Ultimately, Rachel B. testified about a childhood where she ran away from group homes and foster care, began stripping at age fifteen, and got "stuck in human trafficking" at age seventeen. As a victim of human trafficking, she also recounted being beaten by pimps and being sold from one pimp to another.

Rachel B.'s testimony was compelling and emotionally powerful. She described a life replete with hardship, sexual abuse, and violence, all of which began at a young age by people who were supposed to love and care for her. But similarly to Keyona T.'s and Keyana M.'s testimony, Rachel B.'s testimony was not relevant to Gillard's "moral culpability and blameworthiness" in the crime charged and accordingly, was outside the scope of permissible victim evidence allowed under *Payne*. *See Payne*, 501 U.S. at 825. Namely because just like Keyona T. and Keyana M., Rachel B. was not the victim in the crime Gillard was on trial for. *See id.* Rachel B.'s experiences with stripping, human trafficking, and sexual abuse as a child were irrelevant to the jury's consideration of whether Gillard should receive a death sentence. Rather, this evidence was "so unduly prejudicial" that Gillard's sentence could not have been the product of a fundamentally fair proceeding. *See id.* Accordingly, this evidence was admitted in violation of the Fourteenth Amendment's Due Process Clause. *See id.*

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created by [admission of this evidence],' " quoting *State v. Moody*, 345 N.C. 563, 572 (1997) (alteration in original). But in *Moody* this Court applied standards from the rules of evidence to assess whether particular evidence was rightly considered during sentencing. *See id.* In fact, the majority's exact quote comes from a portion of *Moody* where this Court applied Rule 403 balancing to exhibits introduced during the sentencing phase. That is the very approach the majority seemingly disclaims in Part (II)(C)(2) of its opinion. In sum, the majority does not explain what standard it is applying to Gillard's claims that evidence considered during sentencing deprived him of a fair hearing or was unduly prejudicial under *Payne*, let alone what precedent justifies that standard.

Finally, I disagree with the majority that these details of Rachel B.'s abuse by others are merely "introductory evidence" that were relevant because they "provided context to the jury for how Rachel B. crossed paths with defendant on the night he attacked her." *Supra* Part II(C)(1). If that is the test, it seems to have no limiting principle. All manner of unduly prejudicial evidence can be repurposed as "introductory context" through minimally creative framing. That is why courts, including in a case cited by the majority, carefully police the line between testimony offered for "introductory and general purposes" and that which could "play[ ] upon the passions and prejudices of the jury." *E.g.*, *State v. Sports*, 41 N.C. App. 687, 690 (1979), *disc. rev. denied*, 298 N.C. 205 (1979); *see id.* at 689–90 (rejecting a challenge to testimony regarding a witness's "orphan status, epileptic history, scholarship assistance and summer employment" partly because it did not appear "that [the testimony] must be considered prejudicial"). The majority errs, as did the court below, by disregarding this important distinction.

III. The Trial Court's Admission of Repetitive Crime Scene Photos

The admission of photographic evidence pursuant to Rule 403 of the North Carolina Rules of Evidence is left to the sound discretion of the trial court. *State v. Blakeney*, 352 N.C. 287, 309 (2000). On appeal, the trial court's ruling should not be overturned unless it "was manifestly unsupported by reason or was so arbitrary that it could not have been the result of a reasoned decision." *Id.* (cleaned up).

A. Photographic Evidence at Gillard's Trial

The State sought to admit sixteen photos of Holland's naked and bloody body in her hotel room. Gillard objected to ten of these. The trial court admitted all sixteen—in addition to a video of the crime scene, which similarly depicted Holland's naked body surrounded by blood. In making this determination, the court reasoned that these pieces of evidence "each have independent evidentiary value that shows the different angles or provides scale, distances, location of items of evidence, and specifically what the officers observed when they were on the scene." But the trial court's decision to admit all sixteen photos was an abuse of discretion. *See State v. Hennis*, 323 N.C. 279, 285 (1988). The photos were cumulative and served no legitimate evidentiary purpose. Instead, the only purpose these photos served was to provoke the jury's emotions, such that they would sentence Gillard to death.

There are nine photos at issue from the State's Exhibit 3. These photos were shown to the jury on a television (the record does not specify what size) in a color PowerPoint presentation. The photos are

numbered as follows: 63, 64, 66, 69, 70, 71, 72, 75, and 76. The photos were accompanied by testimony from Agent Jones who investigated the hotel crime scene.

According to Jones, photo 63 portrayed a wound on Holland's chest, while photo 64 was "a[n] overall shot of Ms. Holland's body." Yet photos 63 and 64 appear to be the same photo. The only difference is that photo 64 is a zoomed-out version of photo 63. Similarly, photo 64 is also a zoomed-in version of photo 62. The State even observed that photo 63 was a "close up" of photo 64, at a slightly different angle.

For photos 65 and 66, Jones specifically testified that photo 66 was a "closer view" of the bloody shoe impressions depicted in photo 65. Interestingly, while photo 65 was an "overall" view of Holland's body, which also contained bloody shoe impressions, and photo 66 was a close up of those same bloody shoe impressions, the State zoomed in and enlarged photo 65 so that Jones could point out the same bloody shoe impressions from photo 66. Bloody shoe impressions were also present in photos 75 and 76, and Jones testified that these were the same photos the jury had previously been shown, with the exception of placards which had been placed to mark the evidence.

Photos 69, 70, and 71 showed Holland's two gunshot wounds. Jones's testimony noted that photo 70 depicted "Ms. Holland's head and just blood." Photo 71, according to Jones, showed the chest and neck wounds, and photo 69 was "a close-up" of the chest wound evident in other photos. When the pathologist testified, the jury was shown another photo of Holland's chest wound (State's Exhibit 30).

Once all the photos were shown and the PowerPoint presentation was finished, the State played the crime scene video for the jury. This video was displayed on a television in the courtroom while Jones narrated. This video was repetitive because it depicted much of what had already been shown in the State's still photos. The trial court then gave an instruction limiting the jury's consideration of the State's Exhibit 30, stating that it could only be used "for purposes of illustrating and explaining the testimony of a witness." The court also indicated that the State's Exhibit 3 "may be considered by [the jury] as evidence of the facts that they illustrate or show."

B. Applicable Legal Principles

Photographs can be used to explain or illustrate witness testimony. *State v. Holden*, 321 N.C. 125, 140 (1987). "The fact that [a] photograph may be gory, gruesome, revolting or horrible, does not prevent its use

by a witness to illustrate his testimony." *State v. Watson*, 310 N.C. 384, 397 (1984) (quoting *State v. Cutshall*, 278 N.C. 334, 347 (1971)). At the same time, this Court has recognized that the probative value of photographic evidence can be "eclipsed by its tendency to prejudice the jury." *Hennis*, 323 N.C. at 284. This occurs in cases where photographs "that have inflammatory potential" are "excessive or repetitious." *Id.* Put simply, seeing the evidence is different from hearing testimony about it.

While this Court has not drawn a bright-line rule for when photographic evidence becomes prejudicial, a trial court is required to "examine both the content and the manner in which photographic evidence is used and to scrutinize the totality of circumstances composing that presentation." *Id.* at 285. Among these considerations are "[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, [and] the scope and clarity of the testimony it accompanies." *Id.* Consideration of these factors allows a court to determine "the illustrative value of [the] photographic evidence," which must then be weighed "against [the photograph's] tendency to prejudice the jury." *Id.* Importantly, "[w]hen a photograph adds nothing to the State's case, then its probative value is nil, and nothing remains but its tendency to prejudice." *Id.* at 286 (cleaned up). Indeed, this Court has stated that

> 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.

State v. Mercer, 275 N.C. 108, 120 (1969).

C. Application to Gillard's Case

The photo and video evidence in this case was excessive. While color photos of Holland's body were relevant, the photos depicted substantially the same scene: Holland's body surrounded by blood, inflicted with two gunshot wounds, and almost completely naked except for her socks. The same scenes were then shown to the jury again in the crime scene video. The photos at issue served only to play on the jury's emotions and were especially excessive given that Gillard did not dispute the number of shots fired or Holland's cause of death. The photos also did not show any injuries aside from the gunshot wounds which might provide insight into what happened while Gillard was in Holland's room.

Ultimately, no evidentiary value was gained by repeatedly showing Holland's wounds in color photos on a television.[11]

The facts of this case would arouse emotion in almost any juror. The photos depicted Holland, a young pregnant woman, who was killed by a man that under the State's theory of the case had gone to rob and rape her. Garvey, the father of Holland's three children and her unborn child, was shot and killed in the hallway outside her hotel room. In emotionally charged cases such as this one, special care must be taken when admitting photographic evidence. *See Hennis*, 323 N.C. at 285. The trial court did not act in accordance with the special care required in this case and others like it. Given the other photos admitted and the crime scene video, the nine photos at issue lacked probative value, and it was an abuse of discretion for the trial court to admit them. *See id.*

Although I believe the admission of these photographs is harmless error beyond a reasonable doubt for purposes of Gillard's guilt-phase proceeding, in light of the other overwhelming evidence against him, *see State v. Temple*, 302 N.C. 1, 14 (1981), it is yet another error that affected the fairness of Gillard's sentencing hearing in regards to cumulative error review. *See infra* Part VIII.

IV. *Enmund/Tison* Instruction for Dwayne Garvey's Murder

Gillard asserts that the trial court was required to provide the jury with North Carolina Pattern Jury Instruction 150.10 (*Enmund/Tison* instruction), as it relates to the murder of Dwayne Garvey. Because the instructions given by the trial court do not establish whether the jury found Gillard eligible for the death penalty for Garvey's murder under *Enmund* and *Tison*, I agree with Gillard that this instruction should have been given at the sentencing proceeding. *See* N.C.P.I.—Crim. 150.10 (Death Penalty—Instructions to Jury at Separate Sentencing Proceeding); *Enmund*, 458 U.S. at 798; *Tison*, 481 U.S. at 158.

In *Gregg*, the Court explained that the death penalty serves "two principal social purposes: retribution and deterrence of capital crimes by prospective offenders." 428 U.S. at 183. Thus, in cases where the death penalty does not contribute measurably to these goals, that punishment "is nothing more than the purposeless and needless imposition

11. Contrary to the trial court's assessment, which the majority seemingly accepts at face value, *see supra* Part II(D), that a photo may have provided a different angle or view of the crime scene is insufficient to find it nonredundant or full of evidentiary value under our precedent. *See State v. Hennis*, 323 N.C. 279, 286–87 (1988).

of pain and suffering." *Enmund*, 458 U.S. at 798. In those cases, infliction of the death penalty is unconstitutional. *Id.*

For purposes of deterrence, the defendant's *mens rea* is increasingly important. Under our current laws, the death penalty cannot have its intended deterrent effect if it is imposed against a person who does not kill or intend to kill. Deterrence can likely only be effectuated "when murder is the result of premeditation and deliberation." *Id.* at 799 (quoting *Fisher v. United States*, 328 U.S. 463, 484 (1946) (Frankfurter, J., dissenting)). Similarly, for purposes of retribution, the defendant's degree of criminal culpability matters, and this rests on what the defendant's "intentions, expectations, and actions were." *Id.* at 800. Indeed, our Court has stated that "capital punishment must be tailored to the particular defendant's personal responsibility and moral guilt." *State v. Brewington*, 352 N.C. 489, 524 (2000) (citing *Enmund*, 458 U.S. 782). Importantly, criminal penalties have been invalidated as excessive in the absence of intentional wrongdoing. *E.g.*, *Robinson v. California*, 370 U.S. 660, 667 (1962); *Weems v. United States*, 217 U.S. 349, 363 (1910).

Consistent with this, the *Enmund* Court determined it was unconstitutional to impose the death penalty on a person who did not kill, attempt to kill, or intend to kill the victim. 458 U.S. at 798. Later, in *Tison*, the Court held that defendants who are major participants in a felony and exhibit reckless indifference toward human life also "satisfy the *Enmund* culpability requirement." 481 U.S. at 158. Taken together, *Enmund* and *Tison* protect from the death penalty defendants who: (1) did not kill; (2) did not attempt to kill; (3) did not intend to kill; and (4) were not major participants in a felony and did not exhibit a reckless indifference toward human life. *Enmund*, 458 U.S. at 798; *Tison*, 481 U.S. at 158.

This logic is undergirded by the Eighth Amendment's "individualized consideration" requirement for imposing death sentences. *Enmund*, 458 U.S. at 798 (quoting *Lockett v. Ohio*, 438 U.S. 586, 605 (1978)). This procedural safeguard, which helps guarantee that only those who are eligible for the death penalty are subjected to it, requires a focus on the "relevant facets of the character and record of the individual offender." *See id.* (quoting *Woodson*, 428 U.S. at 304). Thus, when determining whether a person is eligible for capital punishment, a reviewing court must consider whether the defendant intended to cause harm and what kind of harm was intended. *See id.*; *Tison*, 481 U.S. at 157–58.

Gillard argues that the trial court was required to provide the jury with the *Enmund/Tison* instruction because the State is seeking

a death sentence for Garvey's murder under a felony murder theory and there is evidence that Gillard did not commit the actual killing. *See* N.C.P.I.—Crim. 150.10. Specifically, Issue One-A of the *Enmund/Tison* instruction provides:

> Do you unanimously find from the evidence, beyond a reasonable doubt, that the defendant himself/herself:
>
> [a. Killed or attempted to kill the victim;] (or)
>
> [b. Intended to kill the victim;] (or)
>
> [c. Intended that deadly force would be used in the course of the underlying felony;] (or)
>
> [d. Was a major participant in the underlying felony and exhibited reckless indifference to human life.]]

Id. This instruction further states that if the answer to these questions is "no," then the jury must "recommend that the defendant be sentenced to life imprisonment." *Id.*

For Garvey's murder, Gillard was convicted under the theory of felony murder as well as the theory of malicious, premeditated, and deliberate murder. The evidence also showed that Gillard was guilty of Garvey's murder by acting in concert, and the trial court provided the jury with an acting in concert instruction during the guilt-innocence phase of trial.

Under North Carolina law, a defendant may be convicted of premeditated and deliberate murder under the doctrine of acting in concert. *State v. Fletcher*, 354 N.C. 455, 480 (2001). Indeed, "a defendant may be found guilty of premeditated first-degree murder by acting in concert without regard to which person committed which particular acts if the acts are done in pursuance of a common purpose to commit a crime or as a natural or probable consequence thereof." *Id.* (citing *State v. Barnes*, 345 N.C. 184, 233 (1997)).

Although it is true that in *Fletcher* this Court stated that an *Enmund/Tison* instruction is not required when a defendant is convicted of first-degree murder on the basis of premeditation and deliberation and under the felony murder rule, this case is distinguishable from *Fletcher*. *See* 354 N.C. at 480–81. Namely because in *Fletcher* the defendant was convicted of premeditated and deliberate murder without any evidence to support an acting in concert theory and without the jury having received an acting in concert instruction. *Id.* at 480. Indeed, the *Fletcher* Court specifically did not decide whether a defendant convicted of premeditated

murder based on acting in concert was entitled to the *Enmund/Tison* instruction. *Id.* Its narrow holding sidestepped that issue: "[W]e hold that where the guilt-phase jury found defendant guilty of first-degree murder on the basis of premeditation and deliberation *without an instruction on acting in concert*, an *Enmund/Tison* instruction is not required at sentencing." *Id.* at 481 (first emphasis added).

But in Gillard's case, the hotel surveillance video evidence supports a finding that Gillard was only guilty under an acting in concert theory. The evidence showed that Hill and Garvey were the only two people in the hallway at the time that Garvey was shot and that Hill fired the shot that killed Garvey. Consistent with this, the jury also found as a mitigating circumstance that Gillard "did not pull [the] trigger" in Garvey's murder. This leaves an open question: was the jury's verdict of first-degree murder based on Gillard's intent to kill Garvey or on the fact that Gillard was present during the commission of the underlying felonies and only shared Hill's purpose to commit those felonies?

This is important because under an acting in concert theory, the jury could have determined Gillard was guilty of first-degree murder without finding that he met the *Enmund/Tison* requirements for imposing the death penalty. If this is true, Gillard's death sentence for Garvey's murder is unconstitutional. *See Enmund*, 458 U.S. at 798; *Tison*, 481 U.S. at 158. Indeed, this Court has previously observed that a jury *can* find a defendant guilty of premeditated murder under a theory of acting in concert *while also* not imposing a death sentence pursuant to *Enmund/Tison* instructions—specifically because the defendant did not have the specific intent to kill the victim. *State v. Gaines*, 345 N.C. 647, 682 (1997) (concluding that a verdict that a defendant was guilty of "premeditated and deliberate murder either under the theory of acting in concert or by aiding and abetting . . . is not inconsistent with the jury's later indication that the defendant did not himself intend to kill the victim [under *Enmund*] as no evidence suggested that [the defendant] personally intended to inflict the fatal wound himself").[12]

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12. The *Gaines* Court did observe, without citation, that "[t]he *Enmund* rule does not apply to a defendant who has been found guilty of first-degree murder based on premeditation and deliberation," including the defendant. *State v. Gaines*, 345 N.C. 647, 682 (1997). But this overbroad observation is at most dicta because the defendant there did receive the *Enmund/Tison* instruction at sentencing and was awarded a life sentence. *Id.* This Court only reviewed that verdict for consistency with the jury's earlier guilt-phase verdict because of the defendant's challenge. *Id.*

State v. Golphin, 352 N.C. 364, 473 (2000) repeated that phrasing when holding that a defendant need not receive an *Enmund/Tison* instruction where the jury found him guilty

Gillard's case is also distinguishable from *State v. Watts*, 357 N.C. 366 (2003). In *Watts*, this Court determined an *Enmund/Tison* instruction was not required for a defendant convicted of first-degree murder under a theory of premeditation and deliberation and under the felony murder rule. *Id.* at 375–76. However, the instructions given in *Watts* differed substantially from the instructions given in Gillard's case. *See id.* at 375. Specifically, in *Watts*, the acting in concert instruction prevented the jury from finding that the defendant had committed premeditated first-degree murder without also finding that the defendant intended to kill. *Id.* (requiring the jury to find beyond a reasonable doubt that "the defendant either by himself or acting with another intentionally killed the victim . . . and that the defendant intended to kill the victim" (emphases omitted)).

By contrast, in Gillard's case, the mandate allowed the jury to convict Gillard for the first-degree murder of Garvey, based on malice, premeditation, and deliberation, if "the defendant or *someone with whom the defendant was acting in concert* intended to kill the victim." (Emphasis added.) That means the jury could find Gillard guilty of this charge without also finding he had intent to kill. Accordingly, an *Enmund/Tison* sentencing instruction was warranted, and the trial court's failure to submit this issue to the jury was error.

Despite concluding that an *Enmund/Tison* instruction was not necessary in Gillard's case, the majority elaborates in a footnote that the "trial court instructed the jury on the substance of an *Enmund/Tison*

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of first-degree murder on the basis of premeditation and deliberation under either an acting in concert theory or by committing all of the elements himself. But the *Golphin* Court also noted that there was more than enough evidence of the defendant's requisite intent to overcome the *Enmund/Tison* instruction. *Id.* at 473–74. Indeed *Fletcher* (2001) came after *Golphin* (2000) and did not interpret it to decide the issue presented here—whether a defendant convicted of first-degree murder only on an acting in concert theory must receive the *Enmund/Tison* instruction. *State v. Robinson*, 342 N.C. 74 (1995) did not decide that issue either, as it pre-dated this Court authorizing acting in concert liability for first-degree murder. *Id.* at 88; *see also Barnes*, 345 N.C. at 233 (holding that a defendant may be held liable for premeditated first-degree murder by acting in concert); *Fletcher*, 354 N.C. at 480 (summarizing this doctrinal development).

The majority reasons that no *Enmund/Tison* instruction was necessary here because Gillard was "a major participant in criminal conduct known to carry a grave risk of death" and "actively involved in planning, arranging, and perpetrating an armed, violent felony." *Supra* Part II(H). But focusing only on Gillard's participation in the underlying felony reads out *Tison* and *Enmund*'s emphasis on the requisite mental state: that the defendant "[w]as a major participant in the underlying felony *and* exhibited reckless indifference to human life." *See* N.C.P.I.—Crim. 150.10(d) (emphasis added); *Tison*, 481 U.S. at 152. The jury in this case should have been instructed accordingly to determine Gillard's mental state based on the evidence before it.

instruction" in any event because it "provided the jury with an instruction on malice." *Supra* Part II(H) & n. 7. This unwarranted observation misconstrues the jury instructions actually provided in this case. The jury here was instructed that it should find Gillard guilty if "the defendant *or* a person with whom the defendant was acting in concert intentionally *and* with malice killed the victim." (Emphasis added.) Malice is conjunctive with intent. In turn, the jury was told that acting in concert liability occurs when "two or more persons join in a common purpose to commit" a crime, and that the defendant is "not only guilty of that crime if the other person commits the crime but also guilty *of any other crime committed by the other in pursuance of the common purpose*," so long as they are "actually or constructively present." (Emphasis added.) If these instructions were enough to satisfy *Enmund/Tison*, then the getaway driver for co-defendants who shot and killed two victims while robbing them, acting in concert to commit the armed robbery, can be found guilty of first-degree murder on the basis of malice, premeditation, and deliberation and receive the death penalty. This outcome contradicts *Enmund* and the majority's own reasoning. Thus this unwarranted observation is properly disregarded as dicta.[13]

V. The Trial Court's Failure to Instruct the Jury that the Same Evidence Could Not be Used to Support More than One Aggravating Factor

A. Standard of Review and Applicable Law

Challenges to "whether a jury instruction correctly explains the law" are reviewed de novo. *State v. Copley*, 386 N.C. 111, 119 (2024) (*quoting State v. Greenfield*, 375 N.C. 434, 440 (2020)). In capital cases, "the trial court may not submit multiple aggravating circumstances supported by the same evidence." *State v. Lawrence*, 352 N.C. 1, 29 (2000) (citing *State v. Goodman*, 298 N.C. 1, 29 (1979)). However, an aggravating factor will

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13. Likewise, the majority's footnote would substantially expand what it means that the defendant got the "substance" of a required instruction. In *State v. Augustine*, 359 N.C. 709 (2005), this Court addressed a narrow circumstance where a defendant requested that a general pattern jury instruction be replaced with a context-specific instruction. *Id.* at 728–29. When the trial court failed to give the context-specific instruction verbatim, this Court held that the substance of the requested instruction was basically conveyed by the general pattern jury instruction that was given. *See id.* That case does not support the Court's conclusion here, that Gillard got the substance of the *Enmund/Tison* instruction because it got an acting in concert instruction on malicious, premeditated, and deliberate murder, for the reasons explained above. Concluding that the substance of an instruction was given when the instruction was not given at all seems to undermine that *Augustine* standard completely.

not be "considered redundant absent a complete overlap in the evidence supporting them." *Id.* (cleaned up).

B. Application to Gillard's Case

Two aggravating factors were submitted in Gillard's case. The first, the course of conduct aggravator, required the jury to find that "[t]he murder for which the defendant stands convicted was part of a course of conduct in which the defendant engaged and that included the commission by the defendant of other crimes of violence against another person or persons." N.C.G.S. § 15A-2000(e)(11). The second, the felony murder aggravator, tasked the jury with determining whether the murder was committed "during the commission of, or flight after committing, the Attempted First Degree Rape of April Holland and the Attempted Robbery with a firearm of April Holland." *See* N.C.G.S. § 15A-2000(e)(5). The jury found both aggravating factors existed and recommended a death sentence for both Holland's and Garvey's murders.

The trial court gave the jury the following instructions:

> The following is the first aggravating circumstance which may be applicable to this case: Was this murder part of a course of conduct in which the defendant engaged, and did that course of conduct include the commission by the defendant *of other crimes of violence against other person or persons*?
>
> . . . .
>
> The following is the second aggravating circumstance which may be applicable to this case: Was this murder committed by the defendant while the defendant was engaged in or flight after committing *attempted first-degree rape of April Holland and/or attempted robbery of April Holland with a firearm*?

(Emphases added.) Although the pattern jury instruction explicitly states, "You are instructed that the same evidence cannot be used as a basis for finding more than one aggravating factor," N.C.P.I.—Crim. 150.10, that language was omitted in the trial court's instructions to the jury in this case. The trial court's failure to give the correct jury instruction was error because it left the jury free to rely on the same evidence to find both the course of conduct aggravator and the felony murder aggravator. *See Lawrence*, 352 N.C. at 29.

When two aggravating factors that are supported by the same evidence are submitted to the jury, it amounts "to an unnecessary

duplication of the circumstances enumerated in the statute" and results "in an automatic cumulation of aggravating circumstances against the defendant." *Goodman*, 298 N.C. at 29. Stated another way, in cases like this, although there is only enough evidence to support one aggravating factor, that evidence is double-counted against the defendant and improperly used to support a second aggravating factor. This is problematic in part because the jury is required to weigh existing aggravating and mitigating circumstances together. N.C.G.S. § 15A-2000(b). If the jury finds that the aggravating factors outweigh the mitigating circumstances, then the jury recommends a death sentence. *Id.* Thus, the more aggravating factors are present in a case, the higher the likelihood a jury's final recommendation will be death.

During closing argument, the State admitted that both aggravating factors were "somewhat related" because Gillard was "committing more crimes in addition to the murder at the time the murders t[ook] place." The evidence in this case did not, on its own, support attempted rape and robbery. Instead of showing attempted rape, the evidence here showed that Holland was not tied up or injured prior to being shot. There was also no evidence of attempted robbery, as Holland's cell phone and $140 were found at the scene.

Without relying on the evidence of Gillard's other alleged crimes, the jury could not have found the attempted felony murder aggravating factor. The evidence in Holland's and Garvey's murders only showed that Holland was killed by a person who she agreed to meet with to exchange sex for money. The same is true for the course of conduct aggravating factor, which also relies heavily on evidence pertaining to attacks against other women.

Moreover, the jury found the presence of eighteen mitigating circumstances. While it ultimately decided that the mitigating circumstances did not outweigh the aggravating circumstances present, the jury might have struck a different balance if it had weighed those eighteen mitigating circumstances against only one aggravating factor. Accordingly, the trial court's failure not to instruct the jury "that the same evidence cannot be used as a basis for finding more than one aggravating factor" was error. *See* N.C.P.I.—Crim. 150.10.

VI. The Trial Court's Failure to Give a Peremptory Instruction on Three Mitigating Circumstances

During the sentencing phase of Gillard's trial, the defense requested peremptory instructions on forty of the forty-one non-statutory mitigating circumstances it submitted to the court. Although the trial court

initially stated that it would give a peremptory instruction for each of the requested mitigating circumstances, it ultimately decided not to give a peremptory instruction on nine mitigating circumstances.

The importance of evidence showing mitigating circumstances cannot be overstated. "Evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background may be less culpable." *Porter v. McCollum*, 558 U.S. 30, 41 (2009) (per curiam) (cleaned up). Evidence of mitigating circumstances humanizes the defendant and allows the jury to "gauge his moral culpability." *Id.* Thus, it stands to reason that any errors regarding the jury's proper consideration of this evidence implicate the jury's ability to place the defendant's "life history on the mitigating side of the scale" and "appropriately reduce[ ] the ballast on the aggravating side of the scale." *Id.* at 42. When errors involving mitigating circumstances exist, there is a risk that absent the error, the jury "would have struck a different balance" in favor of life, instead of death. *Id.* (cleaned up).

"Where all of the evidence in a capital prosecution, if believed, tends to show that a particular mitigating circumstance does exist, the defendant is entitled to a peremptory instruction on that circumstance." *State v. Gay*, 334 N.C. 467, 492 (1993) (cleaned up). The trial court is only permitted not to give the requested instruction if the evidence is controverted or obviously not credible. *See State v. McLaughlin*, 341 N.C. 426, 449 (1995). Giving the peremptory instruction does not mean a jury is required to find that a mitigating circumstance exists. *Gay*, 334 N.C. at 492. Juries are free to reject a mitigating circumstance if they find the supporting evidence unconvincing or, for non-statutory mitigating circumstances like those proffered by Gillard, because they find the circumstance does not have mitigating value. *See id.*

Still, a peremptory instruction in a capital sentencing hearing serves an important purpose: it limits the sentencer's discretion by eliminating the potential that the jury will reject the mitigating circumstance on the erroneous basis that not enough evidence was offered to support that circumstance. This requirement is consistent with the Eighth Amendment, which requires a sentencer's discretion to be directed and limited to "minimize the risk of wholly arbitrary and capricious action." *Gregg*, 428 U.S. at 189. Thus, when a peremptory instruction is requested and the "defendant is otherwise entitled to it, it will be error for the trial judge not to give a peremptory instruction." *Gay*, 334 N.C. at 493 (cleaned up).

Here, Gillard presented "uncontroverted" and credible evidence to support three of the eight mitigating circumstances for which the court

failed to give a peremptory instruction. *See id.*; *McLaughlin*, 341 N.C. at 499. Those circumstances were: (1) that "Seaga Gillard's home environment made it difficult for him to succeed in school"; (2) that "Seaga Gillard's childhood asthma prevented him from participating in the same physical activities and sports as his younger brother"; and (3) that "Seaga Gillard suffers from other specified trauma and stressor related disorder."

A. "Seaga Gillard's home environment made it difficult for him to succeed in school."

There was uncontroverted and credible evidence that Gillard's "home environment made it difficult for him to succeed in school." Dr. Amy James, who testified for the defense, identified two factors present in Gillard's life that can make it difficult for a child to succeed in school. These factors were poverty and lack of a strong parental figure.

All the evidence in Gillard's case showed that he grew up in poverty and that he sometimes could not afford socks or lunch. Evidence also showed that Gillard's parents were not a consistent part of his home environment. Specifically, Gillard's mother moved away when he was "five or six years old" and was largely absent during his formative years. This left him with no parental figure because his father was not present in his life at all. After his mother left, Gillard did not have a consistent place to live. He also skipped school to get money to buy food. Gillard ultimately missed a lot of school.

Similarly, all evidence showed that Gillard's home environment made it difficult for him to succeed when he was in school. This was established by Dr. James's testimony in which she stated that a focus on "educational achievement becomes more difficult" when children do not have access to healthy nutrition. Namely because children who lack access to healthy foods exhibit decreased impulse and emotional control, which can manifest as "acting up in school."

Dr. James also testified that not having a strong parental figure can lead to similar problems. When a child lives in poverty and a parent is not present, there is a "potential to have the problems magnified." Dr. James explained that poverty contributes to problems with academic success because "[i]t's hard to focus on school when you're hungry" and "[i]f you don't have the financial means to purchase the books required for class or . . . the socks that are required for the uniform, it makes it difficult to attend [school] and participate fully." In addition, Dr. James noted that if a child does not "have a strong person guiding [them] towards [academic success], it makes it easier to skip school." Comments from Gillard's school teacher paralleled these concerns. She

stated that Gillard's home environment made it difficult for him to succeed academically because "it affects your concentration," specifically because "[i]f you are hungry, then you can't hear what I'm saying, and if you didn't sleep well last night, how can you concentrate?"

When objecting to a peremptory instruction on this mitigating circumstance, the State did not dispute the evidence or its credibility. Rather, the State's objection was based on there being evidence of problems outside of Gillard's home environment that may have affected Gillard's performance in school. It was on this basis that the trial court determined a peremptory instruction was not warranted. This was error.

According to our caselaw, "[w]here all of the evidence in a capital prosecution, if believed, tends to show that a particular mitigating circumstance does exist, the defendant is entitled to a peremptory instruction on that circumstance." *Gay*, 334 N.C. at 492 (cleaned up). Here, Dr. James's testimony established that Gillard's home environment, specifically evidence of poverty and the lack of a strong parental figure, made it difficult for Gillard to succeed in school. This evidence was further substantiated by testimony from Gillard's teacher who explained how the two factors identified by Dr. James manifested as difficulty concentrating at school.

Whether there is evidence of other factors that also may have made it difficult for Gillard to succeed in school is unrelated to whether a peremptory instruction should be given. Instead, what matters is that all of the evidence about Gillard's home environment, if believed, tends to show that his home environment made it difficult for him to succeed in school. *See id.* Accordingly, a peremptory instruction should have been given on this mitigating circumstance.

B. "Seaga Gillard's childhood asthma prevented him from participating in the same physical activities and sports as his younger brother."

The evidence presented on this mitigating circumstance showed that Gillard's younger brother played soccer very well, both in school and on a traveling team. As a result, Gillard's younger brother received a soccer scholarship. However, Gillard was not able to play sports because he had asthma. Gillard's friend testified that he had previously witnessed Gillard have an asthma attack while playing "football" (soccer).

Although the State did not initially object to a peremptory instruction on this mitigating circumstance, it later objected and asked that the word "sometimes" be added, such that the mitigating circumstance

would read: "Seaga Gillard's childhood asthma *sometimes* prevented him from participating in the same physical activities and sports as his younger brother." In making this request, the State reasoned that "we heard testimony that he was out playing football." But the only testimony stating that Gillard played soccer was the testimony from the friend who saw Gillard have an asthma attack once while participating in the sport. The State did not dispute the credibility of this evidence. Ultimately the court left out the "sometimes" qualifier but demoted the circumstance to a non-peremptory instruction. This demotion was error.

Pursuant to our precedent, because "all of the evidence[,] . . . if believed, tend[ed] to show that [this] particular mitigating circumstance does exist," here that Gillard's asthma prevented him from participating in sports like his brother who did not have asthma, Gillard was "entitled to a peremptory instruction on that circumstance." *See Gay*, 334 N.C. at 492 (cleaned up).

C. "Seaga Gillard suffers from other specified trauma and stressor related disorder."

Testimony from Dr. James established that she had diagnosed Gillard with "other specified trauma and stressor related disorder." This disorder is different from PTSD because while PTSD requires "an identifiable stress or trauma or stressors and traumas" which are "the etiology or the cause" of the person's symptoms, other specified trauma and stressor related disorder only requires that the clinician "know that the cause of the problem is [a] stressor and trauma."

Gillard's diagnosis was related to a fear of death from his asthma, having experienced a serious injury, and "a disruption in attachment." Dr. James based her diagnosis on the following symptoms: Gillard's nightmares and "distressing dreams"; his avoidance talking about "matters that caused [his] trauma"; "[d]ifficulty remembering aspects of the trauma"; his "[i]rritable behavior and angry outbursts"; his display of "[r]eckless and self-destructive behavior, hypervigilance, [and his feelings of] being on edge"; and problems with concentration and sleep. Dr. James also testified that Gillard had previously been diagnosed with another mental health disorder related to his nightmares.

On cross examination, the State elicited testimony about a March 2012 record from the Ohio Department of Rehabilitation and Correction, which had a box checked denying "any kind of mental health problems or depression or anything." The report itself was not introduced into evidence and no other mental health experts testified at Gillard's trial or during sentencing.

Initially, the State did not object to a peremptory instruction on this mitigating circumstance. However, it later withdrew its consent to a peremptory for this mitigating circumstance. The State's reason for this seems to be based on the fact that the jury was not required to believe Dr. James's testimony. The trial court agreed with the State and denied the peremptory. But that concern is beside the point, because a jury is never required to believe the evidence when a peremptory instruction is given. *See Gay*, 334 N.C. at 492 (providing that jurors can reject a mitigating circumstance if they determine "the supporting evidence was not convincing" or if the non-statutory factor is not mitigating). In fact, this rationale skips the peremptory instruction analysis altogether. The jury's determination of whether to accept the evidence does not become a consideration until after the court rules on whether to give the peremptory instruction. This two-step process is no different for factors supported by expert witnesses, whose credibility and persuasive value are equally subject to jury scrutiny. *See* N.C.P.I.—Crim. 104.94 (instructing the jury in pattern instructions for expert witnesses that "you are not bound by" the opinion of an expert witness and that the expert's "training, qualifications, and experience," reasons given for their opinion, and the opinion's reasonableness bear on the testimony's credibility). Notably, the State made no objection to Dr. James's credibility when withdrawing its consent to the peremptory, nor was her testimony controverted by a single box checked in an extra-record document.[14]

Instead, by accepting the State's inapposite objection, the trial court failed to conduct the necessary inquiry and ask whether "all of the evidence[,] . . . if believed, tends to show that [this] mitigating circumstance does exist." *Gay*, 334 N.C. at 492. The answer to this question is "yes," and the trial court's failure to give a peremptory instruction on this mitigating circumstance was error.

VII. The Trial Court's Admission of Keyona T.'s Identification

On appeal from the denial of a motion to suppress a witness's identification, this Court must 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 (2019) (quoting *State v. Biber*, 365 N.C. 162, 167–68 (2011)). The conclusions of law are reviewed de novo. *Id.*

14. I do not read our caselaw to state as a per se rule that experts retained for trial or sentencing can never be "manifestly credible." *Cf. State v. Bishop*, 343 N.C. 518, 557 (1996). Instead, courts only review an expert's testimony for minimal credibility in light of the facts and circumstances before granting a peremptory, and then let the jury decide whether it is persuasive, consistent with *Gay*.

Traditionally, juries, not judges, determine the reliability of evidence. *Id.* at 146 (citing *Perry v. New Hampshire*, 565 U.S. 228, 245 (2012)). But "due process considerations do place limitations upon the admission of eyewitness identification evidence obtained as the result of impermissible official conduct." *Id.* Accordingly, when a due process claim is raised regarding an identification procedure, the reviewing court must utilize a two-step test to determine "whether the identification procedure was so suggestive as to create a substantial likelihood of irreparable misidentification." *Id.* (quoting *Fowler*, 353 N.C. at 617). Step one asks "whether the identification procedures were impermissibly suggestive." *Id.* (quoting *Fowler*, 353 N.C. at 617). If the answer to this question is "yes," then the reviewing court proceeds to step two and asks "whether the procedures create a substantial likelihood of irreparable misidentification." *Id.* (quoting *Fowler*, 353 N.C. at 617).

In assessing whether the identification procedures used created a substantial likelihood of irreparable misidentification, a reviewing court must also ask whether the in-court identification "has an origin independent of the invalid pretrial procedure." *Id.* (quoting *State v. Bundridge*, 294 N.C. 45, 56 (1978)). If so, the in-court identification testimony can still be admissible, despite the witness being subjected to impermissibly suggestive identification procedures, because, in those cases, it cannot be said that the procedures used created a substantial likelihood of irreparable misidentification. *Id.* (citing *Bundridge*, 294 N.C. at 56).

Reliability of the identification "is the linchpin" of this evaluation, and "[w]here the indicators of a witness'[s] ability to make an accurate identification are outweighed by the corrupting effect of law enforcement suggestion, the identification should be suppressed." *Perry*, 565 U.S. at 239 (cleaned up).

The in-court identification at issue here is Keyona T.'s identification of Gillard at the sentencing hearing. The pertinent facts showed that Keyona T. had been assaulted with three others at a Motel 6 in Durham by two men on 16 April 2016. While the incident was reported to police, no suspects were identified, and Keyona T. was not shown a photo lineup at the time of her attack. Moreover, the only identifying information Keyona T. provided to police about her attackers was that one of the men who attacked her had "an island accent."[15]

15. While Detective Gibney testified to a "general description of the suspects," which was included in the Durham Police Department's report, Gibney also testified that he did not know which of the five witnesses at the scene gave police this description.

In December 2018, after the Holland and Garvey murders, Keyona T. was contacted by Detective Gibney from the Raleigh Police Department. Gibney told Keyona T. that a mother and father had been killed, that the woman had been pregnant, and that these murders might be related to Keyona T.'s attack. Gibney also shared that property from one of the people Keyona T. had been assaulted with in 2016 was found in the car of one of the people charged with Holland's and Garvey's murders. Gibney even gave her the name of the person charged in the murder.

The information Gibney provided led Keyona T. to run a Google search for Holland and Garvey's case, which yielded a photo of Gillard. The photo Keyona T. found on the internet showed the way Gillard looked in 2018, not in 2016 at the time of Keyona T.'s attack. Keyona T. stated that she recognized Gillard because she saw a "familiar face." As mentioned above, at the time of her attack, the only identifying information Keyona T. could provide was that one of the men who attacked her had an island accent. Additionally, her 2018 identification of Gillard did not take place until two-and-a-half years after her attack, and this identification occurred only after she had been provided with information that the person charged with Holland's and Garvey's murders may have been the person who attacked her.

In her testimony, Keyona T. referred to her attacker as "Seaga" and testified that although she did not know Gillard, she had "read the article [on the internet] and . . . knew it was him." Keyona T. also stated, "I didn't know him at all, but in connection to when I spoke to [law enforcement] . . . that was something that I heard." Over objection, Keyona T. testified to the internet research she had conducted and her findings, including Gillard's arrest photograph and photographs of Gillard from 2018.

The defense moved to suppress the identification arguing there was government action, which tainted the identification procedure, and that the identification was unreliable. Furthermore, the defense argued that allowing Keyona T.'s identification violated Gillard's constitutional rights under both the United States Constitution and the North Carolina Constitution. While the trial court acknowledged that the procedures employed could be suggestive, it ruled against Gillard because it found no government action in Keyona T. having viewed Gillard's photograph online. The trial court also determined that Keyona T. had a "significant opportunity" to view the perpetrator of the April 2016 attack, that her identification of Gillard was "relatively certain," and that the reliability of Keyona T.'s identification was "bolstered" by her testimony that her attacker had an island accent.[16]

16. It is unclear how this would have "bolstered" the reliability of Keyona T.'s identification since Keyona T.'s attacker's accent played no part in her photo or in-court identification of Gillard. Neither identification involved hearing Gillard speak.

In *Malone*, this Court determined that the identification procedures used in that case were impermissibly suggestive. 373 N.C. at 148–49. To reach this conclusion, the Court explained that "single-suspect identification procedures clearly convey the suggestion to the witness that the one presented is believed guilty by the police." *Id.* at 148 (cleaned up). There, the witnesses had been shown a photograph and video of the defendant, and although the circumstances of this case may differ, the logic underpinning *Malone* is instructive here. Namely that by being subjected to a single-suspect identification procedure, the witnesses were "effectively told" they were viewing photos of the men police believed responsible for the shooting. *Id.* Here, the information Gibney provided, including Gillard's name, led Keyona T. to find a photo of Gillard on the internet. By providing Gillard's name and that in connection with the Holland and Garvey investigation police had located the belongings of someone with whom Keyona T. had been assaulted, Gibney effectively said, "We think the man who attacked Holland and Garvey also attacked you." *See id.* This was impermissible.

Moreover, in *Malone*, this Court concluded that the identification procedures used did not give rise to a substantial likelihood of irreparable misidentification because the in-court identification in question was of independent origin and sufficiently reliable. *Id.* at 149. There, this Court reviewed five factors for each witness that had been subjected to the impermissibly suggestive identification procedure: "the opportunity of the witness to view the defendant at the time of the crime, the witness's degree of attention, the accuracy of any prior description of the defendant, the level of certainty demonstrated by the witness at the time of the confrontation, and the time between the crime and the confrontation." *Id.* (citing *State v. Pigott*, 320 N.C. 96, 99–100 (1987)). This assessment requires the trial court to make findings of fact, because "[w]hether there is a substantial likelihood of misidentification depends upon the totality of the circumstances." *Id.* at 152 (quoting *Pigott*, 320 N.C. at 99).

Here, the trial court failed to properly consider whether the information Gibney provided Keyona T. undermined the reliability of Keyona T.'s in-court identification. Namely because the impermissibly suggestive procedures—the information Gibney provided that was the basis for Keyona T.'s Google search, Gibney telling Keyona T. Gillard's name, and Gibney saying that one of Keyona T.'s friend's belongings, which had been taken during Keyona T.'s 2016 assault, had been found during the Holland and Garvey murder investigation—must be weighed against *Malone*'s five factors to determine whether a substantial risk of misidentification exists. Here, the trial court only made three determinations: (1) that Keyona T. had a significant opportunity to view her attacker during

the 2016 April attack; (2) that Keyona T.'s identification was "relatively certain"; and (3) that Keyona T.'s identification of Gillard was bolstered by her testimony that her attacker had an island accent.

However, the complete analysis as required by *Malone* shows that while the trial court did determine Keyona T.'s "degree of attention" during the 2016 attack, her testimony supports that after the attack she was unable to provide police with a physical description of her attacker. Additionally, no lineup was conducted at the time of her attack, which could have enhanced the reliability of her identification. There was also a two-and-a-half-year gap between the April 2016 incident and Keyona T.'s internet search in December 2018. These facts magnify concerns regarding the reliability of her identification.

Weighing these factors "is not an exercise employed with mathematical precision." *Malone*, 373 N.C. at 152. "Certain factors may be more important than others depending upon the nature of the impermissibly suggestive procedure as well as the particular facts of the case." *Id.* In my view, Keyona T.'s inability to provide a physical description of her attacker immediately after the attack, the fact that no lineup was conducted following the April 2016 incident, and the two-and-a-half years between Keyona T.'s attack and her identification of Gillard bear heavily on this analysis. Accordingly, I cannot "conclude that in the totality of the circumstances" the procedures in this case did not give rise to a substantial likelihood of irreparable misidentification. *See id.* at 150, 152.

Moreover, based on the actions Gibney took, I disagree with the trial court's conclusion that there was no government action. When determining whether there was government action, the question is: Is the person taking the action acting as a private citizen or as part of a governmental entity? *Lindke v. Freed*, 144 S. Ct. 756, 762 (2024). Importantly, "[c]ourts do not ordinarily pause to consider whether [claims requiring state action] appl[y] to the actions of police officers." *Id.* at 765. This was evident in *Griffin v. Maryland*, 378 U.S. 130 (1964), where the United States Supreme Court held that a security guard working at a privately owned amusement park had engaged in state action when he enforced the amusement park's policy of segregation against black protestors. *Id.* at 132–35; *see also Lindke*, 144 S. Ct. at 765 (discussing *Griffin*'s holding). This holding was predicated on the fact that the security guard had been previously deputized as a "sheriff" in the county and had the same power and authority as any other deputy sheriff. *Griffin*, 378 U.S. at 132, 132 n.1. Here, there is no question that Detective Gibney was acting as a member of the Raleigh Police Department at the time he provided

Keyona T. with the information that formed the basis of the impermissibly suggestive identification procedure.

Police cannot provide witnesses with information they can reasonably believe will be used in a way that is inconsistent with the Constitution. While the context of *Brewer v. Williams*, 430 U.S. 387 (1977), is different from this case, the actions the officers took there are analogous to those taken by Gibney. In *Brewer*, the defendant had been charged with the murder of a ten-year-old girl and was being transported by police officers who knew the defendant was represented by counsel. *Id.* at 390, 392. Despite the constitutional impropriety of questioning a defendant who is represented and has not waived their right to counsel, one officer who knew Brewer was religious told Brewer that only he could help locate the girl's body, such that her parents could give her a proper Christian burial. *Id.* at 392–93, 397. In doing so, the officer psychologically coerced the defendant, which led the defendant to disclose the location of the child's body. *Id.* at 393, 404–05; *see also id.* at 412 (Powell, J., concurring) (discussing the detective's use of "psychological coercion that was successfully exploited").

Just like it was reasonably certain the defendant in *Brewer* would disclose the location of the child's body, it was reasonably certain that Keyona T. would take some steps, such as conducting an easily accessible Google search to see if she recognized Gillard as her attacker. This is especially true given that Gibney provided Keyona T. with Gillard's name. And just like in *Brewer*, the police in Gillard's case employed psychological tactics by telling Keyona T. they believed the man responsible for Holland's and Garvey's murders was the same person who attacked her. *See id.* at 412. They also told Keyona T. that Holland had been pregnant when she was killed, adding to the outrage of the crime. *See id.* There is no realistic attenuation here, and Gibney's actions are sufficient to show government action.

Because government action led to an impermissibly suggestive identification that was not otherwise free from a substantial likelihood of misidentification based on the totality of the circumstances, Keyona T.'s identification at the sentencing hearing was constitutional error. *See Malone*, 373 N.C. at 146, 152.

VIII. Whether Cumulative Error Denied Gillard a Fair Sentencing Hearing

Although a "trial court's errors, when considered in isolation," are insufficient to establish prejudice, "the cumulative effect of the errors" can create sufficient prejudice to deny a defendant a fair proceeding. *See*

State v. Canady, 355 N.C. 242, 246 (2002). Because "the choice to exact our state's most extreme punishment is morally infused and deeply personal," death penalty cases carry a heightened risk of cumulative error at the sentencing phase. *State v. Richardson*, 385 N.C. 101, 248 (2023) (Earls, J., concurring in part and dissenting in part) (cleaned up).

Viewed in the aggregate, the cumulative effect of the trial court's errors and the accompanying prejudice impacting Gillard's death sentence is evident, and it becomes harder to guarantee that his sentence was not imposed out of "passion, prejudice, or any arbitrary factor." *See Sanderson*, 336 N.C. at 9. In cases such as this, where cumulative error strips a defendant of a fair sentencing hearing, the proper remedy is a new sentencing hearing. *See State v. Rogers*, 355 N.C. 420, 465 (2002).

Without the cumulative effect of these errors, the jury may have chosen to sentence Gillard to life imprisonment without parole instead of death. Because the death penalty requires unanimous agreement among jurors, N.C.G.S. § 15A-2000(b), all that was needed for the jury to reach a different result was for one juror to strike a different balance in favor of life. *See Wiggins v. Smith*, 539 U.S. 510, 535 (2003); *McCollum*, 558 U.S. at 42. Gillard's sentencing jury was allowed to consider Keyona T.'s unreliable identification, improper and irrelevant victim impact statements, and repetitive photos of Holland's almost naked body surrounded by blood, which had no probative value. The trial court also failed to provide an *Enmund/Tison* instruction, *see Enmund*, 458 U.S. at 798; *Tison*, 481 U.S. at 158, gave an incomplete instruction regarding aggravating factors, and did not provide a peremptory instruction on three mitigating circumstances where all the evidence tended to show that those factors existed. Additionally, the use of unadjudicated offense evidence during the sentencing phase of Gillard's trial not only implicates Gillard's substantive and procedural due process rights but also increases the risk that his death sentence was arbitrarily and capriciously imposed. *See Godfrey*, 446 U.S. at 428.

The majority refuses to engage with the consequence of these compounding errors while it denies Gillard a new sentencing. Instead, it concludes that "there can be no cumulative error because the trial court did not err." *Supra* Part II(L). That holding contradicts this Court's precedent because it conflates "error" for purposes of cumulative error review with other, higher standards of "error" review—namely plain error and abuse of discretion.

Despite what it says, the majority's own analysis does not support that it finds the proceedings below "free from error." Rather it finds none

prejudicial enough, standing alone, to overturn Gillard's conviction or sentence. For example, it announces there was no "error" because the trial court did not abuse its discretion[17] and because the trial court is entitled to deference.[18] Elsewhere it pronounces "no error" while in reality applying a more exacting test. For example, the majority determines there was "no error" in the trial court's failure to instruct the jury that it was prohibited from using the same evidence to support more than one aggravating factor. *Supra* Part II(I). But it bases that conclusion on the existence of "substantial additional evidence" to support the varying factors, which is in actuality the plain error test.[19] Even when it concedes an "arguable error" committed by the trial court for failing to give an *Enmund/Tison* instruction, the majority again relies on the absence of a plain error to dismiss any effect this had on Gillard's claim of cumulative error.[20]

That conflation, treating all "errors" alike, defies the purpose and operation of cumulative error review as articulated in numerous precedents. "Regardless of whether any single error would have been prejudicial in isolation," this review asks whether the "cumulative effect" of the trial court's errors "deprived defendant of a fair trial." *State v. Hembree*, 368 N.C. 2, 20 (2015); *accord Richardson*, 385 N.C. at 187 (majority opinion); *Canady*, 355 N.C. at 246; *State v. Wilkerson*, 363 N.C. 382, 426 (2009); *Thompson*, 359 N.C. at 106. By summarily concluding it found "no errors" despite the varied, demanding tests underlying its analysis, the majority breaks from that precedent. That is unfortunate. If the majority wishes to overrule and discard such bedrock law, it should do so explicitly and explain its rationale for doing so.

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17. *See supra* Part II(A)(2) (concluding no abuse of discretion in the Rule 403 balancing for the Rule 404(b) evidence by Bessie A. and Rachel B. admitted at trial); Part (II)(B)(2) (declining to review for plain error whether the trial court abused its discretion under Rule 403 in admitting Kara L.'s testimony of the prior firearm assault); Part II(D) (no abuse of discretion in decision to admit inflammatory photos).

18. *See supra* Part II(C)(2)(a) (concluding no "error" in allowing testimony on Keyona T.'s and Keyana M.'s abusive backgrounds unrelated to Gillard at sentencing because the trial court is entitled to "considerable leeway").

19. *See supra* Part II(I) (noting that a failure to give this instruction "does not rise to the level of plain error . . . [when there is] *substantial separate evidence* supporting each aggravating circumstance" (emphasis added) (quoting *State v. Conaway*, 339 N.C. 487, 531 (1995))).

20. *See supra* Part II(N) n. 8 ("The only arguable error committed by the trial court concerns the *Enmund-Tison* instruction. As we have discussed above, there can be no cumulative error."); Part II(H) ("Therefore, even if we assume that the trial court erred, defendant has not demonstrated plain error because a rational juror could find that defendant was not merely a minor participant in the crimes detailed herein.").

Finally, the Court's insistence on finding the proceedings below "free from error" has the further consequence of subtly changing the underlying applicable law. For example, as discussed in Part II(D) of this opinion, the majority appears to expand the definition of general, introductory testimony to include testimony that is unfairly prejudicial so long as it is sufficiently framed as "context." As discussed in Part VI and footnote thirteen of this opinion, the majority appears to expand substantially our precedent on what it means that a defendant received the "substance" of a requested instruction. That may limit future defendants' rights to receive jury instructions to which they are entitled. While purporting not to reach cumulative error review since it found no error, the majority injects new language seemingly aimed at amplifying a defendant's burden in a cumulative error challenge: it stresses that there must be "multiple significant errors" for a defendant to meet "the high bar." It does not explain what distinguishes a "significant" error from a "prejudicial" one. These substantive changes would have the effect of granting further leeway to State prosecutors while undermining meaningful appellate review of criminal convictions. That is especially unfortunate for our capital sentencing system, where appellate review "serves as a check against the random or arbitrary imposition of the death penalty." *See Gregg*, 428 U.S. at 206.

IX. Conclusion

I agree with the majority's judgment affirming Gillard's convictions for the first-degree murders of Dwayne Garvey and April Holland. But because Gillard's trial and sentencing were replete with errors, which when taken together denied Gillard a fair sentencing hearing, I dissent from the part of the majority opinion upholding Gillard's death sentence and would remand this case to the trial court for a new sentencing hearing.

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

STATE v. WILKINS

[386 N.C. 923 (2024)]

STATE OF NORTH CAROLINA
v.
JAMEY LAMONT WILKINS

No. 44A23

Filed 13 December 2024

Appeal and Error—preservation of issues—criminal defendant's right to competency hearing—statutory—waiver

In a prosecution for multiple charges arising from defendant's involvement in a scheme to throw footballs containing illegal drugs into a prison yard, where a competency evaluation was ordered for defendant but he posted bond and was released approximately two weeks later without having been evaluated, defendant waived his statutory right to a competency hearing under N.C.G.S. § 15A-1002 by failing—over the course of several years between entry of the evaluation order and his conviction—to assert the issue at trial or beforehand by, for example, remaining in pretrial custody for the evaluation, moving to amend the evaluation order in light of his release, or checking himself into a hospital for the ordered evaluation after his pretrial release. Further, nothing in the record since entry of the evaluation order suggested any competency concerns, defendant repeatedly represented himself as competent at trial, and defendant specifically disclaimed any constitutional competency challenge on appeal.

Justice EARLS dissenting.

Justice RIGGS joins in this dissenting opinion.

Appeal pursuant to N.C.G.S. § 7A-30(2) (2023) from the decision of a divided panel of the Court of Appeals, 287 N.C. App. 343 (2022), finding no error in a judgment entered on 29 July 2021 by Judge Edwin G. Wilson Jr. in Superior Court, Caswell County. Heard in the Supreme Court on 25 September 2024.

Joshua H. Stein, Attorney General, by Keith T. Clayton, Special Deputy Attorney General, for the State-appellee.

Glenn Gerding, Appellate Defender, by Wyatt Orsbon, Assistant Appellate Defender, for defendant-appellant.

NEWBY, Chief Justice.

In this case we decide whether defendant waived his statutory right to a competency hearing when he failed to assert the right at trial. The statutory right, which this Court has considered waivable for nearly half a century, is different from the nonwaivable right to a competency hearing under the Federal Constitution. *See*, *e.g.*, *State v. Young*, 291 N.C. 562, 566, 231 S.E.2d 577, 580 (1977). Defendant concedes that his appeal is based solely on the statutory right and that he did not raise the issue of competency at trial despite ample opportunity to do so. We therefore hold that defendant waived his statutory right to a competency hearing and affirm the decision of the Court of Appeals.

On 11 February 2018, deputies with the Caswell County Sheriff's Office stopped an SUV upon suspicion that its occupants had thrown contraband over the walls of a nearby prison yard. The deputies ordered both the driver and the passenger, defendant, to step out of the SUV. The driver consented to a search of the vehicle, which revealed two footballs that had been split open, filled with drugs, and duct-taped back together. During the stop, defendant became "irate" with the deputies for searching the vehicle and with the driver for consenting to the search. Defendant was arrested and charged with several offenses, including possession with intent to sell or distribute the seized drugs, attempting to provide contraband to an inmate, and habitual felon status. He was detained at the Caswell County Jail while awaiting trial.

After about three weeks in custody, defendant was involved in an altercation at the jail. A detention officer reported defendant for approaching him with clenched fists and threatening "to whip [his] a[--]." Defendant was charged with assaulting a government employee and communicating threats.

Ten days after the incident at the jail, defendant's court-appointed counsel filed an unopposed motion questioning defendant's competency to stand trial. The motion, which counsel filed at defendant's request, stated that defendant believed he was "losing his grip on reality." Counsel referenced defendant's "odd behavior while in custody" and noted that defendant experienced rapid mood swings, spoke to him in elevated tones, and "[did] not completely comprehend his situation." No record evidence suggests that defendant suffered from mental health issues before or after these events.

At a hearing on 15 March 2018—the same day defendant's counsel filed his motion—the trial court granted defendant's request to have his

competency evaluated. Because defendant remained in custody, the trial court noted that he would need transportation to and from the evaluation.

That same day, the trial court signed a form ordering a medical evaluation of defendant's competency and designating Central Regional Hospital in Butner as the evaluating facility. Paragraph 6 of the form order provided two options for defendant's transportation, each of which was listed next to a blank box for marking the appropriate selection:

> a. The Sheriff is Ordered to transport the defendant and all relevant documents to the Certified Local Forensic Evaluator designated by the Local Management Entity and return the defendant afterwards.
>
> b. The defendant shall present himself/herself to the Certified Local Forensic Evaluator designated by the Local Management Entity for evaluation.

Because defendant was still in custody, the trial court selected the first option.

Following the entry of the order, defendant continued to threaten the safety of officers, other inmates, and himself. At this point, defendant had not posted bond. Accordingly, on 20 March 2018, the trial court ordered the sheriff's office to transport defendant to Central Prison in Raleigh for safekeeping. The sheriff's office completed the transfer the next day.

On 28 March 2018—one week after the transfer to Central Prison and roughly two weeks after the trial court ordered a competency evaluation—defendant posted bond and was released from custody. Defendant did not undergo a competency evaluation prior to his release, nor did he seek one after.

Almost a year later, on 19 March 2019, the trial court held a hearing on the State's proposed plea offer. Defendant's counsel, the same court-appointed attorney who filed the motion for a competency evaluation, rejected the State's offer and entered a not guilty plea on defendant's behalf. Counsel did not mention the unfulfilled evaluation order, address defendant's mental health, or otherwise acknowledge the competency issue. The State did not raise the issue either.

The State subsequently offered another plea deal. On 13 May 2019, two months after the first hearing, the trial court held a hearing on the new offer. At the second hearing, defendant's counsel again rejected the deal without any mention of the outstanding evaluation order, defendant's competency, or defendant's mental health in general. Defendant's

counsel instead seemed focused on securing the return of defendant's two cell phones, which the State had seized as evidence.

Defendant's trial began on 28 July 2021, nearly three-and-a-half years since his arrest and more than two years after the second hearing. Nothing in the record indicates that defendant took any steps to seek a competency evaluation or address his mental health whatsoever over his three-plus years out on bond. He did, however, make an independent choice to replace his court-appointed counsel with a team of private attorneys about two months before the trial started.

Over the course of trial, neither defendant nor his new attorneys mentioned defendant's competency. When the State rested its case-in-chief, defendant moved to dismiss the charges for lack of sufficient evidence, again making no reference to competency. The trial court denied the motion. Defendant presented no evidence of his own and chose not to testify. In confirming that choice, the trial court and defendant had the following exchange:

> THE COURT: Stand up just a minute, Mr. Wilkins. So this is your time to testify if you'd like. You need to talk to your attorney and think about that. . . . Do you have any questions about your decision to testify or not testify?
>
> THE DEFENDANT: No, sir. I made the decision.
>
> THE COURT: You're firm in your decision not to testify?
>
> THE DEFENDANT: I made a decision. I thought about it before I made it.
>
> THE COURT: And that's what you'd like to do[,] is not testify?
>
> THE DEFENDANT: No, sir, I don't want to testify.

Once again, neither defendant nor his counsel raised the question of defendant's competency.

The jury found defendant guilty on four of seven charges. Following the verdict, defendant stipulated to being a habitual felon in exchange for a reduced sentence, again confirming to the trial court that he had consulted with counsel and understood the charges, his rights, his possible defenses, and the proceedings before him.

Defendant acted similarly during sentencing. The trial court noted that defendant had "carr[ied] [him]self in a pleasant way" at trial, citing his good conduct as one reason for imposing the minimum sentence of fifty-one months. The trial court expressed optimism that defendant "w[ould] take advantage [of opportunities in prison] and . . . be out in four years." In response, defendant stated, "I hope to be out next year[,] but I understand, sir, and I appreciate you."

Defendant appealed to the Court of Appeals. He argued that the trial court's original competency evaluation order prevented him from being tried without first determining his competency under section 15A-1002 of the North Carolina General Statutes. *See generally* N.C.G.S. § 15A-1002(a)–(b)(1) (2023) (governing a criminal defendant's right to a competency hearing). The majority below rejected that argument, relying on this Court's decisions in *Young* and its progeny. *State v. Wilkins*, 287 N.C. App. 343, 348, 882 S.E.2d 454, 457 (2022); *see Young*, 291 N.C. at 566, 231 S.E.2d at 580 (holding that a criminal defendant could waive his statutory right to a competency hearing).

The dissent, however, agreed with defendant that *Young* and its progeny were distinguishable from his case. *Wilkins*, 287 N.C. App. at 356, 882 S.E.2d at 462–63 (Inman, J., dissenting). Instead, the dissent looked in part to this Court's decision in *State v. Sides*, 376 N.C. 449, 852 S.E.2d 170 (2020), in which this Court held that a trial court's failure to conduct a competency hearing for a potentially incompetent defendant sua sponte violated her constitutional right and required a new trial. *Wilkins*, 287 N.C. App. at 355–56, 882 S.E.2d at 462 (citing *Sides*, 376 N.C. at 466, 852 S.E.2d at 182). Defendant appealed to this Court based on the dissent.[1]

The issue presented is whether defendant waived his statutory right to a competency hearing.[2] Section 15A-1002 of the North Carolina General Statutes governs that right. It provides, in relevant part:

> (a) The question of the capacity of the defendant to proceed may be raised at any time on motion by the prosecutor, the defendant, the defense counsel,

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1. *See* N.C.G.S. § 7A-30(2) (2023), *repealed by* Current Operations Appropriations Act of 2023, S.L. 2023-134, § 16.21(d). The repeal of subsection 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).

2. Defendant disclaimed a constitutional challenge at the Court of Appeals, *Wilkins*, 287 N.C. App. at 346, 882 S.E.2d at 456, and did so again before this Court. Therefore, our review only considers whether defendant waived his statutory right.

> or the court. The motion shall detail the specific conduct that leads the moving party to question the defendant's capacity to proceed.
>
> (b) (1) When the capacity of the defendant to proceed is questioned, the court shall hold a hearing to determine the defendant's capacity to proceed. If an examination is ordered[,] . . . the hearing shall be held after the examination.

N.C.G.S. § 15A-1002(a)–(b)(1). We review questions of law de novo, considering the matter anew and freely substituting our own judgment for those of the lower courts. *State v. Williams*, 362 N.C. 628, 632–33, 669 S.E.2d 290, 294 (2008).

As this Court explained in *Young*, a defendant may generally waive a statutory right through "express consent, failure to assert it in apt time, or . . . conduct inconsistent with a purpose to insist upon it." *Young*, 291 N.C. at 567, 231 S.E.2d at 580 (quoting *State v. Gaiten*, 277 N.C. 236, 239, 176 S.E.2d 778, 781 (1970)). Ordinarily, a defendant waives a right if he fails to assert it to the trial court. *Id.* The record must show affirmative evidence of the defendant's assertion. *Id.*

In the instant case, defendant waived his statutory right to a competency hearing. He had several chances—over several years, with several attorneys, and in several procedural contexts—to assert the right, but never did so. Rather than remain in pretrial custody and wait for a competency evaluation, he instead chose to post bond and leave.[3] Even while defendant was out on bond, he and his counsel had several options at their disposal. For example, counsel could have moved to modify the competency order, or defendant could have checked himself into the hospital. But they did not take any of these actions.

Further, defendant repeatedly presented himself as competent at trial by making affirmative statements to that effect in the presence of counsel. Defendant stated, among other things, that he could hear and understand the trial court, was not under the influence of alcohol

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3. Of course, defendant had a right to leave pretrial custody once he satisfied the trial court's conditions of release. *See* N.C.G.S. § 15A-537(a) (2023) ("Following any authorization of release of any person [in pretrial custody], . . . any judicial official must effect the release of that person upon satisfying himself that the conditions of release have been met."). But as the State points out, defendant's decision to leave cuts both ways: once he posted bond, the State could not hold him in custody against his will. Upon choosing to leave custody, defendant became solely responsible for pursuing his competency evaluation.

or drugs, and thought about his trial decisions before making them. He assured the trial court that he had spoken with counsel and understood the charges, his rights, and his possible defenses. Nothing in the record indicates that defendant had any mental health issues before or after his pretrial custody in 2018, and nothing supports concluding that he was incompetent at the time of trial in 2021. *See State v. Allen*, 377 N.C. 169, 181, 856 S.E.2d 494, 504 (2021) (holding that a defendant is competent to stand trial if he is competent at the time of trial itself). To the contrary, the record affirmatively demonstrates that defendant's hearing, which occurred just one month after his arrest, was the only time his mental health was ever in controversy. For the next three-plus years, defendant interacted with his multiple lawyers and several judges. Not one questioned his competency.

These facts clearly indicate that defendant waived his statutory right to a competency hearing by "fail[ing] to assert it in apt time" and otherwise acting "inconsistent with a purpose to insist upon it." *See Young*, 291 N.C. at 567, 231 S.E.2d at 580. Rather than contest his competency with the trial court, defendant instead proceeded with trial and waited for a jury verdict. Only after the jury ruled against him did defendant raise the issue on appeal. As the majority at the Court of Appeals observed:

> If [defendant]'s counsel believed the competency evaluation was necessary[,] . . . there was ample opportunity to raise the issue and have the trial court act on it. By saving this argument for appeal, [defendant] was able to await the jury's verdict and then, after the verdict was unsatisfactory, seek a second bite at the apple by arguing for a new trial.

Wilkins, 287 N.C. App. at 348, 882 S.E.2d at 458. Defendant's conduct squarely indicated that he was competent and ready to move forward with trial. Thus, he waived his statutory right to a competency hearing.

Our precedent over the last half century confirms that defendant waived his statutory right. For example, the trial court in *Young* ordered the defendant to undergo a competency evaluation, the competency hearing was not held, and the defendant never raised the issue at trial. *Young*, 291 N.C. at 566–67, 231 S.E.2d at 580. This Court concluded that the defendant waived his statutory right. *Id.* at 568, 231 S.E.2d at 581. Similarly, this Court held in *State v. King* that the defendant had waived his statutory right to a competency hearing when his counsel discussed competency at a pretrial hearing but did not pursue the issue beyond

that initial mention. *State v. King*, 353 N.C. 457, 466, 546 S.E.2d 575, 584–85 (2001). Other cases citing *Young* reached similar conclusions. *See, e.g.*, *State v. Badgett*, 361 N.C. 234, 259, 644 S.E.2d 206, 221 (2007); *State v. Dollar*, 292 N.C. 344, 350–51, 233 S.E.2d 521, 525 (1977).

Like in *Young*, the trial court granted defendant's motion for a competency hearing, but the hearing was never held. Like in *King*, defendant's competency was briefly questioned before trial but subsequently abandoned. And like both of those cases, defendant waited until appeal to argue that the trial court violated his statutory right. The result is the same: defendant waived his right when he failed to assert it at trial.

Defendant argues that this Court effectively overruled the *Young* line of cases in 2020 when it issued the *Sides* decision. But defendant's reliance on *Sides* is misplaced. The Court there explicitly limited its holding to the right to a competency hearing under the Federal Constitution, making only passing references to the statutory right protected by section 15A-1002. *See Sides*, 376 N.C. at 457–58, 852 S.E.2d at 176. As the Court explained, it "need not resolve the parties' dispute regarding the [statutory] issue" because "[the] defendant possessed a constitutional due process right."[4] *Id.*

This distinction is important because the constitutional and statutory rights to a competency hearing are not equivalent. Though defendants can generally waive constitutional rights in the same way as statutory rights, *see Young*, 291 N.C. at 567, 231 S.E.2d at 580, the Supreme Court of the United States has explained that the constitutional right to a competency hearing cannot be waived, *see, e.g.*, *Pate v. Robinson*, 383 U.S. 375, 384, 86 S. Ct. 836, 841 (1966). But for the constitutional right to apply, there must be substantial evidence of the defendant's incompetency. *See Young*, 291 N.C. at 568, 231 S.E.2d at 581 (citing *Crenshaw v. Wolff*, 504 F.2d 377, 378 (8th Cir. 1974)). In contrast, the statutory right under section 15A-1002 does not specify an evidentiary requirement. *See* N.C.G.S. § 15A-1002.

In recognition that the two sources of the right are governed by different criteria, our caselaw has carefully delineated between the statutory and constitutional analyses. *See, e.g.*, *Badgett*, 361 N.C. at 259–60,

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4. The dissent at the Court of Appeals in this case acknowledged the limited holding in *Sides* as well. *See Wilkins*, 287 N.C. App. at 355, 882 S.E.2d at 462 (Inman, J., dissenting) ("[O]ur Supreme Court has most recently erred on the side of vindicating a defendant's right to a competency determination—albeit on constitutional rather than statutory grounds . . . .").

644 S.E.2d at 221 (holding first that the defendant waived his statutory right because he never raised the issue at trial, then separately concluding that his constitutional right was not violated because there was not substantial evidence of incompetency). *Sides*—a case decided on purely constitutional grounds—did not overrule *Young*, which addressed both the constitutional and statutory standards. Thus, *Sides* has no bearing on the entirely statutory argument defendant raises here, and *Young* continues to control. Under *Young*, defendant waived his statutory right.

Defendant waived his statutory right to a competency hearing and did not raise a constitutional challenge on appeal. The decision of the Court of Appeals is affirmed.

AFFIRMED.

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

Justice EARLS dissenting.

Because the majority faults Mr. Wilkins for the State's failure to follow its duties, I respectfully dissent. This case turns on a distinct statutory issue: the State's obligation to carry out, and the trial court's duty to oversee, a court-ordered competency evaluation. Section 15A-1002 places unmistakable obligations on the trial court and automatically preserves Mr. Wilkins's claim for appellate review. The majority's unflinching reliance on past cases misses the mark—those decisions differ in critical ways, both factually and legally, from this one. Finally, the majority improperly treats Mr. Wilkins's conduct as evidence of his competence, a circular argument that presumes the very competence that remains unresolved due to the State's failure to act. For these reasons, I dissent from this Court's judgment and would reverse the decision of the Court of Appeals.

I. The Statutory Protections for Mentally Ill Defendants

The General Assembly has instructed the courts of this state to take special steps to protect an acutely vulnerable group of defendants—those who suffer from mental illness. Indeed, our statutes recognize that

> [n]o person may be tried, convicted, sentenced, or punished for a crime when by reason of mental illness or defect he is unable to understand the nature

> and object of the proceedings against him, to comprehend his own situation in reference to the proceedings, or to assist in his defense in a rational or reasonable manner.

N.C.G.S. § 15A-1001(a) (2023). The statutory framework for competency evaluations is as clear as it is essential. When a defendant's competence to stand trial is questioned, N.C.G.S. § 15A-1002(b)(1) directs the trial court to act. The court "shall hold a hearing to determine the defendant's capacity to proceed" or, when more evidence is necessary, order a forensic assessment. N.C.G.S. § 15A-1002(b)(1), (1a) (2023). This mandate exists for a critical reason: when capacity is disputed, a defendant's ability to meaningfully participate in their defense must be established by evidence rather than blithely assumed. A trial conducted without resolving genuine concerns about competence imperils fundamental principles of fairness. *See Cooper v. Oklahoma*, 517 U.S. 348, 354 (1996) ("Competence to stand trial is rudimentary, for upon it depends the main part of those rights deemed essential to a fair trial, including the right to effective assistance of counsel, the rights to summon, to confront, and to cross-examine witnesses, and the right to testify on one's own behalf or to remain silent without penalty for doing so." (cleaned up)).

Mr. Wilkins's case falls squarely within this statutory scheme. But the issue before this Court is more specific—and more nuanced—than the majority acknowledges. Mr. Wilkins focuses on the State's failure to comply with, and the trial court's failure to enforce, a judicial order requiring a competency evaluation. That order was not issued lightly—it was grounded in credible worries about Mr. Wilkins's capacity to stand trial.

The facts confirm that these concerns were real. While in custody, Mr. Wilkins began exhibiting conduct that alarmed both the jail staff and him. Jail employees flagged his "odd behavior" and urged that he be evaluated. Mr. Wilkins seconded those worries, telling his attorney that he was "losing his grip on reality." Defense counsel observed troubling signs, too. So troubling, in fact, that on 15 March 2018, defense counsel moved for a competency evaluation under N.C.G.S. § 15A-1002(a), outlining specific conduct that raised questions about Mr. Wilkins's capacity. Echoing others' concerns, defense counsel recounted Mr. Wilkins's rapid mood swings, elevated speech, and confusion about his circumstances.

That same day, the trial court held a hearing on the motion. At the hearing, defense counsel explained that, beyond his own observations, "[t]here's been some reports from the jail, Judge, that Mr. Wilkins has been exhibiting some odd behaviors." The State did not oppose the

motion for an evaluation. In fact, defense counsel noted that an evaluation was in everyone's interests, as it "was something that the staff at the jail ha[d] been requesting" for about a week. Based on this evidence, the trial court found that Mr. Wilkins's competence was in question and ordered an evaluation.

The trial court's order was clear and specific. It required a forensic evaluator to submit a written report with "findings and recommendations" on Mr. Wilkins's capacity to proceed. It also directed the sheriff's office to transport Mr. Wilkins to Central Regional Hospital in Butner for the evaluation and to return him to custody afterward. The court even acknowledged during the hearing that transportation was necessary because Mr. Wilkins was in jail.

But the State disregarded the court's order. The sheriff's office failed to transport Mr. Wilkins to Central Regional Hospital as directed, leaving the "Return of Service" section of the order blank. Instead, the State, acting on an ex parte order, transferred Mr. Wilkins to a "safekeeping" unit at Central Prison in Raleigh on 21 March 2018.

The trial court, meanwhile, compounded this failure. Despite statutory deadlines for completing evaluations, the court failed to follow up. It did not ask whether Mr. Wilkins had been transported, whether the evaluation had been conducted, or why the State ignored its directive. Then, on 28 March 2018, Mr. Wilkins posted bond and was released from custody—without ever receiving the court-ordered evaluation.

This sequence of events reveals the scope of the statutory failure. The State defied a direct court order. The trial court, in turn, neglected its duty to enforce compliance. As a result, Mr. Wilkins, whose competence remained in question, was denied the professional evaluation needed to determine whether he could meaningfully participate in his defense. These facts reveal a breakdown of statutory duties at every level—duties designed to protect precisely the type of defendant whose capacity to proceed is in doubt.

II. Section 15A-1002 automatically preserves Mr. Wilkins's appeal because it mandates that the trial court oversee and complete judicially ordered competency evaluations.

In its haste to discard Mr. Wilkins's appeal, the majority overlooks the distinct statutory right at issue and the trial court's unique role in enforcing it. A closer look at the statutory regime shows that Mr. Wilkins did not waive his claim because the right to a court-ordered competency evaluation is automatically preserved for appeal. As this Court has long

recognized, when "a statute is clearly mandatory, and its mandate is directed to the trial court, the statute automatically preserves statutory violations as issues for appellate review." *In re E.D.*, 372 N.C. 111, 117 (2019) (cleaned up) (quoting *State v. Hucks*, 323 N.C. 574, 579 (1988)). Our cases have identified two classes of statutory mandates: (1) laws that "require[ ] a specific act by a trial judge," or (2) laws that "leave[ ] no doubt that the legislature intended to place the responsibility on the judge presiding at the trial or at specific courtroom proceedings that the trial judge has authority to direct." *Id.* at 121 (cleaned up). Section 15A-1002 satisfies both conditions. Its plain language assigns the trial court—not the defendant—the duty to ensure that a court-ordered evaluation is completed and to resolve the competency concerns that prompted it.

The statute makes the court's obligations clear. When competence is questioned and the trial court orders an evaluation under subsections (b)(1a) or (b)(2), the court "shall" defer a competency hearing until after the evaluation is done. N.C.G.S. § 15A-1002(b)(1). These provisions are phrased in mandatory terms. If a defendant's capacity is so disputed that the trial court seeks professional input, then the court must see the evaluation through.

Section 15A-1002 reinforces the court's responsibility at every turn. Subsection (b)(1a) speaks to evaluations for defendants charged with a misdemeanor or felony, allowing the court to appoint "impartial medical experts" to "examine the defendant and return a written report describing the present state of the defendant's mental health." N.C.G.S. § 15A-1002(b)(1a). As well, the court may "call any expert so appointed to testify" at the post-evaluation competency hearing. *Id.* Felony defendants may be detained before an evaluation for up to sixty days in a state mental health facility, so long as the trial court makes a specific finding that a facility-based evaluation is more suitable than an outpatient examination under subsection (b)(1a). N.C.G.S. § 15A-1002(b)(2) (2023). Subsection (b)(4) inserts the trial court into the mechanics of the evaluation, instructing that a judge who mandates an evaluation "shall order the release of relevant confidential information to the examiner." N.C.G.S. § 15A-1002(b)(4) (2023). The same provision places control over confidential records in the trial court's hands, ensuring that the court—not the parties—determines what information examiners may access and how they may do so. *See id.*

To make sure evaluations happen promptly, the statute sets firm deadlines for when "[r]eports made to the court pursuant to this section shall be completed and provided to the court." N.C.G.S. § 15A-1002(b2) (2023). Subsection (b2) imposes timelines for filing evaluation reports

after the examination is completed: ten days for in-custody misdemeanants, twenty days for out-of-custody misdemeanants, and thirty days for felony defendants, regardless of custody. N.C.G.S. § 15A-1002(b2)(1)–(2). Subsection (d) directs that all reports "shall be forwarded to the clerk of superior court in a sealed envelope addressed to the attention of a presiding judge." N.C.G.S. § 15A-1002(d) (2023). And the contents of the report are confidential and "kept under such conditions as are directed by the court." *Id.*

When the evaluation is complete, the court must resolve the competency questions that prompted it to act. Subsection (b)(1) mandates a post-evaluation hearing, N.C.G.S. § 15A-1002(b)(1), and subsection (b1) requires the court to make findings of fact to support its determination of a defendant's capacity, N.C.G.S. § 15A-1002(b1) (2023). The legislature made clear that competency decisions belong exclusively to the court—the parties "shall not be allowed to stipulate that the defendant lacks capacity to proceed." *Id.* Section 15A-1002's provisions are unmistakably directed at the trial court and itemize the court's central role and specific duties to manage competency evaluations from start to finish.

The majority nonetheless faults Mr. Wilkins for bonding out of prison. It asserts that when he "cho[se] to leave custody," he became "solely responsible for pursuing his competency evaluation."[1] But section 15A-1002 does not key its statutory mandate to a defendant's custody status.

The statutory timeframes make this clear. Subsection (b2)(1) sets deadlines for when an evaluator must file their report with the court after examining the defendant. N.C.G.S. § 15A-1002(b2)(1). Critically, the statute accounts for custody status—it allows ten days to file when a misdemeanant defendant is in state custody but extends the deadline to twenty days when the defendant is not. *Id.* For a felony defendant, the deadline is thirty days, regardless of custody. N.C.G.S. § 15A-1002(b2)(2). These timeframes show that the legislature recognized practical challenges, like scheduling evaluations for defendants who are no longer confined. The statute thus gives courts some flexibility based on the custody status and type of charge. Yet it imposes no lesser duty on the trial court to see the process through. Custody may affect logistics—but not the court's core responsibility.

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1. This assertion rests on circular reasoning because it assumes that Mr. Wilkins was competent even though he was never evaluated. This point is addressed in more detail below, but I underscore the perverse logic of placing the burden on a person potentially suffering from mental illness to obtain a competency examination mandated by a court. In some cases, people who are mentally ill may not realize that they need treatment or understand the value of an evaluation.

Subsection (c) confirms this by authorizing temporary confinement orders while the competency issue is being resolved, allowing the trial court to ensure the process is not disrupted. N.C.G.S. § 15A-1002(c) (2023). This provision confirms that overseeing competency determinations is the court's obligation—not something that shifts based on a defendant's custody status. For if custody relieved the court of its duty, as the majority claims, subsection (c) would be unnecessary. Together, these statutory directives show that custody status does not affect the trial court's mandate to ensure the completion of the competency examinations it orders.

Section 15A-1002's comprehensive framework leaves no room for doubt: when a trial court orders a competency evaluation, it must see the process through. A defendant's release on bond does not shift that burden. The statute's timelines, its grant of authority to secure defendants temporarily, and its instructions for channeling reports to the presiding judge all reflect the legislature's intent to keep responsibility with the trial court. In short, section 15A-1002 requires "specific act[s]" by the trial court and confirms its central role and singular responsibility to oversee judicially ordered competency evaluations. *See In re E.D.*, 372 N.C. at 121. Because of that statutory mandate, the trial court's failure to secure an examination of Mr. Wilkins's competence—an examination that it ordered—was automatically preserved for appeal, and Mr. Wilkins did not forfeit his right to challenge that dereliction of duty.

III. Legally and factually, Mr. Wilkins's case differs from the precedents cited by the majority.

The majority resolves this appeal by mechanically importing the framework used in past competency cases. That black-and-white approach ignores the unique facts and distinct statutory mandate involved in Mr. Wilkins's case. Unlike *Young*, *King*, *Dollar*, and *Badgett*—cases where capacity was either never raised or where a professional examination found the defendant competent—this appeal involves a breakdown in the statutory framework and the defiance of a judicial mandate. Because the State and the trial court neglected their obligations, Mr. Wilkins's competency was never assessed, leaving the question unresolved both before and during trial. This failure separates Mr. Wilkins's case from our prior decisions in this realm and places the blame squarely on the State and the trial court.

Begin with *Young* and *Dollar*. In *Young*, the trial court ordered a competency evaluation, and the examiner deemed the defendant competent. *State v. Young*, 291 N.C. 562, 566–67 (1977). No evidence suggested

otherwise, and neither the defendant nor his counsel challenged the findings or sought a post-evaluation hearing. *Id.* at 567–68. Similarly, in *Dollar*, a court-ordered evaluation confirmed the defendant's capacity to proceed, and the defense raised no objections. *State v. Dollar*, 292 N.C. 344, 350–51 (1977). In both cases, we held that the defendants waived their right to a post-evaluation hearing by failing to contest the diagnostic findings or request further proceedings. In both cases, too, we emphasized that the completed evaluations provided professional assessments, unchallenged and uncontradicted, finding the defendants were "competent to stand trial, understood the charges and w[ere] able to cooperate with [their] attorney[s]." *See Young*, 291 N.C. at 568.

Not so here. In Mr. Wilkins's case, the trial court ordered an evaluation, but that order went unfulfilled. Unlike in *Young* or *Dollar*, the court developed no evidence on the issue of competence. Without the evaluation, no professional assessment was available to either confirm or dispute Mr. Wilkins's ability to proceed. The defense had no diagnostic finding to challenge—or accept—because no evaluation ever occurred. What happened here, unlike in *Young* and *Dollar*, was a dissolution of the statutory process by the State and court's compounded inaction.

The majority's reliance on *King* and *Badgett* fares no better. In *King*, the trial court asked defense counsel whether competence was an issue. *State v. King*, 353 N.C. 457, 466 (2001). Neither counsel nor the defendant questioned the defendant's capacity to stand trial, sought an evaluation, or asked for a competency hearing. *Id.* In *Badgett*, too, nothing in the record prompted the "prosecutors, defense counsel, defendant, or the court" to "raise[ ] the question of defendant's capacity to proceed at *any* point during the proceedings." *State v. Badgett*, 361 N.C. 234, 259 (2007) (emphasis added). Nor did the defendant or his attorney move for an evaluation or request a hearing. *Id.* In both cases, this Court found that the defendants waived the issue by failing to assert their rights. *See id.*

Again, that is not what happened here. Mr. Wilkins's lawyer filed a detailed motion, flagging serious concerns about his client's competence. Those concerns were supported by observations from jail staff. The trial court agreed that an evaluation was warranted and issued an order accordingly. Unlike in *King* and *Badgett*, Mr. Wilkins's defense counsel did not passively accept the status quo. Counsel brought the issue of competence to the court's attention and sought the necessary evidence to resolve it. The failure in this case lies with the State, which disregarded the court's directive, and with the court itself, which failed to enforce compliance.

These distinctions are crucial. In *Young* and *Dollar*, the trial courts followed through on their orders, obtaining professional evaluations that settled the issue of competence. In *King* and *Badgett*, the defendants never raised their statutory rights and thus forfeited them. But here, the system collapsed at the hands of those tasked with upholding it. The trial court recognized the need to evaluate Mr. Wilkins's capacity, ordered an examination, and then failed to ensure that its directive was carried out. The State's noncompliance with that order, coupled with the court's inaction, left Mr. Wilkins without the statutory protections meant to safeguard defendants in situations like this. The majority's comparison to other cases cannot paper over the fundamental breakdown that happened here.

IV. Inferring waiver from Mr. Wilkins's conduct puts the cart before the horse.

The majority infers waiver from Mr. Wilkins's behavior during trial, concluding that his actions "squarely indicated that he was competent and ready to move forward with trial." That conclusion rests on a circular premise. Waiver requires competence. *See State v. Harvin*, 382 N.C. 566, 585 (2022) (defining "waiver" as "an intentional relinquishment or abandonment of a known right or privilege" (cleaned up)); *State v. Sides*, 376 N.C. 449, 459 (2020) ("Logically, competency is a necessary predicate to voluntariness."). A defendant who lacks the capacity to understand the proceedings or assist in his own defense cannot knowingly relinquish a statutory right. *See id.* ("[I]t is contradictory to argue that a defendant may be incompetent, and yet knowingly or intelligently waive his right to have the court determine his capacity to stand trial." (cleaned up) (quoting *Pate v. Robinson*, 383 U.S. 375, 384 (1966))).

That is true regardless of whether competence is raised under a statutory or constitutional standard. For both types of legal interests, voluntariness is an essential ingredient to waiver. *Cf. State v. Saldierna*, 369 N.C. 401, 405–07 (2016) (examining whether "defendant knowingly and voluntarily waived" both his constitutional and statutory rights); *see also State v. Gibson*, 342 N.C. 142, 148–50 (1995) (same); *In re K.M.W.*, 376 N.C. 195, 208–10 (2020) (assessing whether the respondent-parent voluntarily waived their "statutory right to counsel for parents involved in termination proceedings").

Here, by ordering the evaluation, the trial court acknowledged doubts about Mr. Wilkins's competence—doubts that required professional assessment. Without that examination, those doubts remain unanswered. By pointing to Mr. Wilkins's conduct to prove his capacity,

the majority assigns dispositive weight to conduct that may itself be the product of incompetence. This is circular in the extreme. Much like a snake eating its own tail, inferring waiver from Mr. Wilkins's actions assumes the very competence the evaluation was supposed to determine. The majority's analysis is not just illogical; it turns section 15A-1002 on its head, allowing conduct that may well reflect incompetence to override the statutory duties to ensure a defendant's capacity to stand trial.

V. Conclusion

To conclude that Mr. Wilkins waived his right is to overlook the trial court's responsibility to enforce its own order and the State's duty to follow it. It was not Mr. Wilkins who ignored the court's directive, nor was it his responsibility to hold the State and the court to their lawful duties. The majority's reasoning effectively absolves the State and the trial court of their obligations and shifts the burden onto the very person whose competence was in question. Here, section 15A-1002's mandates are clear, and their violation is even more so—not by Mr. Wilkins, but by the State and the trial court. I respectfully dissent.

Justice RIGGS joins in this dissenting opinion.

MARTIN B. STURDIVANT, EMPLOYEE
v.
NORTH CAROLINA DEPARTMENT OF PUBLIC SAFETY, EMPLOYER,
SELF-INSURED (CCMSI, THIRD-PARTY ADMINISTRATOR)

No. 130PA23

Filed 13 December 2024

Workers' Compensation—temporary total disability payments—"total loss of wage-earning capacity"—plain language analysis—capacity for any type of work

On discretionary review of a workers' compensation case, the Supreme Court modified a Court of Appeals decision by rejecting its interpretation of the plain language of N.C.G.S. § 97-29(c)—which ends, in most cases, temporary total disability payments after 500 weeks unless an employee has sustained a "total loss of wage-earning capacity"—instead holding that the quoted portion of the provision, both as originally drafted and after subsequent

amendments that emphasized the legislature's intent, refers to the total loss of an employee's personal capacity to earn wages in any type of employment and, thus, does not share a meaning with "total disability" as that term of art is used in workers' compensation case law. However, the Court affirmed the lower appellate court's ultimate holding—which in turn affirmed the Industrial Commission's conclusions of law—that the employee, despite ongoing back pain that was sometimes severe enough to prevent him from working at all, was nevertheless capable of some part-time work and thus was subject to the cessation of temporary total disability payments after 500 weeks.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a decision of a divided panel of the Court of Appeals, 288 N.C. App. 470 (2023), affirming an opinion and award entered on 28 February 2022 by the North Carolina Industrial Commission. On 13 December 2023, the Supreme Court allowed plaintiff's conditional petition for discretionary review as to additional issues. Heard in the Supreme Court on 24 September 2024.

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Lennon Camak & Bertics, PLLC, by Michael W. Bertics; and The Harper Law Firm, PLLC, by Richard B. Harper and Joshua O. Harper, for North Carolina Advocates for Justice, amicus curiae.

Brewer Defense Group, by Joy H. Brewer and Ginny P. Lanier; and Nelson Mullins Riley & Scarborough, LLP, by Andrew Heath, for 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, amici curiae.

DIETZ, Justice.

In 2011, the General Assembly amended our workers' compensation laws with the stated aim of putting people back to work. The amendment ended an employee's temporary total disability payments after 500 weeks unless the employee had sustained a "total loss of wage-earning capacity." Protecting and Putting North Carolina Back to Work Act, S.L. 2011-287, § 10, 2011 N.C. Sess. Laws 1087, 1094.

After the Court of Appeals in this case interpreted the phrase "total loss of wage-earning capacity" in a manner inconsistent with its plain meaning, the General Assembly amended the law again to clarify that total loss of wage-earning capacity means "the complete elimination of the capacity to earn any wages." Current Operations Appropriations Act of 2023, S.L. 2023-134, § 31.3.

That clarification controls in cases going forward, but its impact on this case (and other cases pending at the time) led us to allow discretionary review. As explained below, the General Assembly's clarification was not necessary because it reflects what the statute's plain language meant all along: "total loss of wage-earning capacity" in the 2011 amendment means the total loss of the employee's personal capacity to earn wages in any type of employment. We therefore modify the Court of Appeals opinion to reject that court's erroneous statutory interpretation but otherwise affirm the court's decision.

Facts and Procedural History

The facts of plaintiff Martin Sturdivant's underlying workplace injury are not particularly relevant to the legal issues in this case. No one in this case disputes that Sturdivant is an honest, hard-working person who spent most of his adult life employed in jobs ranging from drywall laborer to poultry farm hand to industrial machine operator.

In 2007, Sturdivant took a job as a corrections officer at the North Carolina Department of Public Safety. Several years later, Sturdivant injured his back on the job. The State agreed to accept responsibility for Sturdivant's workplace injury and paid temporary total disability payments though the workers' compensation system. To this day, Sturdivant still suffers from chronic back pain and that pain becomes severe roughly one day each week.

When our State created its workers' compensation system in the 1920s, the law contained a provision limiting injured employees' temporary total disability payments to 400 weeks. *See* The North Carolina Workmen's Compensation Act, ch. 120, § 29, 1929 N.C. Pub. Laws 117, 129.

In the early 1970s, the General Assembly removed that limitation. *See* An Act to Amend the Workmen's Compensation Act Regarding the Duration of Benefits, ch. 1308, § 1, 1973 N.C. Sess. Laws (2d Sess. 1974) 609, 609. As a result, for much of the last fifty years, an employee who suffered a temporary total disability as defined in the statutes could receive benefits indefinitely.

Over time, concern grew that our state's extended disability benefits hurt the ability to attract and retain businesses in the state. As one legislator explained in committee hearings contemplating further amendments, "North Carolina hurts its ability to compete by turning our workers' comp system into a retirement system." *Workers' Compensation: Putting North Carolina Back to Work*, *Hearing on H.B. 709 Before the S. Comm. on Insurance*, 2011-2012 Sess. 338 (N.C. 2011).

Ultimately, in 2011, the General Assembly enacted a new law titled the "An Act Protecting and Putting North Carolina Back to Work by Reforming the Workers' Compensation Act." *See* S.L. 2011-287. The act amended N.C.G.S. § 97-29 to create a 500-week limit on temporary total disability benefits. *Id.* § 10. After 500 weeks, an employee could receive "extended compensation" only if the employee could "prove by a preponderance of the evidence that the employee has sustained a total loss of wage-earning capacity." *Id.*

In 2020, as Sturdivant approached 500 weeks of total temporary disability payments, he applied for extended compensation under N.C.G.S. § 97-29(c). The Industrial Commission rejected his claim, concluding that Sturdivant had not sustained a "total loss of wage-earning capacity" as required by the statute. In reaching this decision, the Commission interpreted "total loss of wage-earning capacity" to mean "a total loss of the ability to earn wages in any employment."

Sturdivant appealed the Industrial Commission's opinion and award to the Court of Appeals. The Court of Appeals rejected the Commission's interpretation of section 97-29(c) and held that the phrase "total loss of wage-earning capacity" was synonymous with "total disability" and thus incorporated a long line of court-created legal tests that went beyond merely assessing whether the employee had the ability to earn wages in any employment. *Sturdivant v. N.C. Dep't of Pub. Safety*, 288 N.C. App. 470, 474–75 (2023).

The remaining portion of the Court of Appeals opinion was quite fractured. The authoring judge held that Sturdivant was not entitled to extended benefits under section 97-29(c) because Sturdivant failed to show that he sustained a "total disability." *Id.* at 476–79 (Dillon, J.). A

second judge concurred "in result only" without explaining the portions of the lead opinion with which the judge agreed or disagreed. *Id.* at 480 (Stroud, J., concurring in result only). A third judge dissented from the "total disability" analysis, reasoning that "the Commission did not make specific findings of fact as to 'the crucial questions necessary to support a conclusion' as to whether Plaintiff remains totally disabled so as to qualify for extended benefits." *Id.* at 482 (Hampson, J., concurring in part and dissenting in part).

The State filed a petition for discretionary review of the Court of Appeals' first holding, seeking review of whether the Court of Appeals erred "in its interpretation of the legal standard to be applied under Section 97-29(c) of the North Carolina Workers' Compensation Act." Sturdivant filed a response containing a conditional petition for discretionary review of the Court of Appeals' second holding, seeking review of whether the Industrial Commission's findings were supported by the record and whether the matter should be "remanded for findings of fact to be made based on the correct application of the law." This Court allowed both petitions.[1]

After the parties filed their petitions for discretionary review, the General Assembly again amended N.C.G.S. § 97-29(c), this time to "clarify, in response to Sturdivant v. N. Carolina Dep't of Pub. Safety, 887 S.E.2d 85 (N.C. Ct. App. 2023), that an employee has a different standard for establishing the burden of proof for extended compensation pursuant to G.S. 97-29(c) to reflect the intent of the General Assembly when it enacted S.L. 2011-287." S.L. 2023-134, § 31.3(b).

The new amendment states that, for purposes of N.C.G.S. § 97-29(c), "the term 'total loss of wage-earning capacity' shall mean the complete elimination of the capacity to earn any wages." *Id.* § 31.3(a). The amendment further emphasized that the term "disability" as defined by N.C.G.S. § 97-2(9) "shall not apply to this provision." *Id.*

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1. Both Sturdivant and his supporting amicus now assert that we should dismiss this appeal because the case is moot. It is not. "A case is 'moot' when a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy." *Roberts v. Madison Cnty. Realtors Ass'n*, 344 N.C. 394, 398–99 (1996). Sturdivant and his supporting amicus contend that he "has already lost under the Court of Appeals' standard" and "stands to gain no ground through this appeal." That is wrong. If we were to reject the State's arguments and agree with Sturdivant's argument, he would receive a remand to the Industrial Commission where he might win relief that he previously lost at every earlier stage of this appeal. That is as live a controversy as can exist in the law. *See In re A.K.*, 360 N.C. 449, 452–53 (2006).

Analysis

I. Interpretation of "total loss of wage-earning capacity"

The heart of this appeal is the meaning of the phrase "total loss of wage-earning capacity" in a 2011 statutory enactment titled "An Act Protecting and Putting North Carolina Back to Work by Reforming the Workers' Compensation Act." *See* S.L. 2011-287, § 10. Throughout this case, the parties and the lower courts have arrived at starkly different interpretations of this statute's meaning. Statutory interpretation is a legal question that we review de novo. *JVC Enters. v. City of Concord*, 376 N.C. 782, 785 (2021). We therefore begin our analysis by engaging in our own interpretation of the statute.

The goal of statutory construction is to carry out the intent of the legislature. *Wynn v. Frederick*, 385 N.C. 576, 581 (2023). When construing a statute, we first examine "the plain words of the statute" because the text of the statute is "the best indicia of legislative intent." *Id.* (cleaned up). "If the plain language of the statute is unambiguous, we apply the statute as written." *Id.* (cleaned up). "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." *Id.* (cleaned up).

The Industrial Commission determined that the statute's text was plain and unambiguous and that the phrase "total loss of wage-earning capacity" means "a total loss of the ability to earn wages in any employment." This is a sound analysis. After all, the words in this phrase are not unusual or technical. "Total" means entire, complete, absolute, or utter. *Total*, *Merriam-Webster's Collegiate Dictionary* (11th ed. 2007). "Loss" means the deterioration, destruction, separation, or absence of something. *Loss*, *Merriam-Webster*. Capacity means the mental or physical ability to do something. *Capacity*, *Merriam-Webster*.

Combining these definitions, then, the ordinary English meaning of the phrase "total loss of wage-earning capacity" is an employee's complete or utter loss of the ability to earn any wages by working.

Moreover, the phrase is part of a larger provision requiring the employee to prove "by a preponderance of the evidence that the employee *has sustained* a total loss of wage-earning capacity." N.C.G.S. § 97-29(c) (2022) (emphasis added); *id.* § 97-29(c) (2023). In this context, "sustain" means to "suffer" or "undergo" a condition, typically an unpleasant one such as an injury. *Sustain*, *Merriam-Webster*. This confirms that

the "loss of wage-earning capacity" is focused on the employee's personal capacity to earn wages as a consequence of a workplace injury, detached from the economic environment that exists at the time and from the willingness of employers to extend a job offer. In other words, the employee's "wage-earning capacity" in this context concerns the capacity of the employee to do wage-earning work, not the likelihood of actually finding a job.

This interpretation is further confirmed by another portion of the act's text—its title. "Even when the language of a statute is plain, the title of an act should be considered in ascertaining the intent of the legislature." *State v. James*, 371 N.C. 77, 87 (2018) (cleaned up). Here, the title of the act confirms the plain meaning of its text. The act is titled "An Act Protecting and Putting North Carolina Back to Work by Reforming the Workers' Compensation Act." This title indicates that a key purpose of the act is to reform the workers' compensation system to get people back into the job market.

To carry out this intent, the text of the act limits temporary disability compensation to 500 weeks and provides that, after that time, an employee can receive "extended compensation" only if the employee's injury caused a total loss of wage-earning capacity. The title indicates that, after 500 weeks of compensation, if an employee is capable of reentering the job market—that is, has the capacity to do so—the General Assembly intended for workers' compensation benefits to end regardless of whether the employee found a job. Were this Court to interpret the statute otherwise, it would not be reforming workers' compensation to put North Carolina back to work; it would be cementing the existing system in which employees with a temporary total disability too often received permanent benefits. Accordingly, we hold that the plain text of "total loss of wage-earning capacity" means the total loss of the employee's personal capacity to earn wages through any type of employment.

Finally, the lack of a statutory definition for "total loss of wage-earning capacity" itself confirms that the phrase has its plain and ordinary meaning. The Workers' Compensation Act is complex. Because of that complexity, many words and phrases that have an ordinary English meaning are given more specialized definitions in the Act. For example, the terms "employee," "injury," "disability," and "compensation" all have specialized definitions in the Act. N.C.G.S. § 97-2(2), (6), (9) & (11) (2023). The General Assembly used all of these specially defined terms in the 2011 amendment. S.L. 2011-287, § 10. If the General Assembly had intended to give the phrase "loss of wage-earning capacity" a specialized meaning as well, it could have done so. It did not. This further

demonstrates that the phrase should be given its plain meaning. *Cf. In re Clayton-Marcus Co., Inc.*, 286 N.C. 215, 219–20 (1974).

In sum, when the Industrial Commission interpreted the phrase "total loss of wage-earning capacity," it did so correctly. The Commission properly concluded that the phrase means an employee's "total loss of the ability to earn wages in any employment."

Why, then, did the Court of Appeals reject the Commission's statutory analysis? The answer lies in the way in which our appellate courts analyze and discuss workers' compensation cases.

As noted above, many of the key terms in the Workers' Compensation Act are defined terms with specialized meaning. Among those terms is "disability." N.C.G.S. § 97-2(9). The Act defines "disability" as "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." *Id.* This definition has existed since the Workers' Compensation Act's inception in 1929. *Medlin v. Weaver Cooke Constr., LLC*, 367 N.C. 414, 420 (2014).

Over the years, this Court and the Court of Appeals have been repeatedly called on to interpret the meaning of this statutory definition of "disability." *See, e.g., id.* at 419–22. In doing so, our opinions did not always repeat this full statutory wording over and over—after all, our opinions are long enough as it is.

Instead, we have often used shorthand references to describe the statutory definition. One such reference that appears in a handful of our cases over the years is the phrase "loss of wage-earning capacity." *See, e.g., Wilkes v. City of Greenville*, 369 N.C. 730, 745 (2017). We have used this phrase as a substitute for the full definition of the term "disability" when repeatedly referencing that definition in our analysis. *Id.*

But importantly, we have also used many other, similar shorthand references. These include "incapacity to earn wages," "loss of wage-earning power," and "incapacity for work." *See Morrison v. Burlington Indus.*, 304 N.C. 1, 11, 13 (1981); *Lanning v. Fieldcrest-Cannon, Inc.*, 352 N.C. 98, 105 (2000); *Little v. Anson Cnty. Schs. Food Serv.*, 295 N.C. 527, 532–33 (1978).

None of these phrases carries any talismanic power to change the ordinary meaning of words in the Workers' Compensation Act. Yet that is precisely what the Court of Appeals in this case believed. The court noted that this Court "uses the phrase 'loss of wage-earning capacity' synonymously with 'disability.' " *Sturdivant*, 288 N.C. App. at 475. Thus, the court reasoned, the phrase "loss of wage-earning capacity" in the

statute must share the same legal meaning with the defined statutory term "disability" and all its years of case-law development.

This analysis fails for two reasons. First, the Court of Appeals' belief that this Court treats "loss of wage-earning capacity" synonymously with "disability" is simply wrong—we have never held those terms synonymous. The term "disability" is a legal term of art created by the General Assembly with specialized meaning in the context of workers' compensation. *See* N.C.G.S. § 97-2(9); *Gregory v. W.A. Brown & Sons*, 363 N.C. 750, 763 n.1 (2010). Phrases like "loss of wage-earning capacity" and "incapacity to earn wages," by contrast, are simply language this Court uses when assessing how that defined term applies to the facts of a particular case.

Moreover, the Court of Appeals' reasoning ignores *why* our statutes so often include defined terms. The legislature defines terms in statutes so that those definitions can then be used in place of repeated, lengthy explanations of the term's meaning. *See Unemployment Comp. Comm'n v. Jefferson Standard Life Ins. Co.*, 215 N.C. 479, 486–87 (1939). This allows a statutory scheme such as the Workers' Compensation Act to remain as clear and concise as possible by condensing complicated technical meanings into defined terms.

By contrast, when this Court analyzes the meaning of those same terms, we do the opposite. We unpack the defined term and thoroughly analyze the full meaning as set out in the statutory definition. *See*, *e.g.*, *Medlin*, 367 N.C. at 420–23.

The important point here is that, unlike this Court, the General Assembly does not interpret laws. It writes them. When doing so, it would be quite abnormal for the General Assembly to define a term and then decline to use that definition, instead opting for an entirely different phrase that it nevertheless intended to convey the same precise, technical meaning of the term it chose to define. Doing so undermines the very reason that the General Assembly would add a statutory definition in the first place.

This is particularly true here because the 2011 amendment used the defined term "disability" repeatedly in the changes and additions to N.C.G.S. § 97-29, but then chose *not* to use that same term in the key portion of N.C.G.S. § 97-29(c) at issue in this case. The 2011 amendment first rewrote subsection (a) to begin with the new phrase: "When an employee *qualifies for total disability*. . . ." *See* S.L. 2011-287, § 10 (emphasis added). Then, in the newly added subsection (b), which applies to the first 500 weeks of workers' compensation, the amendment

again uses the terms "disability" and "total disability" to describe the applicable standard for receiving compensation. *Id.*

Finally, even in subsection (c) itself, the amendment uses the term "disability" as it describes the difference between the initial 500-week period and the period that comes after: "An employee may qualify for extended compensation in excess of the 500-week limitation on *temporary total disability* as described in subsection (b) of this section only if . . . the employee has sustained *a total loss of wage-earning capacity.*" *Id.* (emphasis added).

Simply put, the General Assembly chose *not* to use the term "total disability" in the key portion of subsection (c) although it used that defined term even in that same sentence. Instead, the General Assembly used a different term. It is a long-standing rule of statutory construction "that a change in phraseology when dealing with a subject raises a presumption of a change of meaning." *Latham v. Latham*, 178 N.C. 12, 14 (1919). Here, in light of the glaring change from the use of the defined term "total disability" over and over in the amendment to the entirely new term "total loss of wage-earning capacity," it is simply unreasonable to interpret the latter as synonymous with the former. *Id.*

In sum, we reject the Court of Appeals' interpretation of N.C.G.S. § 97-29(c) in this case. The phrase "total loss of wage-earning capacity" does not share the same legal meaning as the term "total disability" and all its years of case-law development. Instead, as the Industrial Commission properly concluded, the phrase means the total loss of the employee's personal ability to earn wages in any type of employment.

Finally, as we conclude this statutory analysis, we cannot ignore that the General Assembly amended N.C.G.S. § 97-29(c) in response to the Court of Appeals' ruling in this case. In that amendment, the legislature explained that, for purposes of N.C.G.S. § 97-29(c), "the term 'total loss of wage-earning capacity' shall mean the complete elimination of the capacity to earn any wages." S.L. 2023-134, § 31.3(a). The amendment further emphasized that "disability" as defined by N.C.G.S. § 97-2(9) "shall not apply to this provision." *Id.* The General Assembly also stated that it was amending the statute "to clarify" the existing law, directly in response to the Court of Appeals decision in this case. *Id.* § 31.3(b).

For the reasons explained above, this clarification did not change the meaning of the provision. The term "total loss of wage-earning capacity" in the 2011 version of the statute already meant what the 2023 amendment now says. Accordingly, we need not address whether the

2023 amendment was a "clarifying" amendment as that term is described in our case law. *Ray v. N.C. Dep't of Transp.*, 366 N.C. 1, 8–12 (2012). Because the plain meaning of both amendments is the same, there is nothing to clarify.

II. Application of N.C.G.S. § 97-29(c) in this case

In addition to reviewing the Court of Appeals' interpretation of N.C.G.S. § 97-29(c), we also allowed discretionary review in this case to consider Sturdivant's argument that the case should be remanded because the Industrial Commission improperly applied the standard for evaluating total loss of wage-earning capacity.

In its opinion and award, the Industrial Commission described various testimony and evidence that it received with respect to Sturdivant's workplace injury, physical and mental limitations, education, vocational skills, and work experience. Based on this evidence, the Industrial Commission found that, given Sturdivant's "work history, his educational level—high school with some community college experience—transferable skills, communication skills, restrictions, and chronic low back pain," Sturdivant "would be able to obtain some employment, at a minimum, part-time work in a sedentary position." The Commission therefore concluded that Sturdivant "failed to meet his burden to establish by the preponderance of the evidence that he has experienced a total loss of wage-earning capacity" because he "has the capacity to earn wages."

Sturdivant contends that the Commission, in reaching this conclusion, discussed evidence that should not be considered in assessing total loss of wage-earning capacity. First, Sturdivant points to the testimony of his medical providers, who explained that some of their patients with similar chronic back pain conditions were able to find employment. Sturdivant contends that this testimony was impermissible because the Commission cannot rely on "the oblique generality 'that at least some of [their] patients with conditions similar to [Sturdivant's] condition have been able to return to work.' " To support this argument, Sturdivant relies on decisions from this Court that rejected these sorts of generalities when assessing "disability" as that term is defined in N.C.G.S. § 97-2(9). *See Little*, 295 N.C. at 531.

As explained at length above, the General Assembly chose not to incorporate the "disability" legal doctrine into N.C.G.S. § 97-29(c) and instead applied a new standard examining whether the employee sustained a complete loss of the ability to earn any wages in any type of employment. Under this new standard, evidence that similarly situated

people are capable of earning wages through employment is a permissible factor for the Commission to consider in making its findings and conclusions.

Sturdivant also argues that there was insufficient evidence to support the Commission's finding that, despite Sturdivant's severe chronic back pain which occurs "approximately once per week," Sturdivant "retains some wage earning capacity on days where his pain is less severe" and was therefore capable of "some employment, at a minimum, part-time work in a sedentary position."

We hold that there was competent evidence to support this finding. As noted above, Sturdivant's physicians testified that other patients with similar conditions were able to return to work. Moreover, Sturdivant's employer presented expert testimony from a vocational rehabilitation specialist who opined that there was part-time work Sturdivant could perform even with his need for "greater scheduling flexibility" because of his back pain.[2] This is competent evidence to support the Commission's finding that Sturdivant was capable of some part-time work. Accordingly, we hold that the Industrial Commission's findings of fact are supported by competent evidence and those findings, in turn, support the Commission's corresponding conclusions of law.

Conclusion

The Court of Appeals was correct to affirm the Industrial Commission's opinion and award but erred when it interpreted the phrase "total loss of wage-earning capacity" in N.C.G.S. § 97-29(c) as synonymous with "total disability." We reject that interpretation for the reasons explained above but otherwise affirm the decision of the Court of Appeals.

MODIFIED AND AFFIRMED.

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2. Sturdivant also contends that this expert's testimony was inadmissible under Rule 702(a) of the Rules of Evidence. *See* N.C.G.S. § 8C-1, Rule 702(a) (2023). As the Court of Appeals decision observed, this issue is not preserved for appellate review because Sturdivant did not object to this testimony. *Sturdivant*, 288 N.C. App. at 478. The Industrial Commission also expressly noted the lack of any objection in its opinion and award.

ELIZABETH ZANDER AND EVAN GALLOWAY
v.
ORANGE COUNTY, NC AND THE TOWN OF CHAPEL HILL

No. 426A18-2

Filed 13 December 2024

Appeal pursuant to N.C.G.S. § 7A-30(2) (2023) from the decision of a divided panel of the Court of Appeals, 289 N.C. App. 591, 890 S.E.2d 793 (2023), affirming in part and reversing in part an order entered on 17 June 2022 by Judge Allen Baddour in Superior Court, Orange County, and remanding the case. This matter was calendared for argument in the Supreme Court on 30 October 2024 but determined on the record and brief without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by William A. Robertson, Robert J. King III, Daniel F.E. Smith, and Matthew B. Tynan, for plaintiff-appellants.

No brief for defendant-appellees.

PER CURIAM.

For the reasons stated in the dissenting opinion at the Court of Appeals, the decision of the Court of Appeals is reversed. This case is remanded to the Court of Appeals with instructions to remand to the trial court for further proceedings.

REVERSED AND REMANDED.

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

Justice EARLS dissenting.

I would affirm the decision of the Court of Appeals for the reasons stated in the majority opinion of the Court of Appeals. Therefore, I respectfully dissent.

IN RE K.C.

[386 N.C. 952 (2024)]

IN THE MATTER OF

K.C.

From N.C. Court of Appeals
22-396

From Durham
20JA116

No. 142A23

ORDER

In addition to the issues addressed in this Court's order allowing the petition for discretionary review on additional issues, the Court intends to address the following issue: Whether respondent properly preserved this constitutional issue for appellate review.

The parties are directed to submit supplemental briefs to this Court within thirty days addressing this issue and, in particular, whether the Court of Appeals' reliance on its decision in *In re B.R.W.*, 278 N.C. App. 382, 399 (2021), conflicts with this Court's holding in *In re J.N.*, 381 N.C. 131, 133 (2022).

By order of the Court in Conference, this the 9th day of July 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 July 2024.

s/Grant E. Buckner

Grant E. Buckner
Clerk of the Supreme Court

TELIA KIVETT; WANDA NELSON FOWLER; THE REPUBLICAN NATIONAL COMMITTEE; AND THE NORTH CAROLINA REPUBLICAN PARTY

v.

NORTH CAROLINA STATE BOARD OF ELECTIONS; KAREN BRINSON BELL, IN HER OFFICIAL CAPACITY AS EXECUTIVE DIRECTOR OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS; ALAN HIRSCH, IN HIS OFFICIAL CAPACITY OF CHAIR OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS; JEFF CARMON, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE NORTH CAROLINA BOARD OF ELECTIONS; STACY EGGERS IV, KEVIN N. LEWIS, AND SIOBHAN O'DUFFY MILLEN IN THEIR OFFICIAL CAPACITIES AS MEMBERS OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS

From N.C. Court of Appeals
P24-735

From Wake
24CV031557-910

No. 281P24

ORDER

The Court directs defendants and intervenor-defendant to file their responses, if any, to plaintiffs' petition for a writ of supersedeas no later than 4 November 2024 at 12:00 PM.

By order of the Court in Conference, this the 1st day of November 2024.

/s/ Riggs, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 1st day of November 2024.

s/Grant E. Buckner

Grant E. Buckner
Clerk of the Supreme Court

STATE v. CHEMUTI

[386 N.C. 954 (2024)]

STATE OF NORTH CAROLINA	From N.C. Court of Appeals 24-393
v.	
CHARLOTTE CHEMUTI	From Iredell 23CR445997

No. 282P24

ORDER

Upon consideration of the Town of Mooresville's motion for a temporary stay filed herein on 14 November 2024, pursuant to N.C. R. App. P. 8(a) and 23(e), seeking a stay of the 10 October 2024 Order of the Court of Appeals pending this Court's decision on Mooresville's petition for writ of certiorari, the motion is DISMISSED without prejudice to refile with an accompanying petition for a writ of supersedeas.

By order of the Court in Conference, this the 20th day of November 2024.

/s/ Riggs, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 20th day of November 2024.

s/Grant E. Buckner

Grant E. Buckner
Clerk of the Supreme Court

BETTS v. N.C. DEP'T OF HEALTH & HUM. SERVICES

[386 N.C. 955 (2024)]

MARY BETTS, EMPLOYEE

v.

NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES - CHERRY HOSPITAL, EMPLOYER, SELF-INSURED (CCMSI, THIRD-PARTY ADMINISTRATOR)

From N.C. Court of Appeals
22-324

From N.C. Industrial Commission
X59367

No. 193P23

ORDER

Defendant, North Carolina Department of Health and Human Services – Cherry Hospital's petition for discretionary review and conditional motion to vacate opinion of the Court of Appeals are allowed for the limited purpose of vacating the opinion and remanding to the Court of Appeals to reconsider its holding in light of this Court's decision in *Sturdivant v. N.C. Department of Public Safety*, 130PA23, filed on 13 December 2024.

Plaintiff's conditional petition for discretionary review and The 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 are dismissed as moot.

By order of the Court in Conference, this the 11th day of December 2024.

/s/ Riggs, J.
For the Court

Dietz, J., recused.

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 13th day of December 2024.

s/Grant E. Buckner

Grant E. Buckner
Clerk of the Supreme Court

N.C. STATE BAR v. MUSINGUZI

[386 N.C. 956 (2024)]

THE NORTH CAROLINA STATE BAR v. MARTIN MUSINGUZI, ATTORNEY	From N.C. Court of Appeals P24-92 From Disciplinary Hearing Commission 22DHC21

No. 159P24

ORDER

Defendant filed a motion for temporary stay and petition for writ of supersedeas with this Court seeking a stay of a disciplinary order. This Court allowed the temporary stay on 14 June 2024. Defendant's petition for writ of supersedeas is allowed for the limited purpose of staying enforcement of the disciplinary order, and the matter is remanded to the Court of Appeals for resolution of all remaining issues.

By order of the Court in Conference, this the 11th day of December 2024.

/s/ Riggs, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 13th day of December 2024.

s/Grant E. Buckner

Grant E. Buckner
Clerk of the Supreme Court

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

13 DECEMBER 2024

11P24	David Bayne Alexander, et al., Petitioners v. Jeffrey M. Burkey, et al., Respondents v. Diane K. Becker and Thomas H. Becker, Co-Trustees of the Diane K. Becker Revocable Living Trust Dated December 19, 2006, et al., Third Party Respondents v. The Courtyards of Huntersville Condominium Association, Inc., Third-Party Respondent	1. Petitioners' PDR Under N.C.G.S. § 7A-31 (COA23-179) 2. Petitioners' (Frances M. Clairmont and Joe L. Dominguez) Pro Se PDR Under N.C.G.S. § 7A-31	1. Denied 2. Denied
24P23-6	SCGVIII Lakepointe, LLC v. Vibha Men's Clothing, LLC; Kalishwar Das	1. Def's Pro Se Motion for Petition for Notice of Appeal Based on Constitutional Question 2. Def's Pro Se Petition for Writ of Mandamus to Compel Scrutiny/Audit of Judgment Amid New Facts	1. Dismissed 2. Dismissed **Dietz, J., recused** **Riggs, J., recused**
31P14-3	State of North Carolina v. Rodney E. Jones	1. Def's Pro Se Motion to Vacate Habitual Felon Status 2. Def's Pro Se Motion for Resentencing to Avoid Racial Bias	1. Dismissed 2. Dismissed
41P24	State v. Joseph Ball	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA22-1029) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed
44P24	Jean Hill and James Hill v. The Division of Social Services and The Division of Health Benefits of the North Carolina Department of Health and Human Services	Petitioners' PDR Under N.C.G.S. § 7A-31 (COA23-197)	Denied
56PA24	State v. Eric Ramond Chambers	State's Motion to Set Matter for Oral Argument During October 2024 Session	Denied **10/21/2024**

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

13 DECEMBER 2024

57A21-2	Calvin Lee Miller v. Todd E. Ishee, Secretary N.C. Department of Adult Corrections	Def's Pro Se Petition for Writ of Habeas Corpus	Denied **10/28/2024** **Dietz, J., recused**
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 4. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **03/15/2024** 2. Allowed 3. Allowed **03/15/2024** 4. Allowed
68A24	State v. Julie Ann Mincey	1. Def's Notice of Appeal Based Upon a Dissent (COA23-447) 2. State's Notice of Appeal Based Upon a Dissent 3. State's PDR as to Additional Issues 4. State's Petition in the Alternative for Writ of Certiorari to Review Decision of the COA	1. --- 2. --- 3. Allowed 4. Allowed
70P24	Richard C. Hanson, Fred Allen, Richard Burgess, Vernon L. Cathcart, Angie Cathcart, Christopher L. Davis, James J. Flowers, Kenneth C. Lynch, Larry F. Matkins, Thomas Roddey, Daryl Sturdivant, Alvester W. Tucker, and Carlos Valentin v. Charlotte-Mecklenburg Board of Education	Def's PDR Under N.C.G.S. § 7A-31 (COA22-1044)	Allowed
90P24	State v. Gabriel James McDowell	Def's PDR Under N.C.G.S. § 7A-31 (COA23-277)	Denied
102P19-13	State v. Christopher Lee Neal	Def's Pro Se Petition for Writ of Habeas Corpus	Denied **10/30/2024**
102P19-14	State v. Christopher Lee Neal	Def's Pro Se Petition for Writ of Habeas Corpus	Denied **10/31/2024**
102P19-15	State v. Christopher Lee Neal	Def's Pro Se Petition for Writ of Habeas Corpus	Denied **12/04/2024**

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

13 DECEMBER 2024

103P24	State v. George Lee Allison	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA23-635) 2. Def's PDR Under N.C.G.S. § 7A-31	1. Dismissed *ex mero motu* 2. Allowed
108P24	In re L.C.	1. Petitioner and Guardian ad Litem's Motion for Temporary Stay (COA23-759) 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 **05/07/2024** 2. Allowed 3. Allowed
112P24	Franklin Garland, Plaintiff v. Orange County, Orange County Board of Commissioners, Defendants and Terra Equity, Inc., Defendant-Intervenor	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA23-588) 2. Plt's Motion for Temporary Stay 3. Plt's Petition for Writ of Supersedeas	1. Denied 2. Allowed **05/23/2024** Dissolved 3. Denied
113P24	603 Glenwood, Inc. and Glenpeace, LLC, Plaintiffs v. 616 Glenwood, LLC, Timothy S. Wood, and Michael Lore, Defendants 616 Glenwood, LLC, Counterclaimant v. 603 Glenwood, Inc., Glenpeace, LLC, and Daniel A. Lovenheim, Counterclaim & Third Party Defendants	Plts' PDR Under N.C.G.S. § 7A-31 (COA22-943)	Denied
118P17-2	Herbert Lee Stroud v. Todd E. Ishee, Secretary NCDAC	Def's Pro Se Petition for Writ of Habeas Corpus	Denied **11/04/2024**
119A23	State v. Jason William King	1. Def's Motion to Clarify and/or Withdraw and Amend Opinion 2. Def's Motion to Stay the Court's Mandate	1. Denied **11/08/2024** 2. Denied **11/08/2024**
123P24	Craig Schroeder and Mary Schroeder v. The Oak Grove Farm Homeowners Association a/k/a The Oak Grove Farm Homeowners Association, Inc.	1. Def's PDR Under N.C.G.S. § 7A-31 (COA22-919) 2. Plt's Conditional PDR Under N.C.G.S. § 7A-31	1. Allowed 2. Allowed

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

13 DECEMBER 2024

136P24	State v. Phil Jay Heyne	Def's PDR Under N.C.G.S. § 7A-31 (COA23-224)	Denied
138P24	State v. James Edward Glendening	Def's PDR Under N.C.G.S. § 7A-31 (COA23-366)	Denied
148P24	Myra Wenninger v. Lee Arthur Wenninger	Plt's PDR Under N.C.G.S. § 7A-31 (COA23-741)	Denied
149P24	State v. Matthew Thomas Primm	1. Def's Motion for Temporary Stay (COA23-949) 2. Def's Petition for Writ of Supersedeas 3. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed **06/12/2024** Dissolved 2. Denied 3. Denied
152P24	Wilson Ratledge, PLLC v. JJJ Family, LP, a Nevada Limited Partnership, and Loftin Enterprises, LLC, General Partner of JJJ Family, LP	1. Defs' PDR Under N.C.G.S. § 7A-31 (COA23-959) 2. Defs' Motion to Withdraw PDR	1. --- 2. Allowed
154P23	In re M.S., S.L., T.H., S.H.	Respondent-Mother's PDR Under N.C.G.S. § 7A-31 (COA22-401)	Denied **Riggs, J., recused**
159P24	The North Carolina State Bar v. Martin Musinguzi, Attorney	1. Def's Motion for Temporary Stay (COAP24-92) 2. Def's Petition for Writ of Supersedeas	1. Allowed **06/14/2024** 2. Special Order
160P24	State v. Patrick O'Neill Cochran	Def's PDR Under N.C.G.S. § 7A-31 (COA22-885)	Denied
161P24	State v. Zachary Lynn Johnson	Def's Petition for Writ of Certiorari to Review Order of the COA (COA23-307)	Denied
162P24	State v. Bardomiano Martinez	1. Def's Pro Se Motion for Notice of Appeal (COAP23-718) 2. Def's Pro Se Motion for PDR 3. Def's Pro Se Petition for Writ of Certiorari to Review Order of the COA 4. Def's Pro Se Motion for Amended PDR	1. Dismissed 2. Dismissed as moot 3. Dismissed 4. Dismissed

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

13 DECEMBER 2024

175PA24	State v. Demistrus McKinley Ingram	1. State's Motion for Temporary Stay (COA23-748) 2. State's Petition for Writ of Supersedeas 3. State's PDR Under N.C.G.S. § 7A-31 4. Def's Motion to Hold Case in Abeyance Until Court Decides *State v. Chambers*	1. Allowed **07/01/2024** 2. Allowed **10/16/2024** 3. Allowed **10/16/2024** 4. Allowed **11/15/2024**
179P24	State v. William Mack Frizzell	Def's PDR Under N.C.G.S. § 7A-31 (COA23-237)	Denied
183P24	State v. Kimberly Cable	1. State's Motion for Temporary Stay (COA23 192) 2. State's Petition for Writ of Supersedeas 3. State's PDR Under N.C.G.S. § 7A-31 4. Def's Conditional PDR	1. Allowed **07/08/2024** Dissolved 2. Denied 3. Denied 4. Dismissed as moot
186P24	Richard Keith Mashburn, Linda Fay Mashburn, and Calvin James Mashburn v. Michelle L. Chandler and Billy Scott Chandler	1. Plts' Notice of Appeal Based Upon a Constitutional Question (COA23-1042) 2. Plts' PDR Under N.C.G.S. § 7A-31 3. Defs' Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed
188PA24	In re E.H. & R.H.	1. Petitioner's Motion for Temporary Stay (COA23-864) 2. Petitioner's Petition for Writ of Supersedeas 3. Petitioner's PDR Under N.C.G.S. § 7A-31 4. Respondent-Parents' PDR Under N.C.G.S. § 7A-31 5. Guardian ad Litem's Petition for Writ of Certiorari to Review Decision of the COA 6. Guardian ad Litem's Motion to Proceed as an Appellant 7. Guardian ad Litem's Motion for Extension of Time to File Brief	1. Allowed **07/15/2024** 2. Allowed **10/16/2024** 3. Allowed **10/16/2024** 4. Denied **10/16/2024** 5. Allowed **11/15/2024** 6. Dismissed as moot **11/15/2024** 7. Allowed **11/15/2024**

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

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193P23	Mary Betts, Employee v. North Carolina Department of Health and Human Services - Cherry Hospital, Employer, Self-Insured (CCSMI, Third-Party Administrator)	1. Def's (North Carolina Department of Health and Human Services - Cherry Hospital) PDR Under N.C.G.S. § 7A-31 (COA22-324) 2. Plt's Conditional PDR Under N.C.G.S. § 7A-31 3. Defs' Conditional Motion to Vacate Opinion of the Court of Appeals 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. Special Order 2. Special Order 3. Special Order 4. Special Order **Dietz, J., recused**
197P24	State v. Arnold Travis Clark	Def's Motion for Temporary Stay	Denied **10/22/2024**
203P24	Java Warren and Jannifer Warren v. Cielo Ventures, Inc. d/b/a Servpro North Central Mecklenburg County	1. Def's Motion for Temporary Stay (COA22-926) 2. Def's Petition for Writ of Supersedeas 3. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed **07/26/2024** 2. Allowed 3. Allowed
206P24	Paul K. Brooks v. Scott Cunningham	Plt's PDR Under N.C.G.S. § 7A-31 (COA23-1074)	Denied
208P23-3	Kalishwar Das v. State of North Carolina	1. Plt's Pro Se Motion for Notice of Appeal Based Upon a Constitutional Question (COA24-491) 2. Plt's Pro Se Motion for Appeal Based on a Constitutional Question for Relief	1. Dismissed 2. Dismissed **Dietz, J., recused** **Riggs, J., recused**
208P24	Jackie Neal Grubb v. Walda Kindley Grubb	Plt's Petition for Writ of Certiorari to Review Order of the COA (COA24-399)	Denied
210A24	Charles Schwab & Co., Inc. v. Lauren Elizabeth Marilley and Peter Joseph Marilley	Plt's Motion to Admit Neil S. Baritz Pro Hac Vice	Allowed
213P24	State v. James Christopher Gizzi	Def's PDR Under N.C.G.S. § 7A-31 (COA23-733)	Denied

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

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215P24	Micandria Darroux, on behalf of herself and others similarly situated v. Novant Health, Inc. d/b/a Novant Health Presbyterian Medical Center, and Does 1 Through 25, Inclusive	Plt's PDR Under N.C.G.S. § 7A-31 (COA23-947)	Denied
222P24	In re Robert Lee Hayes, III	1. Petitioner's PDR Under N.C.G.S. § 7A-31 (COA22-1058) 2. Petitioner's Motion to Deem PDR Timely Filed or to Treat Petition as Petition for Writ of Certiorari 3. Petitioner's Petition for Writ of Certiorari to Review Decision of the COA	1. Dismissed 2. Denied 3. Denied
225A24	State v. Blaine Dale Hague	Def's Motion to Hold State's Appeal in Abeyance	Allowed **10/23/2024**
235PA23	Thurman Crofton Savage v. N.C. Department of Transportation	Petitioner's Motion for Supplemental Briefing	Denied
249P24	Calista Inman Reiss v. Loren Blair Reiss	Def's PDR Under N.C.G.S. § 7A-31 (COA23-950)	Denied
255P24	J.Z. v. CCR Mooresville Wellness, LLC, et al.	Defs' PDR Under N.C.G.S. § 7A-31 (COA23-789)	Denied
256P24	Adventure Trail of Cherokee, Inc., a North Carolina Corporation v. Ruth A. Owens and William Frederick Owens	Def's PDR Under N.C.G.S. § 7A-31 (COA23-1043)	Denied
258P24	State v. Brian Christopher Legette	1. Def's Motion for Temporary Stay (COA23 1153) 2. Def's Petition for Writ of Supersedeas (COA23-1153) 3. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed **10/01/2024** Dissolved 2. Denied 3. Denied
258PA23	State v. Eric Wayne Wright	American Civil Liberties Union and the American Civil Liberties Union of North Carolina's Motion to Admit Bridget Elaine Lavender Pro Hac Vice	Allowed **Riggs, J., recused**

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260P24	State v. Alexander Thomas	Def's Pro Se PDR Under N.C.G.S. § 7A-31 (COA23-558)	Denied
262P24	State v. Quantez Lashay Thomas	Def's PDR Under N.C.G.S. § 7A-31 (COA23-774)	Allowed
263P24	State v. Brindell Wilkins	1. State's Motion for Temporary Stay (COA23-839) 2. State's Petition for Writ of Supersedeas 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **10/07/2024** Dissolved 2. Denied 3. Denied
268P24	State v. Joshual Lamar Davis	Def's Pro Se Motion for Appeal (COA22-938)	Dismissed **Riggs, J., recused**
270P24	Hope Swicegood Byrd, et al. v. Avco Corporation, et al.	Defs' (Avco Corporation and Lycoming Engines) Motion for Temporary Stay (COAP24-630)	Allowed **10/18/2024**
271P24	State v. Maurice Deon Rivers	Def's Pro Se Petition for Writ of Habeas Corpus	Denied **10/18/2024**
273P24	State v. Rafiel Foreman	Def's Pro Se Motion for Notice of Appeal (COAP23-232)	Dismissed
276P24	KPLuxury, LLC v. KB Holdings LLC and Kenneth Michael Bell	1. Defs' Motion for Temporary Stay (COAP24-220) 2. Defs' Petition for Writ of Supersedeas 3. Defs' Petition for Writ of Mandamus to Direct Superior Court Judge 4. Defs' Petition for Writ of Mandamus to Direct Superior Court Clerk 5. Defs' Petition for Writ of Certiorari to Review Order of Superior Court, Mecklenburg County 6. Defs' Motion for Expedited Review and Shortened Response Time	1. Denied **10/31/2024** 2. Denied **10/31/2024** 3. Denied **10/31/2024** 4. Denied **10/31/2024** 5. Denied **10/31/2024** 6. Denied **10/31/2024**

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278P24	State v. Gromoka J. Carmichael	1. Def's Pro Se PDR Under N.C.G.S. § 7A-31 (COA23-886)	1. Dismissed **11/25/2024**
		2. Def's Pro Se Motion for Temporary Stay	2. Dismissed **11/25/2024**
		3. Def's Pro Se Petition for Writ of Supersedeas	3. Dismissed **11/25/2024**
		4. Def's Pro Se Petition for Writ of Certiorari to Review Decision of District Court, Mecklenburg County	4. Dismissed **11/25/2024**
		5. Def's Pro Se Petition for Writ of Habeas Corpus	5. Denied **11/25/2024**
279A24	Kenya Teasley v. Harris Teeter, LLC and Edward Sweeney	Plt's Pro Se Notice of Appeal Based Upon a Constitutional Question (COA24-537)	Dismissed *ex mero motu*
280A24	State v. Grant Lee Hunt	1. State's Motion for Temporary Stay (COA23-890)	1. Allowed **11/01/2024**
		2. State's Notice of Appeal Based Upon a Dissent	2. ---
281P24	Kivett, et al. v. North Carolina State Board of Elections, et al.	1. Plts' Petition for Writ of Supersedeas (COAP24-735)	1. Special Order **11/01/2024**
		2. Plts' PDR Under N.C.G.S. § 7A-31	2.
		3. Secure Families Initiative and Count Every Hero's Motion for Leave to File Amicus Brief	3.
		4. Secure Families Initiative and Count Every Hero's Motion to Admit Corey Stoughton, Elizabeth Snow, Alexandra G. Butler, Andrew L. Azorsky, Danielle Lang, and Alexandra Copper Pro Hac Vice	4.
		5. Secure Families Initiative and Admiral Steve Abbot, et al.'s Amended Motion for Leave to File Amicus Brief	5.
		6. Honorable Jefferson Griffin, et al.'s Motion for Leave to File Amicus Brief	6.
282P24	State v. Charlotte Chemuti	1. Town of Mooresville's Petition for Writ of Certiorari to Review Order of the COA (COA24-393)	1. Allowed
		2. Town of Mooresville's Petition in the Alternative for Writ of Certiorari to Review Decision of District Court, Iredell County	2. Allowed
		3. Town of Mooresville's Motion for Temporary Stay	3. Special Order **11/20/2024**

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284P24	State v. Thomas Michael McNeil	Def's Pro Se Petition for Writ of Habeas Corpus	Denied **11/05/2024**
285A24	State v. Michael John Moore, Sr.	1. State's Motion for Temporary Stay (COA23-816) 2. Def's Motion for Extension of Time to File PDR 3. State's Notice of Appeal Based Upon a Dissent 4. Def's Notice of Appeal Based Upon a Constitutional Question 5. Def's PDR Under N.C.G.S. § 7A-31 6. State's Motion to Dismiss Appeal	1. Allowed **11/06/2024** 2. Denied **11/18/2024** 3. --- 4. 5. 6.
286P24	Angelo R. Whitehurst v. Benjamin Carver, Warden, et al.	1. Petitioner's Pro Se Petition for Writ of Habeas Corpus 2. Petitioner's Pro Se Motion for Reversal	1. Denied **11/15/2024** 2. Dismissed as moot **11/15/2024**
287P24	Karen M. Tibedo v. Charles R. Tibedo	1. Def's Pro Se Notice of Appeal (COAP24-737) 2. Def's Pro Se Petition for Writ of Certiorari 3. Def's Pro Se Motion to Expedite Consideration of the Petition for Writ of Certiorari 4. Def's Pro Se Motion to Stay Proceedings 5. Def's Pro Se PDR Under N.C.G.S. § 7A-31 6. Def's Pro Se Petition for Writ of Mandamus 7. Def's Pro Se Motion to Expedite Review of PDR and Writ of Mandamus 8. Def's Pro Se Motion to Stay Lower Court Proceedings	1. Dismissed **11/13/2024** 2. Denied **11/13/2024** 3. Dismissed as moot **11/13/2024** 4. Denied **11/13/2024** 5. Denied **11/13/2024** 6. Denied **11/13/2024** 7. Dismissed as moot **11/13/2024** 8. Dismissed as moot **11/13/2024**
289P22-2	Keith Cureton, Jr. v. North Carolina Department of Public Safety, et al.	Petitioner's Pro Se Petition for Writ of Habeas Corpus	Denied **12/10/2024**
291P24	State v. Donnie Lee Cherry, Jr.	Def's Pro Se Motion for Bond Reduction	Dismissed

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292P24	TKAB Investments v. Lei Luxe LLC	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 **11/15/2024** 2. Dismissed **11/15/2024** 3. Dismissed **11/15/2024**
293P24	Juan Carlos Osorio Cruz v. Todd E. Ishee, Secretary NCDAC	Petitioner's Pro Se Petition for Writ of Habeas Corpus	Denied **11/13/2024**
295P24	State v. Rodney Eugene Jones	1. Def's Pro Se Petition for Writ of Habeas Corpus 2. Def's Pro Se Motion for Judicial Conference and Appointment of Special Counsel Representation	1. Denied **11/22/2024** 2. Denied **11/22/2024**
296P24	State v. Raji Mills	Def's Pro Se PDR Under N.C.G.S. § 7A-31 (COA23-1097)	Denied
310P23-4	State v. Rocky J. Bryant	Def's Pro Se Petition for Writ of Habeas Corpus	Denied **11/06/2024** **Riggs, J., recused**
310P23-5	State v. Rocky J. Bryant	Def's Pro Se Motion for Reconsideration and for the Court to Correct Error	Dismissed **12/10/2024** **Riggs, J., recused**
312A19-2	Ha, et al. v. Nationwide General Insurance Company	1. Plt's Notice of Appeal Based Upon a Dissent (COA21-793) 2. Amicus Curae's Motion for Leave to Participate in Oral Argument 3. Plts' Petition for Rehearing	1. --- 2. Allowed **03/05/2024** 3. Denied **10/18/2024**
334A23	Jackson, et al. v. Home Depot U.S.A., Inc	1. Third-Party Plt's Motion to Admit Brian W. Warwick Pro Hac Vice 2. Third-Party Plt's Motion to Admit Janet R. Varnell Pro Hac Vice	1. Allowed 2. Allowed
346P23	Lois McLamb Miller v. Town of Chapel Hill	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA23-230) 2. Def's Motion to Dismiss Appeal	1. Denied 2. Dismissed as moot

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414P04-2	State v. Cornelius Ray Jackson	Def's Pro Se Petition for Writ of Habeas Corpus	Denied **11/14/2024**
584P99-8	Harry James Fowler v. Todd E. Ishee, Secretary of NC Department of Adult Corrections and Brett Bullis, Warden Avery-Mitchell Correctional Institution	1. Def's Pro Se Petition for Writ of Habeas Corpus 2. Def's Pro Se Motion to Appoint Counsel 3. Def's Pro Se Motion to Arrest Judgment and Dismiss Prosecution	1. Denied **10/29/2024** 2. Dismissed as moot **10/29/2024** 3. Dismissed **10/29/2024**

APPENDIXES

THE CHIEF JUSTICE'S FAMILY LAW
ADVISORY COMMISSION

JUDICIAL STANDARDS COMMISSION
RULES OF PROCEDURE

JUDICIAL STANDARDS COMMISSION

PROCEDURES FOR
ADMINISTRATIVE COMMITTEE

DISCIPLINE AND DISABILITY OF ATTORNEYS

The Order establishing the Chief Justice's Family Court Advisory Commission on 25 September 2019 is amended to read as follows:

THE CHIEF JUSTICE'S FAMILY LAW ADVISORY COMMISSION

IN THE SUPREME COURT OF NORTH CAROLINA
BY ORDER OF THE COURT

****

In recognition of the need to monitor North Carolina's approach to family law and to recommend improvements and promote the administration of justice in family law, the Supreme Court of North Carolina hereby amends the Chief Justice's Family Law Advisory Commission.

The Commission's chairperson will be the Chief Justice or the Chief Justice's designee. The Chief Justice will appoint the Commission's other members. The membership of the Commission shall be as follows:

- one justice of the Supreme Court of North Carolina;
- one judge of the North Carolina Court of Appeals;
- Four chief district court judges;
- Two clerks of the superior court;
- two court administrators;
- one staff member from the North Carolina Department of Juvenile Justice and Delinquency Prevention;
- one chief juvenile court counselor;
- one guardian ad litem administrator;
- one representative from a domestic violence program;
- one representative from a local custody mediation program;
- one law professor;
- one practicing attorney who regularly represents a local department of social services;
- two practicing attorneys with expertise in juvenile law; and
- two practicing attorneys with expertise in domestic law.

With the exception of the chairperson, the members of the Commission shall serve for a term of three years.

By virtue of this order, the Court issues to the Commission the following charge:

- to advise the Chief Justice and the Director of the Administrative Office of the Courts on family law issues;
- to set guidelines and standards of practice for courts that decide family law issues;
- to assure accountability for courts that decide family law issues;
- to make recommendations about future legislative action, including needed statutory changes or budgetary suggestions;
- to review and make recommendations about the interrelationship between family law and court programs, such as guardian ad litem, child custody mediation, family treatment courts, and family financial settlement; and
- to oversee the further development of court training curriculum in family law.

Ordered by the Court in Conference, this the 21st day of August, 2024.

s/Paul Newby

PAUL NEWBY
Chief Justice
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 21st day of August, 2024.

s/Grant E. Buckner

GRANT E. BUCKNER
Clerk of the Supreme Court

ORDER ADOPTING THE RULES OF PROCEDURE IN THE SUPREME COURT IN JUDICIAL STANDARDS CASES

Consistent with Article 30 of Chapter 7A of the General Statutes, the Court hereby adopts the "Rules of Procedure in the Supreme Court in Judicial Standards Cases" (shown below) to supersede the "Rules for Supreme Court Review of Recommendations of the Judicial Standards Commission" (372 N.C. 907–10).

* * *

Rules of Procedure in the Supreme Court in Judicial Standards Cases

Rule 1. Scope

These rules apply to cases governed by Article 30 of Chapter 7A of the General Statutes in which the Judicial Standards Commission has filed a recommendation of judicial discipline with the Supreme Court under Rule 22 of the Rules of the Judicial Standards Commission.

Rule 2. Procedure

(a) **Notice of Briefing and Oral Argument**. If a respondent who is recommended for judicial discipline chooses to exercise his or her right under N.C.G.S. § 7A-377 to file a brief, then the respondent must file a notice of briefing and oral argument no later than 10 days after the commission files its recommendation. The notice must indicate that the respondent will file a brief and specify whether the respondent chooses to exercise his or her right to oral argument. If the respondent does not file a notice of briefing and oral argument, then the Supreme Court will decide the case without briefing and oral argument.

(b) **Briefs**. The respondent must file his or her brief no later than 30 days after the notice of briefing and oral argument is filed. The commission must file its brief no later than 30 days after respondent's brief is filed. The form and content of the briefs should conform as nearly as possible to the rules applicable to briefs in appeals to the Supreme Court. If the respondent does not file a brief, then the Supreme Court will decide the case without briefing and oral argument.

(c) **Oral Argument**. Oral arguments will conform as nearly as possible to the rules applicable to oral arguments in appeals to the Supreme Court.

(d) **Filing**. Documents must be filed electronically at https://www.ncappellatecourts.org. Other items should be filed electronically

if permitted to do so by the electronic-filing site, but they may be filed by hand delivery or mail with the permission of the Clerk of the Supreme Court.

(e) **Service**. Each item filed must include a certificate of service and be served on the other party. Service may be made by e-mail or in the manner provided in Rule 4 of the Rules of Civil Procedure.

Rule 3. Fees and Costs

No fees or costs will be assessed in the Supreme Court.

Rule 4. Confidentiality

Proceedings in the Supreme Court are confidential unless the respondent files a document with the Supreme Court that waives the confidentiality of the proceedings. The proceedings are no longer confidential if the Supreme Court publicly reprimands, censures, suspends, or removes the respondent.

* * *

The Rules of Procedure in the Supreme Court in Judicial Standards Cases are effective immediately and 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 21st day of August 2024.

s/Riggs, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 21st day of August 2024.

s/Grant E. Buckner

GRANT E. BUCKNER
Clerk of the Supreme Court

ORDER AMENDING THE RULES OF THE JUDICIAL STANDARDS COMMISSION

Pursuant to subsection 7A-375(g) of the General Statutes of North Carolina, the Court hereby approves the following amendments to the Rules of the Judicial Standards Commission. This order affects Rules 2, 3, 7, 8, 9, 12, 15, 16, 17, 18, 19, 20, and 22.

* * *

Rule 2. Organization and Meetings

(a) **Officers**. The Commission shall have a Chairperson and a Vice-Chairperson, who ~~is~~are the North Carolina Court of Appeals ~~member~~members of the Commission~~, and two Vice-Chairpersons, who are the superior court judge members of the Commission~~. The Executive Director shall serve as the secretary to the Commission and to each panel and shall perform other duties as the Commission or a panel may assign.

(b) **Panels**. The Chairperson shall divide the Commission into 2 panels, designated Panel A and Panel B.

(1) ~~The Chairperson shall be assigned to and serve as the Chairperson of Panel A and Panel B.~~The Chairperson shall be assigned to Panel A or Panel B and preside at the meetings of that panel. The Vice-Chairperson shall be assigned to and preside at the meetings of the other panel. If the Chairperson or Vice-Chairperson is absent from a meeting of their assigned panel, then the other person shall attend and preside at the meeting. If both the Chairperson and Vice-Chairperson are unable to attend a panel meeting, then the superior court judge assigned to that panel with the longest tenure on the Commission shall preside at the meeting unless otherwise designated by the Chairperson or Vice-Chairperson.

(2) The Chairperson shall assign the other members of the Commission to serve on Panel A or Panel B, each panel to include, in addition to either the Chairperson or Vice Chairperson, 1 superior court judge~~,~~ and 1 district court judge appointed by the Chief Justice, ~~2 members appointed by the North Carolina State Bar~~1 superior court judge and 1 district court judge appointed by the General Assembly, 1 citizen appointed by the Governor, and 1 citizen appointed by the General Assembly. ~~Other than the Chairperson, no member shall be assigned~~

~~to both Panel A and Panel B for consideration of the same matter.~~

(3) ~~The superior court judge assigned to Panel A or Panel B shall serve as the Vice-Chairperson of the panel, and in the absence or disqualification of the Chairperson, shall preside over panel meetings, whether meeting as an investigative or hearing panel. In the absence or disqualification of both the Chairperson and Vice-Chairperson, the district court judge assigned to the panel shall preside.~~If the Chairperson or Vice-Chairperson is disqualified from considering a matter at a meeting of their assigned panel, then the other person shall attend the meeting and preside over the consideration of that matter. If both the Chairperson and Vice-Chairperson are disqualified from considering a matter, then the superior court judge assigned to that panel with the longer tenure on the Commission shall preside over the consideration of the matter. If the superior court judge is absent or is disqualified from considering the matter, then the other superior court judge assigned to that panel shall preside over the consideration of the matter. A superior court judge who presides over a matter shall have the same authority over the matter that the Chairperson or Vice-Chairperson has under these rules.

(4) Each panel shall serve as an investigative panel at its regular business meetings for purposes of reviewing complaints, ordering investigations, ~~or~~and authorizing the initiation of disciplinary or disability proceedings. Each panel shall also serve as a hearing panel for any disciplinary or disability proceeding authorized by the other panel. No panel may function as both an investigative and a hearing panel in the same matter. A Chairperson or Vice-Chairperson who has considered a matter while serving on an investigative panel may preside over the consideration of that same matter by a hearing panel. However, a Chairperson or Vice-Chairperson who has voted on a motion to charge a judge while serving on an investigative panel may not vote during a hearing panel's consideration of that matter. Otherwise, no member shall be assigned to both an investigative panel and a hearing panel for consideration of the same matter.

(c) **Panel Meetings**. Panel meetings shall occur pursuant to the following requirements:

(1) ~~Panel A and Panel B shall meet in alternating months, unless prevented by exigent circumstances, such as inclement weather, an emergency, or an unresolvable conflict with court calendars.~~Unless prevented by exigent circumstances, Panel A and Panel B shall each meet at least 5 times per calendar year on a rotating schedule promulgated by the Chairperson. Upon the call of the Chairperson, additional or special panel meetings may also be convened as needed to conduct or conclude the panel's business.

(2) Each panel member, including the Chairperson, Vice-Chairperson, or other presiding member, shall be a voting member of the panel unless disqualified from considering a particular matter pursuant to Rule 7.

(3) A quorum for the conduct of the business of a panel, whether sitting as an investigative or hearing panel, shall consist of 5 members present. The affirmative vote of at least 5 members present is required to authorize official action of the panel.

(4) The presiding Chairperson or Vice-Chairperson may direct the reassignment of any matter for initial review to the other panel so long as no action has been taken by the original investigative panel scheduled to review and consider the matter.

(5) In the event that a hearing panel member will be absent for a hearing in a disciplinary or disability proceeding and the member's absence will prevent the formation of a quorum, the Chairperson, Vice-Chairperson, or Executive Director shall request the appointing authority for the absent member to appoint an alternative member for the sole and exclusive purpose of participating as a member of the hearing panel for that disciplinary or disability proceeding.

(d) **Plenary Meetings**. Meetings of the full Commission shall occur pursuant to the following requirements:

(1) The full Commission shall meet on the call of the Chairperson or upon the written request of any 5 members.

(2) A quorum for the conduct of the business of the full Commission shall consist of 9 members present. The affirmative vote of at least 9 members is required to

authorize any Commission action that requires a vote of the full membership.

(3) In the absence of the Chairperson at a plenary meeting, the Vice-Chairperson ~~with the longest tenure on the Commission~~ shall preside at the meeting. In the absence of both the Chairperson and Vice-Chairperson at a plenary meeting, the superior court judge with the longest tenure on the Commission shall preside at the meeting unless otherwise designated by the Chairperson.

(4) Upon the authorization of the Chairperson, the full Commission may conduct votes on specific matters by electronic means, with the votes to be recorded and maintained by the Executive Director.

(e) **Meeting Places**. Panel and plenary meetings of the Commission shall ordinarily meet at the North Carolina Court of Appeals, 1 West Morgan Street, Raleigh, North Carolina. The Chairperson may also direct that meetings be held anywhere in the state or through telephonic or electronic means.

* * *

Rule 3. Commission Staff

(a) **Executive Director**. The Executive Director shall have the duties and responsibilities prescribed by the Commission, including but not limited to:

(1) reviewing complaints and information as to alleged misconduct or disability, and making preliminary evaluations with respect thereof;

(2) providing training and developing educational resources relating to the Code and Commission procedures;

(3) issuing informal advisory opinions to judges and preparing formal advisory opinions as directed by the Commission, as provided in Rule 8;

(4) maintaining the Commission's records concerning the operation of the Commission;

(5) administering funds for the Commission's budget as prepared by the Administrative Office of the Courts;

(6) preparing an annual report and statistical information regarding the Commission's activities for presentation to the Commission, Supreme Court, and public;

(7) employing, with the approval of the Chairperson, the Commission Counsel, Commission Investigator, and other authorized Commission staff;

(8) supervising the Commission staff; and

(9) performing other duties at the direction of the Commission, ~~the~~ Chairperson, or Vice-Chairperson, or as required by these rules.

(b) **Commission Counsel**. The Commission Counsel shall have the duties and responsibilities prescribed by the Commission, including but not limited to:

(1) reviewing complaints and information as to alleged misconduct or disability, and making preliminary evaluations thereof;

(2) conducting limited confidential inquiries with respect to complaints or information as to alleged misconduct or disability as necessary to verify information to be presented to an investigative panel for initial review;

(3) directing investigations as to alleged misconduct or disability and reporting to and advising the appropriate investigative panel as to the investigations;

(4) prosecuting disciplinary and disability proceedings before the Commission and appearing on behalf of the Commission in the Supreme Court in connection with any recommendation made by the Commission;

(5) providing training and developing educational resources relating to the Code and Commission procedures;

(6) issuing informal advisory opinions to judges as provided in Rule 8; and

(7) performing other duties at the direction of the Commission, Chairperson, Vice-Chairperson, or Executive Director, or as required by these rules.

(c) **Commission Investigator**. The Commission Investigator shall have the duties and responsibilities prescribed by the Commission, including but not limited to:

(1) conducting investigations initiated pursuant to these rules;

(2) assisting the Commission Counsel during disciplinary proceedings;

(3) maintaining records of Commission investigations; and

(4) performing other duties at the direction of the Commission, Chairperson, Vice-Chairperson, Executive Director, or Commission Counsel, or as required by these rules.

* * *

Rule 7. Disqualification

(a) **Applicable Standard**. A member of the Commission is disqualified from considering a matter in which disqualification would be required of a judge by the Code or by law. A judge who is a member of the Commission is disqualified from acting in a matter in which the judge is the subject of a complaint, investigation, or disciplinary or disability proceeding, except in his or her own defense.

(b) **Procedure**. At the convening of each panel meeting, whether an investigative panel or a hearing panel, the ~~Chairperson~~presiding member shall remind all members to voluntarily disqualify themselves from consideration of any matter wherein disqualification is required pursuant to subsection (a) of this rule. In the absence of a voluntary disqualification from the matter under consideration, or upon motion of a party to a disciplinary or disability proceeding, the ~~Chairperson~~presiding member shall decide in his or her sole discretion whether disqualification is required in that instance.

* * *

Rule 8. Advisory Opinions

(a) **Formal Advisory Opinions**. A person may request that the Commission issue a formal advisory opinion as to whether actual or contemplated conduct on the part of a judge conforms to the requirements of the Code, subject to the following procedures:

(1) A request for a formal advisory opinion shall be submitted to the Executive Director in writing, who shall present the request to the Commission for consideration.

(2) Upon the affirmative vote of 9 members, the full Commission may issue a formal advisory opinion, which shall be written and shall state its conclusion with respect to the question asked and the reasons therefor.

(3) A formal advisory opinion shall be provided to the Appellate Reporter for publication, and the Reporter

shall, from time to time, as directed by the Commission, publish an index of advisory opinions. The formal advisory opinion shall also be published on the Commission's website.

(4) A formal advisory opinion shall have precedential value in determining whether similar conduct conforms to the Code but shall not constitute controlling precedent or legal authority in the Supreme Court for the purpose of reviewing a disciplinary recommendation. To the extent the Supreme Court expressly nullifies an existing formal advisory opinion, the formal advisory opinion shall be deemed automatically withdrawn.

(5) Other than as provided in subsection (a)(4) of this rule, a formal advisory opinion may be modified or withdrawn by the Commission only upon the affirmative vote of 9 members of the full Commission. Until a formal advisory opinion is modified or withdrawn by the Commission or nullified by the Supreme Court, a judge shall be deemed to have acted in good faith if he or she acts in conformity with the advisory opinion.

(6) Except as published in the formal advisory opinion, information provided to the Commission and work product or communications associated with drafting and issuing the formal advisory opinion shall be confidential.

(b) **Informal Advisory Opinions**. A judge subject to the jurisdiction of the Commission may seek a confidential informal advisory opinion from the Chairperson, Vice-Chairperson, Executive Director, or Commission Counsel as to whether conduct, actual or contemplated, conforms to the requirements of the Code, subject to the following procedures:

(1) An informal advisory opinion may be requested orally or in writing.

(2) Any oral or written communications between the requesting judge and the Commission relating to an informal advisory opinion shall be confidential unless waived in writing by the judge.

(3) If a request for an informal advisory opinion discloses actual conduct that may be actionable as a violation of the Code, then the Chairperson, Vice-Chairperson, Executive Director, or Commission Counsel shall refer

the matter to an investigative panel of the Commission for consideration.

(4) An informal advisory opinion may be issued orally but shall be confirmed in writing and shall approve or disapprove only the matter in issue, shall not otherwise serve as precedent, and shall be confidential.

(5) Informal advisory opinions shall be reviewed at regularly scheduled panel meetings. If upon review, a majority of the panel members present and voting decide that an informal advisory opinion should be withdrawn or modified, then the inquiring judge shall be notified in writing by the Executive Director. Until this notification takes place, the judge shall be deemed to have acted in good faith if he or she acts in conformity with the informal advisory opinion that is later withdrawn or modified.

(6) If an inquiring judge disagrees with the informal advisory opinion issued by the Chairperson, Vice-Chairperson, Executive Director, or Commission Counsel, then the judge may submit a written request in accordance with subsection (a) of this rule for consideration of the inquiry by the full Commission as a formal advisory opinion.

(c) **Protection of Privileged Information**. All inquiries, whether requesting a formal advisory opinion or an informal advisory opinion, shall present in detail all operative facts upon which the inquiry is based but should not disclose privileged information that is not necessary to the resolution of the question presented.

* * *

Rule 9. Procedure on Receipt of Complaint or Information

(a) **Summary Dismissal After Initial Review**. The Executive Director and the Commission Counsel shall review a written complaint received by the Commission to determine whether the complaint discloses facts that, if true, indicate that a judge has engaged in conduct in violation of the Code or suffers from a disability that seriously interferes with the judge's judicial duties. If the initial review does not disclose such facts, or if the allegations in the written complaint are obviously unfounded or frivolous, then the presiding Chairperson or Vice-Chairperson shall summarily dismiss the complaint at the next investigative panel meeting, subject to the right of a member of the panel to review the complaint and request consideration of it pursuant to subsection (b) of this rule.

(b) **Action on Review by the Investigative Panel**. A written complaint not summarily dismissed pursuant to subsection (a) of this rule shall be considered by an investigative panel. The investigative panel shall also consider any complaint brought on the Commission's own motion that is based on credible information received by the Commission disclosing facts that, if true, indicate that a judge has engaged in conduct in violation of the Code or suffers from a disability that seriously interferes with the judge's judicial duties. By the affirmative vote of at least 5 members, the investigative panel may dismiss the complaint or authorize an investigation pursuant to Rule 10.

(c) **Notice to Judge Regarding Complaint**. A judge who is the subject of a complaint pending before the Commission shall not be notified of the filing of the complaint, except:

(1) if notification to the judge is required pursuant to Rule 10, following the authorization of a formal investigation;

(2) if the investigative panel considering the complaint has authorized the Chairperson, Vice-Chairperson, Executive Director, Commission Counsel, or Commission Investigator to notify the judge of the complaint in the interests of the administration of justice; or

(3) if the judge has been notified by the complainant that the complaint was filed, or if the judge has been notified by another state agency of the receipt of a complaint that was received by that agency and forwarded to the Commission as required by law or other rules.

(d) **Notice to Complainant Regarding Commission Action**. A complainant who files a complaint with the Commission shall be notified in writing of:

(1) the Commission's receipt of the complaint;

(2) the initiation of a formal investigation into the complainant's allegations;

(3) a dismissal of the complaint by the investigative panel, if applicable;

(4) the investigative panel's decision with respect to an appropriate request for reconsideration after the dismissal of a complaint; and

(5) the issuance of an order of public discipline by the Supreme Court in the matter.

In cases in which a complaint is dismissed with a private letter of caution pursuant to Rule 11, the complainant shall be notified that the

matter has concluded and that the Commission has taken appropriate action within its authority to address the complainant's concerns of judicial misconduct.

In cases in which disciplinary proceedings against the judge have been initiated, the complainant shall be notified of the proceedings only if the complainant is to be called as a witness, or if the presiding Chairperson or Vice-Chairperson deems notice to be necessary in the interests of the administration of justice.

(e) **Requests for Reconsideration**. Upon dismissal of a complaint, a complainant may request reconsideration of the dismissal, provided that a request for reconsideration will only be considered by the investigative panel that dismissed the complaint if a request includes new or additional information not previously considered by the panel. Multiple requests for reconsideration without new or additional information will be considered an abuse of the Commission's complaint process and may result in a bar order pursuant to subsection (f) of this rule.

(f) **Abuse of the Complaint Process**. At any meeting of an investigative panel, the Commission Counsel may request that the Commission bar a complainant from filing further complaints or requests for reconsideration with the Commission for either a specified period of time or permanently as to allegations against the judge that have already been considered by the Commission. A bar shall be ordered only upon the affirmative vote of at least 5 members of the panel after a finding by clear and convincing evidence that the complainant has abused the complaint process by:

(1) using abusive or threatening language that is directed toward the Commission, Commission members, or Commission staff, or toward specific members of the judiciary;

(2) knowingly filing false information with the Commission;

(3) repeatedly demanding that the Commission rehear a complaint that has already been reviewed and dismissed without providing new or significantly different allegations or evidence, or repeatedly demanding that the Commission consider a complaint that has already been determined to be outside of the time period allowed for review of the alleged misconduct by the Commission or outside of the Commission's jurisdiction; or

(4) filing complaints that maintain the complainant is not subject to the authority of the State of North Carolina, or its laws, rules, or procedures, and that refuse to recognize

the authority of the General Statutes of North Carolina over the Commission's operations and procedures.

* * *

Rule 12. Initiation of Disciplinary or Disability Proceedings

(a) **Authorization of Disciplinary or Disability Proceedings**. After completion of a formal investigation authorized pursuant to Rule 10, and upon the affirmative vote of at least 5 members, the investigative panel considering the matter may authorize the initiation of a disciplinary or disability proceeding against the judge, who thereafter shall be referred to as the Respondent. The authorization to initiate a disciplinary or disability proceeding constitutes a finding that probable cause exists to believe that the Respondent engaged in conduct that warrants public reprimand, censure, suspension, or removal by the Supreme Court or that the Respondent suffers from a disability that warrants suspension or removal by the Supreme Court pursuant to Article 30 of Chapter 7A of the General Statutes of North Carolina.

(b) **Filing of the Statement of Charges**. A disciplinary or disability proceeding is initiated through the filing of a Statement of Charges by the Commission Counsel at the Commission offices. The Statement of Charges shall contain:

(1) a caption entitled "BEFORE THE JUDICIAL STANDARDS COMMISSION, Inquiry Concerning a Judge No. ___.";

(2) a description of the charge or charges in plain and concise language and in sufficient detail to give fair and adequate notice of the nature of the alleged misconduct or disability;

(3) the name of the complainant;

(4) a statement about the Respondent's right to be represented by counsel at the Respondent's expense; and

(5) directions to the Respondent to file a Verified Answer as required pursuant to Rule 13.

(c) **Notice and Service of the Statement of Charges**.

(1) Service of the Statement of Charges shall constitute notice to the Respondent of the initiation of disciplinary or disability proceedings.

(2) Unless waived by the Respondent, a copy of the Statement of Charges shall be personally served upon the Respondent by a person of suitable age and discretion

who has been designated by the Commission. If, after reasonable efforts to do so, personal service upon the Respondent cannot be effected, service may be made to the Respondent's home address by Registered Mail or Certified Mail, return receipt requested. Proof of service in accordance with N.C.G.S. § 1-75.10(a)(4) shall be filed with the Commission.

(d) **Withdrawal of the Statement of Charges**. Upon motion by the Commission Counsel and good cause shown, the investigative panel that authorized the initiation of disciplinary or disability proceedings may withdraw the Statement of Charges upon the affirmative vote of at least 5 members. Notice of withdrawal of the Statement of Charges shall be made in the same manner as service of the Statement of Charges.

(e) **Interim Suspension During Disciplinary or Disability Proceedings**. At any time following the conclusion of a formal investigation, if the investigative panel finds by clear and convincing evidence that a judge has (1) been charged with a felony under state or federal law, or (2) engaged in serious misconduct that poses an ongoing threat of substantial harm to public confidence in the judiciary or to the administration of justice, then the investigative panel may, upon the affirmative vote of at least 5 members, direct the presiding Chairperson or Vice-Chairperson to recommend that the Chief Justice temporarily suspend the judge from the performance of his or her judicial duties with pay pending final disposition of the proceedings. A copy of the recommendation of interim suspension shall be provided to the judge by Certified Mail, return receipt requested, or as otherwise agreed to in writing by the judge. At any time after an interim suspension is issued, the judge shall have the right to submit written objections to the Commission. The Executive Director shall provide the judge's objections to the Chief Justice, along with the Commission's response. The Executive Director shall also provide a copy of the Commission's response to the judge.

* * *

Rule 15. Ex Parte Communications

(a) **During Disciplinary or Disability Proceedings**. Except as provided in subsection (b) of this rule, upon the initiation of a disciplinary or disability proceeding, no member of the Commission shall engage in ex parte communications with the Respondent, Respondent's counsel, Commission Counsel, or witness regarding the facts or merits of the proceeding.

(b) **Administrative and Procedural Matters**. Commission members may communicate with the Executive Director, Commission

Counsel, and Commission staff with respect to procedural and administrative matters involved in a disciplinary or disability proceeding as may be required in these rules. Upon consent of the Respondent, or the Respondent's counsel, if any, the Commission Counsel may also communicate with the presiding Chairperson or Vice-Chairperson regarding administrative and procedural motions submitted on consent of the parties during the course of a disciplinary or disability proceeding.

* * *

Rule 16. Discovery

(a) **Required Disclosures**. Unless extended by order of the presiding Chairperson or Vice-Chairperson, within 60 days of the filing of the Verified Answer, the Commission Counsel and the Respondent shall disclose to the other:

(1) the name, address, and contact information of each witness the party expects to offer at the disciplinary or disability hearing;

(2) a brief summary of the expected testimony of each witness;

(3) written statements provided by a witness to the Commission or the Respondent; and

(4) copies of documentary or other evidence that may be offered at the disciplinary or disability hearing.

(b) **Exculpatory Evidence**. At the same time the Commission Counsel provides the disclosures required under subsection (a) of this rule, the Commission Counsel shall also provide the Respondent with exculpatory evidence that he or she is aware of and that is relevant to the allegations contained in the Statement of Charges or in a defense thereto.

(c) **Other Forms of Discovery**. The taking of depositions, serving of interrogatories, document requests, requests for admissions, and other discovery procedures authorized by the North Carolina Rules of Civil Procedure shall be permitted only by stipulation of the parties or by order of the Chairperson for good cause shown, and shall be completed in the manner and subject to any conditions as the Chairperson may prescribe.

(d) **Discovery Disputes**. Disputes concerning discovery shall be determined by the presiding Chairperson or Vice-Chairperson, whose decision may not be appealed prior to the conclusion of the disciplinary or disability proceeding.

(e) **Failure to Disclose and Duty to Supplement**. Upon the failure of either party to disclose information or evidence as required under subsections (a) and (b) of this rule, the opposing party may move the presiding Chairperson or Vice-Chairperson for an order compelling disclosure. A copy of the motion to compel shall be served on the opposing party and shall be heard before the presiding Chairperson or Vice-Chairperson, who shall decide the motion in his or her sole discretion. A willful or continuing failure to provide required disclosures may result in the exclusion of the testimony of the witness or of the documentary evidence that was not provided. Both the Commission Counsel and the Respondent shall have a continuing duty to supplement information required to be exchanged under this rule.

* * *

Rule 17. Special Rules as to Disability Cases

(a) **Applicability of Rules Relating to Judicial Misconduct**. A proceeding shall be considered a disability proceeding if it is initiated by either a complaint or motion of the Commission alleging a disability of a judge that seriously interferes with the judge's judicial duties. If a disability proceeding is authorized by the investigative panel upon the completion of a formal investigation pursuant to Rule 10, then the disability proceeding shall be conducted in accordance with the procedures for disciplinary proceedings except as provided in this rule.

(b) **Waiver of Medical Privilege**. A judge waives the medical privilege and shall produce to the Commission Counsel the judge's medical records relating to an alleged disability, if the judge:

(1) provides a written waiver to the Commission;

(2) denies the existence of a disability in a proceeding in which the mental or physical condition or health of the judge is in issue; or

(3) asserts the existence of a disability as a defense to a Statement of Charges.

(c) **Physical or Mental Examination**. Upon the affirmative vote of 5 members, the investigative panel may order a judge who is subject to a formal investigation based on alleged disability to submit to a physical or mental examination by one or more qualified licensed physicians, psychologists, or mental health professionals appointed by the presiding Chairperson or Vice-Chairperson to conduct the examination. The examination shall be at the Commission's expense and copies of the report of the examination shall be provided to the judge and the Commission Counsel. The examining physician or health professional

shall be compensated by the Commission in the same manner as experts in civil cases in the General Court of Justice are compensated. If called to testify at a disciplinary proceeding, the Commission shall bear the witness costs of the examining physician or health professional as provided in Rule 20.

(d) Failure or Refusal to Submit to Examination. The failure or refusal of a judge to submit to a physical or mental examination ordered by the investigative panel shall preclude the judge from presenting evidence of the results of a physical or mental examination done at the judge's own expense. An investigative or hearing panel may consider a refusal or failure to submit to a physical or mental examination ordered pursuant to subsection (c) of this rule as evidence that the judge has a disability that seriously interferes with the ability of the judge to perform the duties of the judicial office.

* * *

Rule 18. Stipulated Facts and Agreed Disciplinary or Disability Dispositions

(a) **Factual Stipulations**.

(1) At any time prior to the conclusion of a disciplinary or disability hearing, the Respondent may stipulate to any of the factual allegations in the Statement of Charges and any other agreed upon facts. The factual stipulations shall be in writing and shall be signed by the Respondent, the Respondent's counsel, if any, and by the Commission Counsel. The factual stipulations may include an agreement as described in subsection (b) of this rule.

(2) The presiding Chairperson or Vice-Chairperson of the hearing panel may accept the factual stipulations and any agreement made pursuant to subsection (b) of this rule into the record at the disciplinary hearing upon the ~~Chairperson's~~presiding Chairperson or Vice-Chairperson's satisfaction that they were entered into freely and voluntarily.

(3) At the conclusion of the disciplinary hearing, the hearing panel shall deliberate and may adopt the factual stipulations upon the affirmative vote of at least 5 members present at the disciplinary hearing. Adoption of the factual stipulations constitutes a finding that the facts contained therein are established by clear and convincing evidence.

(4) If the factual stipulations are rejected by the hearing panel, then they shall be deemed withdrawn. In such circumstances, the Executive Director shall promptly notify the Respondent and the Commission Counsel of a date for a full evidentiary hearing.

(b) **Agreements as to Code Violations and Disciplinary Disposition.**

(1) Factual stipulations made pursuant to subsection (a) of this rule may, but are not required to, include an agreement as to specified violations of the Code in exchange for a requested disciplinary disposition. Upon its de novo review, the hearing panel may accept the agreement upon the affirmative vote of at least 5 members.

(2) In the absence of an agreement as to violations of the Code or a requested disciplinary disposition, or in the event the hearing panel rejects the agreement, the Executive Director shall promptly notify the Respondent and the Commission Counsel of a date for a hearing to consider the arguments of the parties with respect to the Code violations and the disciplinary disposition of the matter.

(c) **Consent Order Upon Resignation or Retirement of the Respondent**. At any time prior to the conclusion of a disciplinary or disability proceeding, the Respondent may enter into a consent order, signed by all parties and approved by the presiding Chairperson or Vice-Chairperson, by which the Respondent resigns or retires from judicial office and agrees never to seek judicial office in North Carolina in the future in exchange for dismissal of the Statement of Charges without prejudice and upon any other terms and conditions as the parties may agree. A violation of the consent order shall be deemed a separate and independent violation of the Code.

* * *

Rule 19. Disciplinary and Disability Hearings

(a) **Notice of Hearing**. The Executive Director shall serve a notice of hearing upon the Respondent in the same manner as service of the Statement of Charges under Rule 12, or in any manner otherwise agreed to by the Respondent. The Notice of Hearing shall set forth the date, time, and location of the disciplinary hearing. Unless otherwise agreed to in writing by the Commission Counsel and the Respondent, the disciplinary hearing shall be held no sooner than 60 days after filing

of the Verified Answer or, if no response to the Statement of Charges is filed, 60 days after the expiration of time allowed for its filing.

(b) **Failure of the Respondent to Appear for Hearing**. The disciplinary hearing shall proceed whether or not the Respondent has filed a Verified Answer or appears for the hearing, either in person or through counsel.

(c) **Applicable Rules of Evidence**. The North Carolina Rules of Evidence set forth in Chapter 8C of the General Statutes of North Carolina shall apply in all disciplinary hearings except as otherwise indicated in these rules. Rulings on evidentiary matters shall be made by the presiding Chairperson or Vice-Chairperson, or by the member presiding in the Chairperson or Vice-Chairperson's absence ~~of the Chairperson~~.

(d) **Burden of Proof**. At the disciplinary hearing, the Commission Counsel shall have the burden of proving the existence of grounds for a recommendation of discipline, suspension, or removal based on disability by clear and convincing evidence, as that evidentiary standard is defined by the Supreme Court.

(e) **Additional Rights of the Respondent**. In addition to the rights specified in these rules, the Respondent shall have the right to defend against the charges by the introduction of evidence, by the examination and cross-examination of witnesses, and by the right to address the hearing panel in argument at the conclusion of the disciplinary hearing.

(f) **Record of Hearing**. The disciplinary or disability hearing shall be recorded ~~verbatim by a court reporter~~by an audiovisual recording device. ~~In the event that an evidentiary hearing is held, testimony of witnesses shall also be video recorded.~~The hearing panel of the Commission may engage a court reporter to transcribe a hearing in person or from the recording of the hearing. If a witness testifies at the hearing, public discipline is recommended by the hearing panel, and no court reporter transcribed the hearing in person, then the hearing panel must engage a court reporter to transcribe the hearing from the recording.

* * *

Rule 20. Witnesses; Oaths; Subpoenas

(a) **Witnesses**. The Commission Counsel and the Respondent shall have the right to call fact witnesses, expert witnesses, and character witnesses in accordance with the North Carolina Rules of Evidence, subject to the following limitations:

(1) **Fact and Expert Witnesses**. The Commission Counsel and the Respondent shall have the right to call witnesses to testify about a genuine dispute of material fact between the parties in the disciplinary hearing. The Commission Counsel may call the Respondent as a witness. Expert witnesses may be called at the expense of the party calling the expert and only in accordance with the North Carolina Rules of Evidence.

(2) **Character Witnesses**. The Commission Counsel and the Respondent shall have the right to call witnesses to testify to the character of the Respondent, but neither the Commission Counsel nor the Respondent may call more than 4 character witnesses in a disciplinary proceeding. Additional character witnesses may submit affidavits or be identified and tendered for the record.

(3) **Witness Costs**. Witnesses shall be reimbursed in the manner provided in civil cases in the General Court of Justice, and their expenses shall be borne by the party calling them. Vouchers authorizing disbursements by the Commission for witnesses shall be signed by the presiding Chairperson or Vice-Chairperson or by the Executive Director.

(b) **Oaths**. Every witness who testifies before the hearing panel at a disciplinary hearing shall be required to declare, by oath or affirmation, to testify truthfully. The oath or affirmation may be administered by any member of the Commission or by the Executive Director.

(c) **Subpoenas**. Both the Commission Counsel and the Respondent have the right to the issuance of subpoenas to compel the attendance of witnesses or the production of documents and other evidentiary material for the disciplinary or disability hearing. A subpoena to compel the attendance of a witness at a disciplinary or disability hearing before the Commission, or a subpoena for the production of evidence, shall be issued in the name of the State of North Carolina upon request of the Commission Counsel or the Respondent, and shall be signed by a member of the Commission, by the Executive Director, or by the Commission Counsel. A subpoena shall be served, without fee, by any officer authorized to serve a subpoena under Rule 45(b) of the North Carolina Rules of Civil Procedure.

* * *

Rule 22. Recommendation to the Supreme Court; Record in Support of Recommendation

(a) **Recommendation to the Supreme Court.**

(1) Unless the time is extended by order of the ~~Chair~~presiding Chairperson or Vice-Chairperson, within 60 days of the conclusion of the disciplinary hearing, the Executive Director shall serve upon the Respondent and the Commission Counsel the hearing panel's recommendation to the Supreme Court. Service of the recommendation upon the Respondent shall be in the same manner as service of the Statement of Charges, or in any manner otherwise agreed to by the parties.

(2) The recommendation shall be signed by the presiding Chairperson~~,~~ or Vice-Chairperson ~~in the absence of the Chairperson,~~ and shall contain findings of fact supported by the record, conclusions of law, and a recommended disposition as to the Respondent. If the hearing panel's recommendation is based upon a stipulation and an agreement entered into pursuant to Rule 18, then the conclusions of law and recommendation for the disposition shall rely only upon the factual stipulations, facts that may be properly judicially noticed, and admissions in the Verified Answer.

(b) **Record in Support of Recommendation.**

(1) **Proposed Record**. At the same time and in the same manner that the recommendation is served upon the Respondent, the Executive Director shall also serve a proposed record in support of the recommendation. The proposed record shall include the pleadings, a verbatim transcript of the hearing, a copy of the video recording of any witness testimony at the hearing, and any evidence entered into the record during the hearing and referenced in the recommendation. The name, office address, telephone number, State Bar number, and e-mail address of the Commission Counsel and the Respondent's counsel shall appear at the end of the record. If the Respondent is not represented by counsel, then the record shall include the Respondent's name, address, telephone number, State Bar number, and e-mail address.

(2) **Objections and Settling the Record**. Unless the Respondent files objections to the proposed record

within 10 business days after service of the proposed record, the proposed record shall constitute the official record. If the Respondent files objections, any objections not resolved by the agreement of the parties shall be settled by the presiding Chairperson or Vice-Chairperson upon notice and an opportunity of the Respondent and the Commission Counsel to be heard. In such cases, the record as settled by the presiding Chairperson or Vice-Chairperson shall be the official record.

(c) **Filing of the Recommendation and Record.**

(1) Within 10 business days after the record has been settled, the Executive Director shall file with the Clerk of the Supreme Court the recommendation, the record in support of the recommendation, and a certification that the record has been settled and is the official record of the disciplinary or disability proceeding.

(2) The Executive Director shall concurrently serve upon the Respondent a Notice of Filing giving notice of the recommendation, record, and certification, and specifying the date upon which they were filed in the Supreme Court. The Executive Director shall also transmit to the Respondent copies of the certification along with any changes to the official record occurring as a result of the settlement of the record.

(3) The Executive Director shall serve copies of the filings upon the Respondent in the same manner as service of the Statement of Charges, or in any manner otherwise agreed to by the parties.

(d) **Proceedings in the Supreme Court**. Proceedings in the Supreme Court shall be governed by the Supreme Court's Rules for Review of Recommendations of the Judicial Standards Commission.

* * *

These amendments to the Rules of the Judicial Standards Commission become effective on 3 September 2024.

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 21st day of August 2024.

s/Riggs, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 21st day of August 2024.

s/Grant E. Buckner

GRANT E. BUCKNER
Clerk of the Supreme Court

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

RULES GOVERNING THE ADMINISTRATIVE 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 July 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 .0900, *Procedures for the Administrative Committee*, be amended as shown in the following attachment:

ATTACHMENT 1: 27 N.C.A.C. 01D, Section .0900, Rule .0901, *Transfer to Inactice Status*

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 19, 2024.

Given over my hand and the Seal of the North Carolina State Bar, this the 30th day of July, 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 21st day of August, 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 21st day of August, 2024.

s/Riggs, J.
For the Court

27 NCAC 01D .0901 TRANSFER TO INACTIVE STATUS

(a) Petition for Transfer from Active to Inactive Status

Any active member who desires to be transferred to inactive status shall file a petition with the secretary addressed to the council setting forth ~~fully~~fully:

(1) the member's name and current address;

(2) the date of the member's admission to the North Carolina State Bar;

~~(3) the reasons why the member desires transfer to inactive status;~~

(3~~4~~) that at the time of filing the petition the member is in good standing having paid all membership fees, Client Security Fund assessments, late fees and costs assessed by the North Carolina State Bar, as well as all past due fees, fines and penalties owed to the Board of Continuing Legal ~~Education~~Education. ~~and without any grievances or disciplinary complaints pending against him or her~~;

(4~~5~~) any other matters pertinent to the petition.

(b) Petition for Transfer from Administrative Suspension Status to Inactive Status

Any member suspended pursuant to Rule .0903 of this subchapter who desires to be reinstated and immediately transferred to inactive status shall file a petition with the secretary addressed to the council setting forth fully:

(1) the member's name and current address;

(2) the date of the member's admission to the North Carolina State Bar;

(3) the date of the member's administrative suspension;

(4) that at the time of filing the petition the member has paid all membership fees, Client Security Fund assessments, late fees and costs assessed by the North Carolina State Bar, as well as all past due fees, fines and penalties owed to the Board of Continuing Legal Education;

(5) that the member acknowledges that any subsequent petition to transfer from inactive status to active status will

require satisfying the requirements for reinstatement from suspension pursuant to Rule .904 of this subchapter, using the effective date of the member's suspension to calculate the requirements of Rule .0904(d)(3) or (4).

(c~~b~~) Conditions Upon Transfer

No member may be voluntarily transferred to disability-inactive status, retired/nonpracticing status, or emeritus pro bono status until:

(1) the member has paid all membership fees, Client Security Fund assessments, late fees, and costs assessed by the North Carolina State Bar or the Disciplinary Hearing Commission, as well as all past due fees, fines and penalties owed to the Board of Continuing Legal Education;

(2) the member acknowledges that the member continues to be subject to the Rules of Professional Conduct and to the disciplinary jurisdiction of the State Bar including jurisdiction in any pending matter before the Grievance Committee or the Disciplinary Hearing Commission; and,

(3) in the case of a member seeking emeritus pro bono status, it is determined by the Administrative Committee that the member is in good standing, is not the subject of any matter pending before the Grievance Committee or the Disciplinary Hearing Commission, and will be supervised by an active member employed by a nonprofit corporation qualified to render legal services pursuant to G.S. 84-5.1.

(d~~c~~) Order Transferring Member to Inactive Status

Upon receipt of a petition which satisfies the provisions of Rule .0901(a) or (b) above, the council may, in its discretion, enter an order transferring the member to inactive status and, where ~~appropriate,~~appropriate for petitions filed pursuant to Rule .0901(a), granting emeritus pro bono status. The order shall become effective immediately upon entry by the council. A copy of the order shall be mailed to the member.

(e~~d~~) Transfer to Inactive Status by Secretary of the State Bar

Notwithstanding paragraph (d~~e~~) of this rule, an active member may petition for transfer to inactive status pursuant to paragraph (a) or (b) of this rule and may be transferred to inactive status by the secretary of the State Bar upon a finding that the active member has complied with

or fulfilled the conditions for transfer to inactive status set forth in paragraph (c~~b~~) of this rule. Transfer to inactive status by the secretary is discretionary. If the secretary declines to transfer a member to inactive status, the member's petition shall be submitted to the Administrative Committee at its next meeting and the procedure for review of the petition shall be as set forth in paragraph (d~~e~~) of this rule.

History Note: *Authority G.S. 84-23;*
Readopted Eff. December 8, 1994;
Amendments Approved by the Supreme Court: March 7, 1996; February 3, 2000; March 6, 2008; March 6, 2014; August 21, 2024
Amendments Approved by the Supreme Court November 2, 2022 and re-entered into the Supreme Court's minutes March 20, 2024.

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

DISCIPLINARY RULE ON THE TRUST ACCOUNT COMPLIANCE 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 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. 01B, Section .0100, *Discipline and Disability Rules* be amended as shown in the following attachment:

ATTACHMENT 2- 27 N.C.A.C. 01B, Section .0100, Rule .0132,
Trust Accounts; Audits

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 19, 2024.

Given over my hand and the Seal of the North Carolina State Bar, this the 30th day of July, 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 21st day of August, 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 21st day of August, 2024.

s/Riggs, J.
For the Court

27 NCAC 01B .0132 Trust Accounts; Audit

(a) Investigative Subpoena for Reasonable Cause - For reasonable cause, the chairperson of the Grievance Committee is empowered to issue an investigative subpoena to a member compelling the production of any records required to be kept relative to the handling of client funds and property by the Rules of Professional Conduct for inspection, copying, or audit by the counsel or any auditor appointed by the counsel. For the purposes of this rule, circumstances that constitute reasonable cause, include, but are not limited to:

(1) any sworn statement of grievance received by the North Carolina State Bar alleging facts which, if true, would constitute misconduct in the handling of a client's funds or property;

(2) any facts coming to the attention of the North Carolina State Bar, whether through random review as contemplated by Rule .0132(b) below or otherwise, which if true, would constitute a probable violation of any provision of the Rules of Professional Conduct concerning the handling of client funds or property;

(3) two or more grievances received by the North Carolina State Bar over a ~~twelve~~ 12 month period alleging facts which, if true, would indicate misconduct for neglect of a client matter or failure to communicate with a client;

(4) any failure to respond to any notices issued by the North Carolina State Bar with regard to a grievance or a fee dispute;

(5) any information received by the North Carolina State Bar which, if true, would constitute a failure to file any federal, state, or local tax return or pay an federal, state, or local tax obligation; or

(6) any finding of probable cause, indictment, or conviction relative to a criminal charge involving moral turpitude. The grounds supporting the issuance of any such subpoena will be set forth upon the face of the subpoena.

(b) Random Audit ~~Investigative~~ Subpoenas and Investigations - The chairperson of the Grievance Committee may randomly issue investigative subpoenas to members compelling the production of any records required by the Rules of Professional Conduct to be kept relative to the handling of client funds or property ~~by the Rules of Professional Conduct~~ for inspection by the counsel or any auditor appointed by the counsel to

determine compliance with the Rules of Professional Conduct. Any such subpoena will disclose upon its face its random character and contain a verification of the secretary that it was randomly issued. No member will be subject to random selection under this section more than once in three years. Any member whose random audit discloses one or more violations of the Rules of Professional Conduct may be referred by the counsel, by the director of the Trust Account Compliance Department (the department), or by the auditor to the department's Trust Account Compliance Program. Determination of a member's qualification for referral to the Trust Account Compliance Program after random audit shall be made by the counsel, by the director, or by the auditor pursuant to guidelines established by the Council. The counsel, the director, or~~The~~ the auditor may also report any violation of the Rules of Professional Conduct discovered during the random audit to the Grievance Committee for investigation. ~~The auditor may allow the attorney a reasonable amount of time to correct any procedural violation in lieu of reporting the matter to the Grievance Committee.~~ The director of the department and the auditor shall each have authority under the original subpoena for random audit to compel the production of any documents necessary to determine whether the attorney has corrected any violation identified during the audit.

(c) Time Limit - No subpoena issued pursuant to this rule may compel production within five days of service.

(d) Evidence - The rules of evidence applicable in the superior courts of the state will govern the use of any material subpoenaed pursuant to this rule in any hearing before the commission.

(e) Attorney-Client Privilege/Confidentiality - No assertion of attorney-client privilege or confidentiality will prevent an inspection or audit of a trust account as provided in this rule.

History Note: *Authority G.S. 84-23;*
Readopted Eff. December 8, 1994;
Amendments Approved by the Supreme Court: November 16, 2006; September 22, 2016; August 21, 2024.

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ADVERSE POSSESSION

Easement—claim by owner of dominant tenement—hostile possession—summary judgment—In a property dispute between neighbors, where a husband and wife (defendants) owned adjoining tracts of land, the first of which contained defendants' home and the second of which benefited from a 30-foot-wide easement containing a driveway and a strip of land east of the driveway leading up to plaintiffs' property, the trial court erred in denying summary judgment to defendants on their claim for adverse possession of the land between the driveway and plaintiffs' property line. Defendants' forecast of evidence—considered in the light most favorable to defendants—created a genuine issue of material fact concerning the hostility element of their adverse possession claim, with the evidence showing that: defendants mistakenly believed that they owned the disputed land; defendants made permanent improvements on the land that went beyond what the easement allowed, thereby rebutting the presumption of permissive use; and, although none of plaintiffs' predecessors in interest ever objected to defendants' use or improvement of the disputed tract, their silence did not amount to a grant of permission for such use or improvement. **Hinman v. Cornett, 62.**

APPEAL AND ERROR

Appeal to Supreme Court—based on Court of Appeals dissent—new theory asserted in dissent—review declined—In an appeal to the Supreme Court based on a dissent from the Court of Appeals, where a business sought to overturn the trial court's order upholding a towing company's statutory lien on one of the business's trucks and authorizing the sale of the truck, the Supreme Court declined to review the dissent's theory of the case—that the towing company unlawfully converted the truck for personal use and, therefore, the lien should have been reduced based on the truck's loss in fair market value—because it was not first raised and argued by the parties and addressing it would require access to evidence that no party presented at trial and findings of fact that the trial court never made. **Bottoms Towing & Recovery, LLC v. Circle of Seven, LLC, 359.**

Interlocutory order—failure to show grounds for appellate review—release of underlying claim—The Supreme Court dismissed the fifth appeal from an interlocutory order entered by the Business Court where, as was the case in his previous four appeals, appellant failed to demonstrate grounds for appellate review and instead advanced arguments that were unrelated to the Court's jurisdiction. Notably, the arguments that appellant did raise neither addressed the opposing party's main argument in the underlying action nor cured the fact that appellant had already released his claim giving rise to the action. The Court also cautioned appellant that he could face sanctions in the future if he continued to flout the Rules of Appellate Procedure and show disregard for the Court's time and resources. **In re Se. Eye Ctr., 101.**

Interlocutory order—substantial right—sufficiency of factual basis—The decision of the Court of Appeals dismissing a town's appeal from an interlocutory order (in which the trial court dismissed the town's claims for lack of standing but allowed another municipality's claims to proceed) was reversed where the town provided in its statement of appellate review a sufficient factual basis for immediate review pursuant to *Creek Pointe Homeowner's Ass'n, Inc. v. Happ*, 146 N.C. App. 159 (2001) (allowing immediate review under similar circumstances). The matter was remanded for the lower appellate court to consider the parties' arguments on the issue of standing. **Gardner v. Richmond Cnty., 594.**

APPEAL AND ERROR—Continued

Mootness—denial of habeas petition—review of lower appellate court decision—clarification required—The Supreme Court exercised its jurisdiction pursuant to the North Carolina Constitution to review the decision of the Court of Appeals regarding the denial of a habeas corpus petition because, although the case was moot, review was necessary to clarify the scope of the writ of habeas corpus and the public interest exception and to resolve conflicting statements of law between the lower appellate court's opinion and established law. **State v. Daw, 468.**

Preservation of issues—constitutional rights of parent—determined by district court on its own initiative—not challenged in trial court—In a neglect proceeding resulting in the temporary placement of a juvenile with relatives, where the district court on its own initiative determined that the father had acted in a manner inconsistent with his constitutional rights as a parent but the father did not challenge that determination on constitutional grounds, that issue was not preserved for appellate review—a result in conformance with the longstanding precedent that constitutional arguments not raised in a trial court will not be considered for the first time on appeal, in part to ensure that parties have notice and an opportunity to present relevant evidence on the matter. In addition to reversing the lower appellate court's decision in the instant case, the Supreme Court expressly overruled the contrary preservation holding by the Court of Appeals in *In re B.R.W.* and its progeny. **In re K.C., 690.**

Preservation of issues—criminal defendant's right to competency hearing—statutory—waiver—In a prosecution for multiple charges arising from defendant's involvement in a scheme to throw footballs containing illegal drugs into a prison yard, where a competency evaluation was ordered for defendant but he posted bond and was released approximately two weeks later without having been evaluated, defendant waived his statutory right to a competency hearing under N.C.G.S. § 15A-1002 by failing—over the course of several years between entry of the evaluation order and his conviction—to assert the issue at trial or beforehand by, for example, remaining in pretrial custody for the evaluation, moving to amend the evaluation order in light of his release, or checking himself into a hospital for the ordered evaluation after his pretrial release. Further, nothing in the record since entry of the evaluation order suggested any competency concerns, defendant repeatedly represented himself as competent at trial, and defendant specifically disclaimed any constitutional competency challenge on appeal. **State v. Wilkins, 923.**

Preservation of issues—criminal trial—judge's failure to follow statutory mandate—no preliminary prejudice analysis required—The Court of Appeals properly reviewed defendant's appeal from his convictions for first-degree murder, murder of an unborn child, and robbery with a dangerous weapon after concluding that his main argument—that the trial court failed to exercise its discretion under N.C.G.S. § 15A-1233 when it denied the jury's request to review partial transcripts of witness testimony—was preserved for appellate review despite defendant's failure to raise the issue at trial. The statutory mandate placed upon the trial court in section 15A-1233 automatically preserved defendant's argument, and the Court of Appeals was not required to condition appellate review on a showing that the trial court's alleged error was prejudicial—a step that would require reviewing the issue on the merits before determining whether it was even preserved. **State v. Vann, 244.**

Right to appeal—denial of motion to suppress—entry of guilty plea—no plea agreement—notice of intent to appeal not required—Where defendant entered

APPEAL AND ERROR—Continued

an open guilty plea—one that was not made as part of a plea agreement—he was not required to provide notice of his intent to appeal the denial of his motion to suppress or his judgment prior to entry of the plea. The Supreme Court declined to expand the scope of the rule stated in *State v. Reynolds*, 298 N.C. 380 (1979) (concluding that a defendant who wants to appeal a suppression motion denial pursuant to N.C.G.S. § 15A-979(b) must give notice of his or her intent to appeal prior to pleading guilty as part of a negotiated plea agreement, or else the right to appeal is waived) to include open pleas. **State v. Jonas, 137.**

ASSAULT

With a deadly weapon inflicting serious injury—jury instructions—castle doctrine—proportionality of force used—improper—In a prosecution for assault with a deadly weapon inflicting serious injury arising from defendant having shot the victim after the victim entered defendant's front porch, the trial court erred by instructing the jury that defendant did "not have the right to use excessive force" when defending her home, even under the castle doctrine. Based on the statutory formulation of the castle doctrine, which provides that a lawful occupant of a home who uses deadly force against an intruder is presumed to have had a reasonable fear of imminent death or serious bodily harm, the jury could not consider the proportionality of defendant's force unless it found that: (1) defendant was not entitled to the presumption of reasonable fear, or (2) defendant qualified for the presumption to apply, but the State adequately rebutted the presumption. Instead of granting defendant a new trial, the matter was remanded to the Court of Appeals with instructions to analyze whether the trial court's error was prejudicial. **State v. Phillips, 513.**

CHILD ABUSE, DEPENDENCY, AND NEGLECT

Abuse and neglect—visitation—dispositional evidence and factual findings—principles for appellate review—In an abuse and neglect matter involving four biological parents (a mother and three men who each fathered one of her children), the Supreme Court reversed a decision by the Court of Appeals, which after prior remand from the higher court reversed the trial court's dispositional order denying visitation to all but one parent, and remanded the case directly to the trial court for any further proceedings. In doing so, the Supreme Court reiterated the following principles: on appeal, dispositional findings of fact are reviewed for whether they are supported by competent evidence; the Juvenile Code permits trial courts to consider hearsay evidence at disposition hearings; here, the trial court was not required to make specific findings for each parent regarding their parental fitness or any conduct inconsistent with their parental rights before determining whether visitation was in the children's best interest; because the issue of each parent's constitutionally protected parental status was not raised at trial, it could not be addressed on appeal; both the evidence and the unchallenged factual findings supported the trial court's disposition; and the trial court was not required to enter separate factual findings and legal conclusions for each parent before making its disposition. **In re A.J.L.H., 305.**

Full custody awarded to non-relative—statutorily required findings sufficient—Following an abuse and neglect adjudication, the district court's final permanency planning order—awarding full custody to the juvenile's foster parents (rather than placing the juvenile with a maternal grandfather) and converting the case to a civil custody proceeding—was affirmed because the written findings of fact

CHILD ABUSE, DEPENDENCY, AND NEGLECT—Continued

complied with the Juvenile Code provisions cited in the mother's appeal in that: no written finding regarding placement of the juvenile with the mother within six months was required where the impossibility of such a placement was uncontested (N.C.G.S. § 7B-906.1(e)); the findings reflected the court's determination that reunification with the mother was inconsistent with the juvenile's health and safety (N.C.G.S. § 7B-906.2(b), (d)(4)); the findings, including facts in the department of social services court report incorporated by reference in the order, detailed the mother's availability to the court and the guardian ad litem (N.C.G.S. § 7B-906.2(d)(3)), as well as her participation in her case plan (N.C.G.S. § 7B-906.2(d)(2)); and the findings demonstrated the district court's consideration of the maternal grandfather as a potential placement, in conformance with the requirement of N.C.G.S. § 7B-903(a1) that it "first consider" a relative as a placement for a juvenile. **In re L.L., 706.**

Guardianship—awarded to in-state relative—before home study of out-of-state relative was completed—After adjudicating respondent-mother's three minor children as neglected and dependent, the trial court did not abuse its discretion when it awarded guardianship to the children's great aunt, who lived in North Carolina, without waiting for the completion of a home study of an alternative relative placement—the children's grandmother, who lived in Georgia—pursuant to the Interstate Compact for the Placement of Children (ICPC). Neither the ICPC nor N.C.G.S. § 7B-903(a1) require a trial court to wait for the resolution of a home study to rule out placement with an out-of-state relative if the court concludes that an in-state relative is willing and able to provide proper care and supervision and that placement with the in-state relative is in the children's best interests. Further, in this case, the trial court made findings of fact that supported awarding guardianship to the great aunt, including that she had provided the children a safe, loving, and stable home for almost three years. **In re K.B., 68.**

Neglect and dependency—adjudication order—steps for reviewing on appeal—sufficiency of findings and evidence—In a neglect and dependency matter, where the parties agreed on appeal that many of the trial court's adjudicatory findings of fact were based on inadmissible hearsay and should therefore be disregarded, the Supreme Court reiterated the proper steps for reviewing an adjudication order on appeal after disregarding unsupported findings: first, the appellate court must examine whether the remaining findings of fact support the trial court's conclusions of law; then, if those findings do not support the trial court's conclusions, the appellate court must examine whether the record contains sufficient evidence that could support the necessary findings. Here, the trial court's remaining findings did not support its legal conclusions, but the record contained clear, cogent, and convincing evidence that could have supported the necessary findings, which required vacating the adjudication order and remanding the matter to the trial court to enter a new order. **In re A.J., 409.**

CONSTITUTIONAL LAW

Capital murder trial—pretrial motion to strike death penalty—prosecutorial discretion—In a capital murder prosecution arising from the fatal shooting of two victims, the trial court did not err by denying defendant's pretrial motion to strike the death penalty because the decision to seek a particular sentence or to engage in plea bargaining is within the exclusive and discretionary power of the district attorney and does not impermissibly burden a defendant's constitutional rights. **State v. Gillard, 797.**

CONSTITUTIONAL LAW—Continued

Challenge to Certificate of Need law—claims not limited to as-applied challenge—facial challenge implicated—remand required—In a case challenging the constitutionality of North Carolina's Certificate of Need law, although plaintiffs asserted that their claims constituted an "as-applied" challenge, where the allegations in their complaint, if proven, could render the law unconstitutional in all its applications, the trial court and Court of Appeals mistakenly treated the claims exclusively as as-applied challenges rather than both as-applied and facial challenges. The lower courts' decisions were vacated and the matter was remanded for further proceedings. **Singleton v. N.C. Dep't of Health & Hum. Servs., 597.**

Clerk of superior court—constitutional officer—removal—authority of a replacement judge appointed by the Chief Justice—Following two trial court proceedings removing a duly elected clerk of superior court—the second of which was conducted on remand from the Court of Appeals—the Supreme Court overruled the lower appellate court's holding in the clerk's first appeal that, upon the recusal of the senior regular resident superior court judge (the official authorized to preside in such cases pursuant to Article IV, Section 17(4) of the North Carolina Constitution), a replacement judge appointed by the Chief Justice lacked authority to preside in the matter. The Chief Justice is authorized by N.C.G.S. § 7A-41.1(e) to appoint an acting senior resident superior court judge when the regular senior resident superior court judge is unable to perform their duties, including to preside in a clerk removal proceeding. **In re Chastain, 678.**

Clerk of superior court—removal standard—The Supreme Court clarified that, in a proceeding to remove a duly elected clerk of superior court pursuant to Article IV, Section 17(4) of the North Carolina Constitution, "misconduct"—wrongful, unlawful, dishonest, or improper conduct—rather than "willful misconduct," is the proper standard to be applied. **In re Chastain, 678.**

Clerk of superior court—removal—procedural due process—The Supreme Court clarified that, in a proceeding to remove a duly elected clerk of superior court pursuant to Article IV, Section 17(4) of the North Carolina Constitution, due process considerations require that a clerk may be removed only for conduct identified in the charging affidavit that initiated the removal proceeding per N.C.G.S. § 7A-105. **In re Chastain, 678.**

Effective assistance of counsel—capital murder trial—premature consideration on direct appeal—In a capital murder prosecution arising from the fatal shooting of two victims, where defendant's claims that his counsel provided ineffective assistance—by failing to object at numerous points throughout the trial and sentencing—could not be determined on the cold record, those claims were dismissed without prejudice to defendant's right to raise them in a subsequent proceeding. **State v. Gillard, 797.**

Eighth and Fourteenth Amendments—death penalty—method of lethal injection—substantial and imminent risk not shown—In a capital murder prosecution arising from the fatal shooting of two victims in which defendant received a sentence of death, defendant failed to meet his burden of demonstrating that the state's method of lethal injection involved a substantial risk of serious harm (severe pain over and above death itself) and that an alternative method was available that would entail significantly less risk of needless suffering. Therefore, defendant's argument that the state's method of punishment was cruel and unusual and unconstitutional under the Eighth and Fourteenth Amendments was rejected. **State v. Gillard, 797.**

CONSTITUTIONAL LAW—Continued

North Carolina—direct constitutional claims—colorable—selective enforcement of emergency executive order—State's sovereign immunity overcome—In a dispute between the Department of Health and Human Services (DHHS) and a racetrack owner, who publicly criticized and refused to comply with the governor's executive order prohibiting "mass gatherings" during the COVID-19 pandemic, the trial court properly denied the State's motion to dismiss based on sovereign immunity where the counterclaims brought by defendants (the racetrack and its owner) adequately alleged colorable constitutional claims under the Fruits of Their Labor Clause and Equal Protection Clause of the North Carolina Constitution sufficient to pierce the State's sovereign immunity. Specifically, defendants alleged that: the governor singled out defendants by pressuring the local sheriff to arrest the racetrack owner and, when the sheriff refused, ordering DHHS officials to shut down the racetrack as a health hazard; the governor took these actions to punish the racetrack owner rather than to address an actual health hazard at the racetrack; and DHHS officials did not take similar actions against other large outdoor venues whose owners did not openly criticize the emergency executive order. **Kinsley v. Ace Speedway Racing, Ltd., 418.**

North Carolina—direct constitutional claims—condemnation of plaintiffs' properties—adequate state law remedy—In an action raising direct claims under the state constitution ("*Corum* claims"), in which plaintiffs alleged that defendant city violated their rights to equal protection and substantive due process by condemning plaintiffs' properties and marking them for demolition, the trial court had subject matter jurisdiction to hear the claims even though plaintiffs had not exhausted their administrative remedies first. Exhaustion of administrative remedies does not dictate a court's jurisdiction over direct constitutional claims, but instead speaks to an element of this type of claim: whether an adequate state law remedy exists for the constitutional harm alleged. Further, in determining the availability of an adequate state law remedy, plaintiffs' equal protection and due process claims could not be lumped together, since each claim involved different constitutional rights, raised different injuries, and envisioned different modes of relief. **Askew v. City of Kinston, 286.**

North Carolina—Fines and Forfeitures Clause—interlocal agreement—"clear proceeds"—fines from red light camera enforcement program—A local act implementing a city's red light camera enforcement program and authorizing an interlocal agreement—which laid out a cost-sharing framework for funding the program—between the city and its county's school board did not violate the Fines and Forfeitures Clause of the North Carolina Constitution (Art. IX, section 7), where the board received all of the fines collected under the program and then reimbursed the city for two main expenses: the fee for the private company hired to install the cameras, maintain them, and process captured violations; and the salary of an officer hired to review the recorded evidence and approve citations. Through this framework, the city recouped only the "reasonable costs of collection," and therefore the board retained the "clear proceeds" of collected red light penalties as that term is defined under the Fines and Forfeitures Clause. **Fearrington v. City of Greenville, 38.**

CONTRACTS

Covenant of good faith and fair dealing—consumer agreement—unilateral changes—arbitration amendment—relation back to original contract—contract not rendered illusory—A credit union's unilateral changes, with notice, to

CONTRACTS—Continued

a standard membership contract (which contained a change-of-terms provision) to require arbitration for certain disputes and to waive members' right to file a class action suit were enforceable because they did not violate the implied covenant of good faith and fair dealing inherent in contracts where the changes reasonably related to the universe of terms, including those that related to dispute resolution, that existed in the original contract. Further, the change-of-terms provision that permitted unilateral modifications did not render the contract illusory since the implied covenant of good faith and fair dealing acted as a sufficient check on the credit union's power to modify the contract. Finally, a member's argument that the arbitration amendment was unenforceable without her mutual assent had no merit where she gave her assent to the credit union's ability to make changes with notice when she entered into the original contract that contained the change-of-terms provision. **Canteen v. Charlotte Metro Credit Union, 18.**

CRIMINAL LAW

Capital murder trial—no error—no cumulative error—In a capital murder prosecution arising from the fatal shooting of two victims, defendant failed to show that cumulative prejudicial error deprived him of a fair trial and required reversal of his convictions and a new trial or sentencing hearing. Where the Supreme Court addressed each of defendant's substantive claims on appeal and found no error by the trial court, there could be no cumulative error. **State v. Gillard, 797.**

Capital murder trial—preservation issues—In a capital murder prosecution arising from the fatal shooting of two victims, arguments presented by defendant as preservation issues—that the death penalty should be invalidated and that the indictment was insufficient to elevate the crime of murder from second-degree to first-degree and did not allege aggravating circumstances—did not include compelling reasons to depart from well-established precedent. **State v. Gillard, 797.**

Jury instructions—capital murder trial—culpability for killing by accomplice—major participant in events leading to death—In a capital murder prosecution arising from the fatal shooting of a prostitute and her protector (a male) at a hotel by defendant and another man, there was no plain error with regard to defendant's argument that, since he was not the one who killed the male victim and therefore could not have had the requisite intent to kill for imposition of the death penalty, the trial court should have included a culpability requirement in its jury instruction pursuant to *Enmund v. Florida*, 458 U.S. 782 (1982), and *Tison v. Arizona*, 481 U.S. 137 (1987). The instruction was not required because defendant was convicted of first-degree murder for the killing of the male victim on both theories of felony murder and premeditation and deliberation based on evidence showing that defendant was a major participant in the male victim's death by actively planning, arranging, and perpetrating an armed, violent felony that was likely to lead to a person's death. **State v. Gillard, 797.**

Jury instructions—capital murder trial—felony murder—final mandate—felony elements not repeated—In a capital murder prosecution arising from the fatal shooting of two victims, the trial court did not plainly err when, in its final mandate to the jury on first-degree murder based on felony murder, it failed to repeat the elements for the underlying felonies—attempted first-degree rape and attempted robbery with a dangerous weapon—because the instructions, taken as a whole, included thorough and correct instructions regarding each element of those felonies

CRIMINAL LAW—Continued

and, therefore, there was no reasonable cause to suggest that the jury was misled or misinformed. **State v. Gillard, 797.**

Motion to disqualify district attorney's office—actual conflict of interest—victim's role as county manager irrelevant—In a trial for cyberstalking and making harassing phone calls, the trial court improperly granted defendant's motion to disqualify the entire district attorney's (DA's) office from prosecuting him where defendant argued that the victim's position as the county manager—whose duties included superintending county courthouses and proposing the county's annual budget, which included expenses for the DA's office—created a conflict of interest. In the context of criminal prosecutions, an "actual conflict" only exists if a prosecutor in a criminal case once represented the defendant in another matter and, by virtue of that attorney-client relationship, obtained confidential information that could be used to the defendant's detriment at trial. Thus, the trial court's office-wide disqualification of the DA's office was improper where defendant did not offer evidence of such a conflict with the DA or with any of the twenty assistant DAs serving under him. **State v. Giese, 127.**

Prosecutor's closing argument—child rape trial—defendant's sexual history—not grossly improper—In defendant's trial for multiple counts each of rape of a child and sex offense with a child, a prosecutor's closing argument was not so grossly improper as to require the trial court to intervene ex mero motu. First, the prosecutor's reference to a sexual encounter defendant had with an adult girlfriend was based on evidence that the Supreme Court held, under a separate analysis, had not been impermissibly admitted. Second, where the prosecutor insinuated that, based on defendant's statements that he did not use a condom during sex with adult partners, defendant could have gotten the child victim pregnant or infected her with a sexually transmitted disease, although the statement constituted an improper appeal to the jury's emotions, it was an isolated statement that was not so egregious as to require the trial court's intervention on its own initiative. **State v. Reber, 153.**

Prosecutor's closing statement—self-defense to murder—characterization of defendant's actions as aggressive—no misstatements of law—In defendant's trial for first-degree murder, in which defendant asserted that he was acting in self-defense when he fired his shotgun out through the window of his garage toward attendees of a nearby house party, killing one person, there was no gross impropriety in the prosecutor's closing statement requiring the trial court's intervention where the prosecutor did not misstate the law on self-defense while characterizing certain of defendant's actions as aggressive. At no point did the prosecutor invoke the aggressor doctrine, claim that defendant had a duty to retreat within his home, or disclaim defendant's right to lawfully defend his home. **State v. Copley, 111.**

ELECTIONS

Protest—defamation claim—absolute privilege—broad scope—attaches to the proceeding—The defense of absolute privilege applies broadly to protect from civil defamation liability everyone involved in the preparation or filing of an election protest, since the privilege attaches to the proceeding in which the statements are published, and is not restricted only to those who directly participate in election-protest hearings as a party, counsel, or witness as erroneously concluded by the Court of Appeals. Therefore, plaintiffs' libel suit against defendants for preparing and filing election protests alleging that plaintiffs engaged in illegal double-voting

ELECTIONS—Continued

was absolutely barred, since the challenged statements were made in the due course of a quasi-judicial proceeding and were both relevant and pertinent to its subject matter. **Bouvier v. Porter, 1.**

EMINENT DOMAIN

Condemnation—rights asserted by owner and developer—corollary suits pending—all pleaded issues regarding taking resolved—summary judgment proper—In a condemnation matter, where the property's owner (a condominium association) and a developer (to which the association had granted certain development rights with a set expiration date) asserted rights in the property at the time of the taking by the Department of Transportation (for a temporary construction easement) and, therefore, were both parties to the eminent domain action, the trial court did not err by granting summary judgment to and distributing settlement funds in favor of the developer even though the parties' corollary actions were not yet finalized. All of the issues pleaded in the taking action and argued at the hearing held pursuant to N.C.G.S. § 136-108 had been resolved, including the total amount of just compensation (which the parties settled via consent judgment) and issues related to the parties' relative interests in the taken property. Further, the trial court had discretion under section 136-117 to determine the apportionment of compensation between the parties, including that the developer was entitled to compensation for the loss of development rights, which was in accord with the assessment of both parties' appraisers. **Dep't of Transp. v. Bloomsbury Ests., LLC, 384.**

EQUITY

Action to quiet title—equitable subrogation—applicability—genuine issues of material fact—culpable negligence—In plaintiff bank's declaratory judgment action to quiet title to a home sold under execution (which was held to satisfy a lien of judgment) to the homeowner's daughter—at which point plaintiff's lien was extinguished—where there were genuine issues of material fact regarding whether the doctrine of equitable subrogation was applicable to provide relief to plaintiff, which had a superior interest in the property to the holder of the lien of judgment, the Court of Appeals erred by concluding that defendants (the homeowner and her daughter) were entitled to summary judgment. On remand, the trial court was instructed to utilize broad discretion to obtain the necessary information to determine whether plaintiff's predecessor-in-interest was culpably negligent in agreeing to refinance the first loan on the property without exercising due diligence to discover the publicly-recorded lien of judgment, and to use all of the facts to balance the equities. **MidFirst Bank v. Brown, 103.**

EVIDENCE

Hearsay—phone call between murder victim and niece—code name used for defendant—excited utterance exception—In defendant's prosecution for first-degree murder and robbery with a dangerous weapon, evidence that the victim called his niece the night before he was murdered and quickly said "Dianne to the house" before hanging up, which they both knew was a code name for defendant, was not improperly admitted because, although the statement was hearsay, it fell within the excited utterance exception since it was made in circumstances indicating that the victim was startled by the defendant's intention to come to his home

EVIDENCE—Continued

(the phone call was hurried and brief, and the victim and defendant had experienced recent conflict in their relationship). **State v. Davenport, 454.**

Murder and robbery trial—defendant's prior incarceration, gang affiliation, and tattoos—plain error analysis—prejudice prong not met—In defendant's prosecution for first-degree murder and robbery with a dangerous weapon, there was no plain error in the admission of evidence regarding defendant's prior incarceration, gang affiliation, and tattoos because, even if the evidence had been excluded, the jury probably would not have reached a different result in light of other evidence consisting of witness statements placing defendant at the scene of the crime and defendant's extrajudicial confession to another inmate that defendant killed the victim for money. **State v. Davenport, 454.**

Murder trial—gun never recovered—prior assault with a firearm—relevance—In a capital murder prosecution arising from the fatal shooting of a prostitute and her protector at a hotel, in which the gun defendant used to shoot one of the victims was never recovered, the trial court did not commit plain error by admitting evidence from a woman about a prior incident involving defendant making a threat to her by putting his gun up to her mouth and telling her if she didn't comply with his demands, then her blood would be on the walls. The prior incident was relevant to the question of whether defendant possessed a firearm and, even if the evidence was not relevant, defendant failed to show that the jury probably would have reached a different result absent the evidence. **State v. Gillard, 797.**

Other bad acts—child rape trial—plain error analysis—standard for determining prejudice—probable impact—In evaluating whether the admission of portions of defendant's cross-examination testimony—regarding text messages and sexual encounters with an adult girlfriend—during his trial for rape and sexual abuse of a child constituted plain error, the Supreme Court reaffirmed that the prejudice prong of the three-factor test for plain error requires an evaluation of whether there is a reasonable probability that, but for the errors complained of, the jury would have returned a different result. In this case, which hinged mostly on witness credibility, where the victim recounted specific details of abuse perpetrated by defendant and where there were issues with defendant's credibility, defendant failed to demonstrate that a different outcome probably would have been reached if the challenged evidence was excluded; therefore, defendant did not meet the standard for showing prejudice and was not entitled to a new trial. **State v. Reber, 153.**

Photographs—murder victims and scene—not repetitive or cumulative—In a capital murder prosecution arising from the fatal shooting of a prostitute and her protector at a hotel, the trial court did not abuse its discretion by admitting nearly one hundred photographs of the victims and the crime scene, only nine of which defendant challenged at trial. The challenged photos were not unnecessarily repetitive and cumulative where they depicted different angles of the victims' bodies and injuries—as well as the distance between the bodies, shell casings, and bloody footprints in the context of the general layout of the room and hallway where the incident took place—and were illustrative of what officers observed when they arrived on the scene. **State v. Gillard, 797.**

Prior bad acts—murder trial—prior armed assaults and rapes—common scheme or plan—temporal proximity and similarity—In a capital murder prosecution arising from the fatal shooting of a prostitute and her protector at a hotel by defendant and another man, the trial court did not err in admitting evidence from

EVIDENCE—Continued

two women who related separate incidents that each took place less then two months before the fatal shooting in which each woman, while working as a prostitute at a hotel, was raped and robbed at gunpoint by defendant and a second man. The incidents were admissible under Evidence Rule 404(b) as evidence of defendant's identity, motive, and a common plan or scheme to rape and rob the murder victim because there was sufficient temporal proximity and similarity between those incidents and the one that gave rise to the murder charges. Given that the evidence demonstrated a common plan or scheme, its admission was not unfairly prejudicial so as to outweigh any probative value under Evidence Rule 403. Further, the trial court's limiting instruction regarding the prior incidents was not in error or, even if there was any error, it was invited error since the instruction was given at defendant's request. **State v. Gillard, 797.**

Rule 412—definition of "sexual behavior"—criminal prosecution—sexual offenses against child—evidence of prior sexual abuse by different perpetrator—In a prosecution for sexual offense with a child by an adult and indecent liberties with a child, the trial court properly excluded evidence of previous sexual abuse of the victim by an abuser other than defendant, where Evidence Rule 412 bars evidence of a victim's "sexual behavior," which is defined as "sexual activity other than the sexual act which is at issue in the indictment on trial." Although Rule 412 does not define "sexual activity," the Rule's plain language indicates that all evidence of a victim's sexual activity other than the sexual act at issue is inadmissible regardless of whether that activity was consensual or nonconsensual. Thus, defendant's argument that the victim's prior sexual abuse did not fall under Rule 412's definition of "sexual behavior" lacked merit. **State v. Washington, 265.**

Witness testimony—background information—past experience of abuse—plain error review—In a capital murder prosecution arising from the fatal shooting of a prostitute and her protector at a hotel, the trial court did not commit plain error by admitting personal background information from two witnesses during the guilt-innocence phase of the trial and from two other witnesses during the sentencing phase, where the evidence was relevant and more probative than prejudicial. Testimony from the sister of one of the victims about the victim's past experience of abuse was limited in scope, provided an explanation for how the victim ended up as a prostitute, and did not constitute impermissible character testimony. Testimony from the other witness during the guilt-innocence phase detailing her abusive upbringing similarly served to provide context as to why she was working as a prostitute on the night she was attacked by defendant. For each of the two witnesses who detailed their experiences of abuse during the sentencing phase—in which less restrictive standards apply—their testimony introduced each of them to the jury and related to the aggravating circumstance of showing a course of conduct by defendant engaging in violent acts. Finally, the trial court properly instructed the jury that all of the evidence in both phases of the trial could be considered during sentencing deliberations. **State v. Gillard, 797.**

HABEAS CORPUS

Summary denial—final judgment of court of competent jurisdiction—discharge provisions inapplicable—The trial court's summary denial of petitioner's application for a writ of habeas corpus was proper under the plain and definite language of N.C.G.S. § 17-4 because petitioner was detained by virtue of a final judgment of a court of competent criminal jurisdiction. Despite the unambiguous mandate

HABEAS CORPUS—Continued

of section 17-4, the Court of Appeals improperly extended its analysis to consider petitioner's argument that the COVID-19 pandemic created conditions making him eligible for discharge under section 17-33(2), and erroneously concluded that section 17-33(2) provided an exception to the general rule contained in section 17-4(2) for parties detained by virtue of criminal process. However, the discharge provisions in section 17-33 apply only to persons detained by virtue of civil process—which does not include criminal convictions—and do not provide an exception to section 17-4 because they only become relevant after an application to prosecute the writ has been granted and returned and a hearing has been held. **State v. Daw, 468.**

HOMICIDE

First-degree murder—acting in concert—murder committed in pursuit of a common plan—In a capital murder prosecution arising from the fatal shooting of a prostitute (a female) and her protector (a male) by defendant and another man, the State presented substantial evidence that defendant and his accomplice were acting in concert when the accomplice shot and killed the male victim. Specifically, there was sufficient evidence from which the jury could determine that the murder of the male victim occurred during the pursuit, and as a natural and probable consequence of the two men's common plan to rob and rape the female victim; therefore, the charge of first-degree murder of the male victim based on theories of premeditation and deliberation and felony murder was properly submitted to the jury. **State v. Gillard, 797.**

First-degree murder—felony murder—underlying felony—sufficiency of evidence—In a capital murder prosecution arising from the fatal shooting of a prostitute and her protector at a hotel by defendant and another man, the State presented substantial evidence of first-degree murder based on felony murder, where the evidence—including testimony about prior rapes and robberies committed by defendant against other women, which was submitted pursuant to Evidence Rule 404(b) as evidence of a common plan or scheme—supported an inference that defendant intended to rape the female victim or rob her at gunpoint, and took overt steps to do so, before he was interrupted when his accomplice shot the other victim in the hallway outside the hotel room. **State v. Gillard, 797.**

First-degree murder—premeditation and deliberation—sufficiency of evidence—In a capital murder prosecution arising from the fatal shooting of a prostitute and her protector at a hotel by defendant and another man, the State presented substantial evidence from which a jury could conclude that defendant acted with premeditation and deliberation to support the first-degree murder charge regarding the female victim, including that defendant arrived at the hotel with a loaded weapon, there was no evidence of provocation by the female victim based on video surveillance, and the victim was unarmed when she was shot. Further, the two shots defendant fired at the victim, both of which hit her, constituted evidence of intent to kill. **State v. Gillard, 797.**

Instructions—murder by lying in wait—castle doctrine not properly accounted for—error cured by alternate theory of murder—In defendant's trial for first-degree murder, in which defendant asserted that he was acting in self-defense when he fired his shotgun out through the window of his garage toward attendees of a nearby house party, killing one person, the trial court's instruction on first-degree murder by lying in wait did not properly account for the castle doctrine

HOMICIDE—Continued

—a justification for defensive force, about which the jury was also instructed and, if applicable, would act as a shield from criminal culpability—where the trial court instructed the jury that if they found each element of murder by lying in wait, they must find defendant guilty, thereby impermissibly suggesting that the crime eclipses the castle doctrine. However, where the jury also found defendant guilty of first-degree murder by premeditation and deliberation, they necessarily concluded that defendant was not entitled to the castle doctrine defense; therefore, despite the error in the lying in wait instruction, defendant could not demonstrate prejudice that would entitle him to a new trial. **State v. Copley, 111.**

Jury instructions—self-defense—defense of habitation—request for aggressor doctrine language—invited error—In defendant's first-degree murder trial, in which defendant asserted that he was acting in self-defense when he fired his shotgun out through the window of his garage toward attendees of a nearby house party, killing one person, the trial court did not err in its jury instructions on the defense of habitation—the pattern jury instruction of which included a provocation exception—or self-defense. Not only did defendant not object to the instructions, but any error regarding the aggressor doctrine—which the court only included as part of the self-defense instruction—was invited error, since defendant specifically requested the aggressor doctrine language. **State v. Copley, 111.**

IDENTIFICATION OF DEFENDANTS

Capital murder trial—sentencing phase—pre-trial identification—not induced by State action—In the sentencing phase of a capital murder prosecution arising from the fatal shooting of two victims, there was no violation of defendant's due process rights from the admission of a witness's pretrial identification of defendant as the perpetrator of a prior armed assault and robbery committed against her, where the identification did not result from any State action. Although the witness was contacted by a detective who was investigating whether a link existed between the murders and her prior reported attack, the witness did her own independent research and recognized defendant from a photograph in a news article. Any questions about the reliability of her testimony were for the jury to determine and went to the weight rather than the admissibility of the evidence. **State v. Gillard, 797.**

INDICTMENT AND INFORMATION

Second-degree rape—short-form indictment—sufficiency—effect on trial court's jurisdiction—abrogation of common law pleading rules—A short-form indictment charging defendant with second-degree rape neither contained a fatal defect nor deprived the trial court of subject matter jurisdiction to convict defendant, even though the indictment did not allege that the defendant knew or should have known that the victim was physically helpless during the rape. The Criminal Procedure Act abrogated the common law rule that a court's subject matter jurisdiction in a criminal case depends on the sufficiency of the underlying indictment, as well as the strict common law requirement that an indictment specifically allege every element of an offense—a requirement that the legislature loosened even further by enacting short-form indictments by statute. Instead, a defective indictment only raises jurisdictional concerns when it alleges conduct that does not constitute a crime; meanwhile, indictments containing merely technical, non-jurisdictional defects will not be set aside so long as they give defendants sufficient notice of the crimes charged to prepare a defense and to protect against double jeopardy. Here,

INDICTMENT AND INFORMATION—Continued

the indictment against defendant did allege an actual crime under North Carolina law while also meeting the short-form pleading requirements for second-degree rape (codified in N.C.G.S. § 15-144.1(c)). **State v. Singleton, 183.**

Sexual battery—essential elements—force implied by lack of consent—sufficiency of notice to defendant—The indictment charging defendant with sexual battery was facially valid where it contained sufficient facts to support each essential element of the charged offense, including force, since the allegation that defendant engaged in sexual conduct with the victim without her consent was sufficient to imply that the contact was committed by force, however slight, and was therefore adequate to put defendant on notice of the charge. **State v. Stewart, 237.**

Sufficiency of indictments—human trafficking—multiple counts per victim—unit of prosecution—Each of four indictments charging defendant with multiple counts of human trafficking per victim over specified periods of time were sufficient to put defendant on notice of each offense because they contained the necessary elements of trafficking pursuant to N.C.G.S. § 14-43.11. Although defendant argued that he could be convicted of only one count per victim, the plain language of the statute makes clear that human trafficking is not one continuous offense, that a separate charge may be attached to each violation regardless of whether the same victim is involved, and that the offense is committed when a defendant "obtains" a victim—one of the essential elements of the offense—by any one of the alternative means listed in the statute. **State v. Applewhite, 431.**

INSURANCE

Commercial—government-ordered pandemic restrictions—policy interpretation—viral contamination exclusion—A clothing retailer's claim for insurance coverage for loss of business as a result of government-mandated restrictions imposed during the COVID-19 pandemic was properly dismissed for failure to state a claim pursuant to Civil Procedure Rule 12(b)(6). The Supreme Court modified and affirmed the Court of Appeals' decision upholding the trial court's dismissal where, contrary to the lower appellate court's determination, plaintiff did allege a "direct physical loss of or damage to" its property—a definition which did not require a tangible alteration of property—based on the forced closure of its stores and the undertaking of significant remediation before being allowed to reopen. However, coverage was nevertheless precluded because plaintiff's "all-risk" commercial property insurance policy—which defined the scope of covered risks by its exclusions—contained an exclusion for viral contamination. **Cato Corp. v. Zurich Am. Ins. Co., 667.**

Commercial—government-ordered pandemic restrictions—temporary business closures—"direct physical loss" met—In a claim brought by numerous bars and restaurants (plaintiffs) seeking insurance coverage for their loss of business when—during the COVID-19 pandemic—government-mandated restrictions temporarily limited the use of and access to their physical properties, plaintiffs were entitled to partial summary judgment on the issue of whether their losses were covered by their "all-risk" commercial property insurance or supplemental business income policies. Under each policy, any ambiguity in the phrase "direct physical loss" was construed in favor of the policyholders, and, here, plaintiffs sufficiently alleged direct physical losses where government-issued orders rendered their properties unusable for their insured purposes, and the policies did not specifically exclude viruses or contaminants from covered risks. **N. State Deli, LLC v. Cincinnati Ins. Co., 733.**

INSURANCE—Continued

Homeowner's fire insurance—notice of cancellation—statutory requirements—actual notice sufficient—Where plaintiff homeowners had actual notice that their provisional homeowner's fire insurance policy had been cancelled—based, in part, on evidence that plaintiffs received, signed, and cashed a check from defendant insurance company listing the policy number and refunding plaintiffs their excess premium—and, therefore, had a reasonable opportunity to procure other insurance before their house burned down two months later, the Supreme Court found it unnecessary to address the broader question of whether defendant's manner of notice—by mailing a letter of cancellation to plaintiffs that they claimed not to have received—was sufficient to meet the requirements of N.C.G.S. § 58-44-16(f)(10). **Ha v. Nationwide Gen. Ins. Co., 399.**

JURISDICTION

Custodial law enforcement agency recordings—media request—release—initiation by petition versus complaint—legislative intent—In an action seeking the release of custodial law enforcement agency recordings (CLEAR) of a protest march pursuant to N.C.G.S. § 132-1.4A(g), media petitioners were not required to file a civil complaint rather than a petition to invoke the trial court's jurisdiction. Where the language in subsection (g) instructing anyone seeking release of CLEAR to file an "action" was not clear and unambiguous, statutory interpretation principles supported the conclusion that legislative intent allowed for such an action to be initiated by petition. **In re McClatchy Co., 77.**

Standing—taxpayer—constitutional challenge—local red light camera enforcement program—remedies permitted—After the legislature passed a local act implementing a city's red light camera enforcement program and authorizing an interlocal agreement—which laid out a cost-sharing framework for funding the program—between the city and its county's school board, two individuals (plaintiffs) who received citations and were each fined $100.00 for running red lights had taxpayer standing to challenge the local act's constitutionality. First, plaintiffs effectively sued on the school board's behalf by alleging that, under the Fines and Forfeitures Clause of the state constitution, the board was entitled to a larger share of red light penalties than what it retained under the interlocal agreement. Second, plaintiffs adequately alleged a "direct injury" where they argued that at least part of the $100.00 penalty they paid to the city was unconstitutionally rerouted away from the local school board. Third, plaintiffs sufficiently alleged a "demand" on the board to protect its interests and the board's refusal to do so by challenging plaintiffs' claims. Finally, plaintiffs' taxpayer standing permitted them to pursue injunctive and declaratory relief, but not money damages (specifically, a refund of the fines). **Fearrington v. City of Greenville, 38.**

JURY

Request for transcript of witness testimony—trial court's discretion—ambiguous language by court—evidence in record—At a trial for first-degree murder, murder of an unborn child, and robbery with a dangerous weapon, the trial court did not abuse its discretion by denying the jury's request for partial transcripts of testimony—from defendant, the lead investigator in the case, and the medical examiner—after stating that "[w]e're not—we can't provide a transcript as to that." Defendant had the burden on appeal to show that the court misunderstood and failed to exercise its discretion under N.C.G.S. § 15A-1233(a) to grant the jury's request,

JURY—Continued

since the court's language of "we're not" juxtaposed with "we can't" was ambiguous and therefore insufficient to overcome the "presumption of regularity" afforded to trial courts on appellate review. Defendant failed to meet this burden where the record showed that the court: granted the jury's other requests to review evidence, even partially granting the request at issue by allowing the jury to see the medical examiner's report; provided other evidence that the jury did not request but that the court believed would be helpful; and, when denying the request for the transcripts, stated that it was the jury's duty to recall the testimony. **State v. Vann, 244.**

Selection—capital murder trial—excusal for cause—views on death penalty—During jury selection for a capital murder prosecution arising from the fatal shooting of two victims, the trial court did not abuse its discretion by excusing three prospective jurors for cause based on their answers to questions about their ability to consider imposing a penalty of death—the one who stated that he didn't think that he could vote for (or would have a hard time voting for) the penalty; a second who stated unequivocally that she did not believe in the death penalty and would not vote for it; and a third who equivocated but then agreed that he would automatically vote for life without parole. In each case, the court's determination that the prospective jurors' stated views would substantially impair the performance of their duties to impartially apply the law was not manifestly unreasonable and, further, there was no abuse of discretion in the trial court's decision not to allow further questioning of each prospective juror by defendant in light of the improbability that different answers would be given. **State v. Gillard, 797.**

NEGLIGENCE

Contributory negligence—fall through attic floor—open and obvious risk—failure to exercise reasonable care—Plaintiff was barred from asserting a negligence claim against defendant, who was the builder of her newly constructed home, for injuries plaintiff suffered when she was walking through her attic, stepped backward off of a plywood walkway without looking, and fell through a scuttle hole that defendant had cut into the attic floor. Plaintiff's failure to exercise reasonable care to avoid an open and obvious risk, particularly given her acknowledgment that she knew the attic floor was unsafe, contributed to her injuries as a matter of law; therefore, summary judgment was properly entered in favor of defendant. **Cullen v. Logan Devs., Inc., 373.**

Gross negligence—unsafe condition—alleged building code violation—conscious disregard for safety not shown—Plaintiff failed to show that defendant, the builder of her newly constructed home, acted with a bad purpose or reckless indifference to plaintiff's rights by constructing a scuttle hole in the attic floor—through which plaintiff fell to the floor below and severely injured herself—and, therefore, defendant was entitled to summary judgment on plaintiff's claim of gross negligence. Even if defendant violated the building code by covering over the hole in the lower floor's ceiling with drywall, there was no indication that defendant acted with conscious disregard for plaintiff's safety, and the scuttle hole presented the same amount of risk as the other insulation-covered areas of the attic that were unsafe to walk on. **Cullen v. Logan Devs., Inc., 373.**

PUBLIC RECORDS

Custodial law enforcement agency recordings—media request—release—no eligibility requirement—In an action seeking the release of custodial law enforcement

PUBLIC RECORDS—Continued

agency recordings (CLEAR) of a protest march, initiated by the filing of a petition by media petitioners pursuant to N.C.G.S. § 132-1.4A(g), the trial court was not required to first find that petitioners were eligible to seek the release of the recordings before granting their request. Unlike subsection (f) of the statute regarding disclosure of CLEAR, which has eligibility requirements, subsection (g) authorizes "any person" seeking release of CLEAR to file an action for a court order. **In re McClatchy Co., 77.**

Custodial law enforcement agency recordings—media request—release—scope of trial court's authority—In an action seeking the release of custodial law enforcement agency recordings (CLEAR) of a protest march, initiated by the filing of a petition by media petitioners pursuant to N.C.G.S. § 132-1.4A(g), where the trial court found that the release of the requested CLEAR would reveal highly sensitive and personal information but ordered the unredacted release of all CLEAR because it "d[id] not have the authority to [c]ensor this information absent a legitimate or compelling state interest [ ] to do so," the trial court committed reversible error by misunderstanding the scope of its authority. The trial court had broad discretion under the CLEAR statute to place any conditions or restrictions on the release of the recordings, and its failure to acknowledge those options constituted an abuse of discretion. **In re McClatchy Co., 77.**

ROBBERY

With a dangerous weapon—taking of property—sufficiency of evidence—In a prosecution for murder and robbery, the State presented sufficient evidence to survive defendant's motion to dismiss the charge of robbery with a dangerous weapon, including that: the victim's wallet had contained a large sum of money the day before his murder and he had not planned to deposit the money until the next day; the victim's money, wallet, and cell phone were missing from his house where he was killed; the victim's body exhibited defensive wounds from a knife that was presumed to be the murder weapon, which supported the theory that his life was endangered or threatened; witness testimony and cell phone records linked defendant temporally and spatially with the crime; and defendant gave an extrajudicial confession to a fellow inmate that he killed the victim so that he could steal $10,000 from him. Although some of the evidence was circumstantial and the victim's items were never recovered, all of the evidence considered as a whole and in the light most favorable to the State established each element of the offense and that defendant was the perpetrator. **State v. Davenport, 454.**

SCHOOLS AND EDUCATION

Local school board—cost-sharing agreement with city—funding for red light camera enforcement program—"clear proceeds" allotted to board—exemption from statutory collection cap—Where the legislature passed a local act implementing a city's red light camera enforcement program and authorizing an interlocal agreement between the city and its county's school board, the funding scheme laid out in the agreement did not violate N.C.G.S. § 115C-437 by allotting to the board less than 90% of the penalties collected under the program. Section 115C-437 promises local school administrative units the "clear proceeds" that they are constitutionally owed under such government programs, defining "clear proceeds" as the full amount of all penalties or fines collected minus the costs of collection, with those costs not to exceed 10% of the amount collected. Nevertheless, the text of

SCHOOLS AND EDUCATION—Continued

the local act authorizing the red light program showed that the legislature intended to exempt the board and the city from having to follow the statutory 10% cap and to allow them to split costs differently. **Fearrington v. City of Greenville, 38.**

SENTENCING

Capital murder trial—jury instructions—aggravating factors—multiple factors supported by same evidence—In the sentencing phase of a capital murder prosecution arising from the fatal shooting of a prostitute and her protector at a hotel by defendant and another man, the trial court did not commit plain error by failing to instruct the jury that it could not use the same evidence to support more than one aggravating factor. There was not a complete overlap in the evidence supporting the aggravating circumstance that the murders occurred during the attempt to commit rape or armed robbery and the evidence used to support the aggravating circumstance that the murders were part of a course of conduct by defendant engaging in violent acts against the victims. There was substantial separate evidence that defendant subjected prior victims to the same type of violence perpetrated on the night in question. **State v. Gillard, 797.**

Capital murder trial—mitigating circumstances—peremptory instructions not required—During the sentencing phase of a capital murder prosecution arising from the fatal shooting of two victims, the trial court did not err by failing to give peremptory instructions to the jury regarding three out of forty mitigating circumstances, which would have directed the jury to find that a particular mitigating circumstance had been established if the jury found the facts presented to be true. Contrary to defendant's assertion, the evidence supporting each of the three nonstatutory mitigating factors (that defendant's asthma as a child prevented him from engaging in sports, that his home life impacted his ability to succeed in school, and that he suffered from other specified trauma and related stressor disorder) was not uncontroverted. **State v. Gillard, 797.**

Driving while impaired—aggravating factors—found by trial judge instead of jury—harmless error review—In a prosecution for impaired driving, although the trial judge violated N.C.G.S. § 20-179(a1)(2) by finding the existence of aggravating factors—since "only a jury may determine if an aggravating factor is present"—the error was not automatically reversible because it was subject to harmless error analysis (i.e., whether the trial judge's actions prejudiced defendant). The decision of the Court of Appeals determining that the statute violation mandated resentencing—and that harmless error review was inapplicable—was reversed, and the matter was remanded for application of the correct standard of review. **State v. King, 601.**

Murder trial—aggravating circumstance—murder perpetrated during commission of felonies—In the sentencing phase of a capital murder prosecution arising from the fatal shooting of a prostitute and her protector at a hotel by defendant and another man, the State presented sufficient evidence that the murders occurred during the commission of the attempted rape or armed robbery of the female victim to support the submission of this aggravating circumstance to the jury. **State v. Gillard, 797.**

Prior record level—prior federal conviction—substantial similarity to N.C. offense—any error harmless—Any error by the trial court in calculating defendant's prior record level (to which he had not stipulated) without first comparing defendant's prior federal firearms conviction to any state offense was harmless

SENTENCING—Continued

because the record contained sufficient information demonstrating that the federal offense was substantially similar to the North Carolina offense of possession of a firearm by a felon. **State v. Applewhite, 431.**

TAXATION

Statutory construction—purpose and legislative intent—export credit allowed in a tax year—summary judgment improper—In a complex business case requiring the interpretation of N.C.G.S. § 105-130.45 (repealed effective 1 January 2018) regarding a taxpayer's yearly limit of $6,000,000 of export credit—a tax credit based on the number of cigarettes manufactured in the state for export in a given year—the trial court erred in allowing summary judgment in favor of the Department of Revenue, whose position was that the provision capped the export credit that could be generated in any tax year. Construing the pertinent language of the statute, the Supreme Court held that the $6,000,000 cap applied only to the amount of export credit that could be claimed in any tax year and did not limit a taxpayer's ability to generate credit in excess of that amount in any tax year, to carry forward as otherwise provided. **Philip Morris USA, Inc. v. N.C. Dep't of Revenue, 748.**

WORKERS' COMPENSATION

Temporary total disability payments—"total loss of wage-earning capacity"—plain language analysis—capacity for any type of work—On discretionary review of a workers' compensation case, the Supreme Court modified a Court of Appeals decision by rejecting its interpretation of the plain language of N.C.G.S. § 97-29(c)—which ends, in most cases, temporary total disability payments after 500 weeks unless an employee has sustained a "total loss of wage-earning capacity"—instead holding that the quoted portion of the provision, both as originally drafted and after subsequent amendments that emphasized the legislature's intent, refers to the total loss of an employee's personal capacity to earn wages in any type of employment and, thus, does not share a meaning with "total disability" as that term of art is used in workers' compensation case law. However, the Court affirmed the lower appellate court's ultimate holding—which in turn affirmed the Industrial Commission's conclusions of law—that the employee, despite ongoing back pain that was sometimes severe enough to prevent him from working at all, was nevertheless capable of some part-time work and thus was subject to the cessation of temporary total disability payments after 500 weeks. **Sturdivant v. N.C. Dep't of Pub. Safety, 939.**

ZONING

Ordinance—land use buffer—conflicting text and table—interpretive provision—text controls—A county board of adjustment properly decided against installing a buffer between petitioner's property and a road being built next to an adjacent residential subdivision, where the county's zoning ordinance only required buffers between properties from different zoning districts and both of the properties involved here were in the same "R-1 residential" zoning district. Although the ordinance included a table suggesting that buffers were required based on either the zoning districts or the land uses of the subject and adjacent properties, the ordinance's introductory provision eliminated any internal ambiguity by clarifying that where

ZONING—Continued

the text and a table contradicted each other, the text would control. **Arter v. Orange Cnty., 352.**

Unified development ordinance—school construction—connectivity requirements—ambiguous provision—free use of land—In conducting a de novo review of a town's denial of petitioner's permit applications for the construction of a proposed charter school, the Supreme Court reversed the decision of the Court of Appeals and held that, where the town's unified development ordinance regarding the inclusion of off-premise sidewalks was ambiguous, the lower appellate court erred by adopting the town's interpretation of that provision and instead should have strictly construed the provision in favor of the free use of land per public policy. Since petitioner carried its initial burden of production by presenting competent, material, and substantial evidence tending to show that it was entitled to the issuance of permits and no evidence was presented to the contrary, the matter was remanded with instructions for the town to approve petitioner's site plan and subdivision applications. **Schooldev E., LLC v. Town of Wake Forest, 775.**