NORTH CAROLINA REPORTS

VOLUME 365

SUPREME COURT OF NORTH CAROLINA

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THE SUPREME COURT
OF
NORTH CAROLINA

Chief Justice
SARAH PARKER

Associate Justices

MARK D. MARTIN
ROBERT H. EDMUNDS, JR.
PAUL MARTIN NEWBY
PATRICIA TIMMONS-GOODSON[1]
ROBIN E. HUDSON
BARBARA A. JACKSON
CHERI BEASLEY[2]

Former Chief Justices

RHODA B. BILLINGS
JAMES G. EXUM, JR.
BURLEY B. MITCHELL, JR.
HENRY E. FRYE
I. BEVERLY LAKE, JR.

Former Justices

ROBERT R. BROWNING
J. PHIL CARLTON
HARRY C. MARTIN
WILLIS P. WHICHARD
JAMES A. WYNN, JR.
FRANKLIN E. FREEMAN, JR.
G. K. BUTTERFIELD, JR.
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GEORGE L. WAINWRIGHT, JR.
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ALLEGRA COLLINS

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1. Retired 17 December 2012.
2. Appointed 18 December 2012; Sworn in 3 January 2013.

TRIAL JUDGES OF THE GENERAL COURT OF JUSTICE

SUPERIOR COURT DIVISION

DISTRICT	JUDGES	ADDRESS
	First Division	
1	Jerry R. Tillett	Manteo
	J. Carlton Cole	Hertford
2	Wayland Sermons	Washington
3A	W. Russell Duke, Jr.	Greenville
	Clifton W. Everett, Jr.[1]	Greenville
	Marvin Blount[2]	Greenville
6A	Alma L. Hinton	Roanoke Rapids
6B	Cy A. Grant, Sr.	Ahoskie
7A	Quentin T. Sumner	Rocky Mount
	Milton F. (Toby) Fitch, Jr.	Wilson
7BC	Walter H. Godwin, Jr.	Tarboro
	Second Division	
3B	Benjamin G. Alford	New Bern
	Kenneth F. Crow	New Bern
	John E. Nobles, Jr.	Morehead City
4A	Russell J. Lanier, Jr.[3]	Wallace
	W. Douglas Parsons[4]	Clinton
4B	Charles H. Henry	Jacksonville
5	W. Allen Cobb, Jr.	Wrightsville Beach
	Jay D. Hockenbury	Wilmington
	Phyllis M. Gorham	Wilmington
8A	Paul L. Jones	Kinston
8B	Arnold O. Jones II	Goldsboro
	Third Division	
9	Robert H. Hobgood	Louisburg
	Henry W. Hight, Jr.	Henderson
9A	W. Osmond Smith III	Semora
10	Donald W. Stephens	Raleigh
	Abraham P. Jones[5]	Raleigh
	Howard E. Manning, Jr.	Raleigh
	Michael R. Morgan	Raleigh
	Paul C. Gessner	Wake Forest
	Paul C. Ridgeway	Raleigh
	G. Bryan Collins, Jr.[6]	Raleigh
14	Orlando F. Hudson, Jr.	Durham
	Elaine Bushfan	Durham
	Michael O'Foghludha	Durham
	James E. Hardin, Jr.	Hillsborough
15A	Robert F. Johnson	Burlington
	Wayne Abernathy	Burlington

DISTRICT	JUDGES	ADDRESS
15B	Carl R. Fox	Chapel Hill
	R. Allen Baddour	Chapel Hill
	Fourth Division	
11A	Franklin F. Lanier[7]	Buies Creek
	C. Winston Gilchrist[8]	Buies Creek
11B	Thomas H. Lock	Smithfield
12	Claire Hill	Fayetteville
12B	Gregory A. Weeks[9]	Fayetteville
	Gale M. Adams[10]	Fayetteville
12C	James F. Ammons, Jr.[11]	Fayetteville
	Mary Ann Tally	Fayetteville
13A	Douglas B. Sasser	Whiteville
13B	Ola M. Lewis	Southport
16A	Richard T. Brown	Laurinburg
16B	Robert F. Floyd, Jr.	Lumberton
	James Gregory Bell	Lumberton
	Fifth Division	
17A	Edwin Graves Wilson, Jr.	Eden
	Richard W. Stone	Eden
17B	A. Moses Massey	Mt. Airy
	Andy Cromer	King
18	Lindsay R. Davis, Jr.	Greensboro
	John O. Craig III	High Point
	R. Stuart Albright	Greensboro
	Patrice A. Hinnant	Greensboro
	Joseph E. Turner[12]	Greensboro
	Susan Bray[13]	Greensboro
19B	Vance Bradford Long	Asheboro
19D	James M. Webb	Whispering Pines
21	Judson D. DeRamus, Jr.[14]	Winston-Salem
	William Z. Wood, Jr.[15]	Troutman
	L. Todd Burke	Winston-Salem
	Ronald E. Spivey	Winston-Salem
	David L. Hall[16]	Winston-Salem
23	Edgar B. Gregory	Wilkesboro
	Sixth Division	
19A	W. Erwin Spainhour	Concord
19C	Anna Mills Wagoner	Salisbury
20A	Tanya T. Wallace	Rockingham
	Kevin M. Bridges	Oakboro
20B	W. David Lee	Monroe
	Christopher W. Bragg	Monroe
22A	Christopher Collier[17]	Statesville
	Joseph Crosswhite[18]	Statesville
	Alexander Mendaloff III[19]	Statesville
	Julia Lynn Gullett[20]	Statesville
22B	Mark E. Klass	Lexington
	Theodore S. Royster, Jr.	Lexington

DISTRICT	JUDGES	ADDRESS
	Seventh Division	
25A	Beverly T. Beal[21]	Lenoir
	Robert C. Ervin[22]	Morganton
	C. Thomas Edwards[23]	Lenoir
25B	Timothy S. Kincaid	Newton
	Nathaniel J. Poovey	Newton
26	Richard D. Boner	Charlotte
	W. Robert Bell	Charlotte
	Yvonne Mims Evans	Charlotte
	Linwood O. Foust	Charlotte
	Eric L. Levinson	Charlotte
	H. William Constangy	Charlotte
	Hugh Lewis	Charlotte
27A	Jesse B. Caldwell III	Gastonia
	Robert T. Sumner	Gastonia
27B	Forrest Donald Bridges	Shelby
	James W. Morgan	Shelby
	Eighth Division	
24	Charles Phillip Ginn	Boone
	Gary Gavenus	Boone
28	Alan Z. Thornburg	Asheville
	Marvin Pope	Asheville
29A	Laura J. Bridges[24]	Rutherfordton
	J. Thomas Davis[25]	Forest City
29B	Mark E. Powell	Hendersonville
30A	James U. Downs	Franklin
30B	Bradley B. Letts	Sylva

SPECIAL JUDGES

Sharon T. Barrett	Asheville
Marvin K. Blount	Greenville
Craig Croom[26]	Raleigh
Richard L. Doughton	Sparta
James L. Gale	Greensboro
A. Robinson Hassell	Greensboro
Kendra D. Hill[27]	Raleigh
D. Jack Hooks, Jr.	Whiteville
Lucy Noble Inman	Raleigh
Jack W. Jenkins	Morehead City
John R. Jolly, Jr.	Raleigh
Shannon R. Joseph	Raleigh
Calvin Murphy	Charlotte
William R. Pittman	Raleigh
Gary E. Trawick, Jr.	Burgaw
Reuben F. Young[28]	Raleigh

EMERGENCY JUDGES

DISTRICT	JUDGES	ADDRESS
	W. Douglas Albright	Greensboro
	James L. Baker, Jr.[29]	Marshall
	Steve A. Balog	Burlington
	Michael E. Beal[30]	Lenoir
	Michael E. Beale	Rockingham
	Henry V. Barnette, Jr.	Raleigh
	Stafford G. Bullock	Raleigh
	C. Preston Cornelius	Mooresville
	B. Craig Ellis	Laurinburg
	Clifton W. Everette, Jr.[31]	Greenville
	Ernest B. Fullwood	Wilmington
	Thomas D. Haigwood	Greenville
	Clarence E. Horton, Jr.	Kannapolis
	Charles C. Lamm, Jr.	Terrell
	Russell J. Lanier, Jr.[32]	Wallace
	Gary Lynn Locklear[33]	Pembroke
	Jerry Cash Martin	Mt. Airy
	J. Richard Parker	Manteo
	A. Leon Stanback[34]	Durham
	Ronald L. Stephens	Durham
	Kenneth C. Titus	Durham
	Jack A. Thompson	Fayetteville
	Joseph E. Turner[35]	Greensboro
	John M. Tyson	Fayetteville
	George L. Wainwright	Morehead City
	Dennis Winner	Asheville

RETIRED/RECALLED JUDGES

	J. B. Allen	Burlington
	Anthony M. Brannon	Durham
	Frank R. Brown	Tarboro
	James C. Davis	Concord
	Larry G. Ford	Salisbury
	Marvin K. Gray	Charlotte
	Zoro J. Guice, Jr.	Hendersonville
	Knox V. Jenkins	Four Oaks
	John B. Lewis, Jr.	Farmville
	Robert D. Lewis	Asheville
	Julius A. Rousseau, Jr.	Wilkesboro
	Thomas W. Seay	Spencer
	Ralph A. Walker, Jr.	Raleigh

1. Retired 21 December 2012.
2. Appointed 28 December 2012.
3. Retired 1 April 2012.
4. Appointed 1 June 2012.
5. Term ended 31 December 2012.
6. Sworn in 2 January 2013.
7. Retired 31 December 2011.
8. Appointed 12 April 2012.
9. Retired 31 December 2012.
10. Sworn in 1 January 2013.
11. Appointed Senior Resident Superior Court Judge 1 January 2013.

12. Appointed 1 April 2011; Retired 31 December 2012.
13. Sworn in 1 January 2013.
14. Retired 31 December 2012.
15. Appointed Senior Resident Superior Court Judge 1 January 2013.
16. Sworn in 1 January 2013.
17. Deceased 8 February 2012.
18. Appointed Senior Resident Superior Court Judge 13 February 2012.
19. Appointed 15 June 2012; Term ended 31 December 2012.
20. Sworn in 1 January 2013.
21. Retired 1 December 2012.
22. Appointed Senior Resident Superior Court Judge 2 December 2012.
23. Appointed 14 December 2012.
24. Retired 31 December 2012.
25. Sworn in 1 January 2013.
26. Term ended 30 December 2012.
27. Appointed 31 December 2012.
28. Appointed 31 December 2012.
29. Resigned 31 January 2012.
30. Appointed 17 December 2012.
31. Appointed 28 December 2012.
32. Appointed 5 April 2012.
33. Resigned 3 May 2011.
34. Resigned 4 February 2012.
35. Appointed 7 January 2013.

DISTRICT COURT DIVISION

DISTRICT	JUDGES	ADDRESS
1	C. Christopher Bean (Chief)	Edenton
	Edgar L. Barnes	Manteo
	Amber Davis	Wanchese
	Eula E. Reid	Elizabeth City
	Robert P. Trivette	Kitty Hawk
2	Michael A. Paul (Chief)	Washington
	Regina Rogers Parker	Williamston
	Christopher B. McLendon	Williamston
	Darrell B. Cayton, Jr.	Washington
3A	David A. Leech (Chief)	Greenville
	Patricia Gwynett Hilburn	Greenville
	Joseph A. Blick, Jr.	Greenville
	G. Galen Braddy	Grimesland
	Charles M. Vincent[1]	Greenville
	Brian DeSoto[2]	Greenville
3B	Jerry F. Waddell (Chief)[3]	New Bern
	Cheryl Lynn Spencer[4]	New Bern
	Paul M. Quinn	Atlantic Beach
	Karen A. Alexander	New Bern
	Peter Mack, Jr.	New Bern
	L. Walter Mills[5]	New Bern
	Kirby Smith, II[6]	New Bern
	Clinton Rowe[7]	New Bern
	W. David McFadyen, III[8]	New Bern
4	Leonard W. Thagard (Chief)	Clinton
	Paul A. Hardison	Jacksonville
	William M. Cameron III	Richlands
	Louis F. Foy, Jr.	Pollocksville
	Sarah Cowen Seaton	Jacksonville
	Carol Jones Wilson	Kenansville
	Henry L. Stevens IV	Warsaw
	James L. Moore, Jr.	Jacksonville
5	J. H. Corpening II (Chief)	Wilmington
	John J. Carroll III[9]	Wilmington
	Rebecca W. Blackmore	Wilmington
	James H. Faison III	Wilmington
	Sandra Criner	Wilmington
	Richard Russell Davis	Wilmington
	Melinda Haynie Crouch	Wrightsville Beach
	Jeffrey Evan Noecker	Wilmington
	Chad Hogston	Wilmington
	Robin W. Robinson[10]	Wilmington
6A	Brenda G. Branch (Chief)	Roanoke Rapids
	W. Turner Stephenson III	Roanoke Rapids
	Teresa R. Freeman	Roanoke Rapids
6B	Thomas R. J. Newbern (Chief)[11]	Aulander
	William Robert Lewis II	Winton
	Thomas L. Jones	Ashoskie
	Vershenia B. Moody[12]	Windsor
7	William Charles Farris (Chief)	Wilson

DISTRICT	JUDGES	ADDRESS
	Joseph John Harper, Jr.	Tarboro
	John M. Britt	Tarboro
	Pell C. Cooper	Rocky Mount
	William G. Stewart	Wilson
	John J. Covolo	Rocky Mount
	Anthony W. Brown	Spring Hope
8	David B. Brantley (Chief)	Goldsboro
	Lonnie W. Carraway[13]	Walstonburg
	R. Leslie Turner	Pink Hall
	Timothy I. Finan	Goldsboro
	Elizabeth A. Heath	Kinston
	Charles P. Gaylor III	Goldsboro
	Ericka Y. James[14]	Goldsboro
9	Daniel Frederick Finch (Chief)	Oxford
	J. Henry Banks	Henderson
	John W. Davis	Louisburg
	Randolph Baskerville	Warrenton
	S. Quon Bridges[15]	Oxford
	Carolyn J. Yancey	Creedmoor
	Amanda Stevenson[16]	Oxford
9A	Mark E. Galloway (Chief)	Roxboro
	L. Michael Gentry	Pelham
10	Robert Blackwell Rader (Chief)	Raleigh
	James R. Fullwood	Raleigh
	Kristin H. Ruth[17]	New Hill
	Jennifer M. Green	Raleigh
	Monica M. Bousman	Raleigh
	Jane Powell Gray[18]	Raleigh
	Jennifer Jane Knox	Raleigh
	Debra Ann Smith Sasser	Raleigh
	Lori G. Christian	Raleigh
	Christine M. Walczyk	Raleigh
	Eric Craig Chasse	Raleigh
	Ned Wilson Mangum	Raleigh
	Jacqueline L. Brewer	Apex
	Anna Elena Worley	Raleigh
	Margaret Eagles	Raleigh
	Keith O. Gregory	Raleigh
	Vinston M. Rozier, Jr.	Raleigh
	Michael J. Denning	Raleigh
	Kris D. Bailey	Cary
	Erin M. Graber[19]	Raleigh
	Louis B. Meyer[20]	Raleigh
	Dan Nagle[21]	Raleigh
11	Albert A. Corbett, Jr. (Chief)	Smithfield
	Jacquelyn L. Lee	Smithfield
	Jimmy L. Love, Jr.	Sanford
	O. Henry Willis, Jr.	Dunn
	Addie M. Harris-Rawls	Clayton
	Resson O. Faircloth II	Erwin
	Robert W. Bryant, Jr.	Selma
	R. Dale Stubbs	Clayton
	Charles Patrick Bullock[22]	Coats

DISTRICT	JUDGES	ADDRESS
	Paul A. Holcombe	Smithfield
	Charles Winston Gilchrist	Clayton
	Caron H. Stewart[23]	Smithfield
	Mary H. Wells[24]	Smithfield
12	A. Elizabeth Keever (Chief)	Fayetteville
	Robert J. Stiehl III	Fayetteville
	Edward A. Pone	Parkton
	Kimbrell Kelly Tucker	Fayetteville
	John W. Dickson[25]	Fayetteville
	Talmage Baggett	Fayetteville
	George J. Franks	Fayetteville
	David H. Hasty	Fayetteville
	Laura A. Devan	Fayetteville
	Toni S. King	Fayetteville
	Lou Oliveria[26]	Fayetteville
13	Jerry A. Jolly (Chief)	Tabor City
	Napoleon B. Barefoot, Jr.[27]	Supply
	Marion R. Warren	Ash
	William F. Fairley	Southport
	Scott Ussery	Elizabethtown
	Sherry D. Tyler	Tabor City
	Pauline Hankins[28]	Tabor City
14	Marcia H. Morey (Chief)	Durham
	James T. Hill	Durham
	Nancy E. Gordon	Durham
	William Andrew Marsh III	Durham
	Brian C. Wilks	Durham
	Pat Evans	Durham
	Doretta Walker	Durham
15A	James K. Roberson (Chief)	Burlington
	Bradley Reid Allen, Sr.	Burlington
	Kathryn W. Overby	Burlington
	David Thomas Lambeth, Jr.	Burlington
15B	Joseph M. Buckner (Chief)	Chapel Hill
	Charles T. Anderson	Chapel Hill
	Beverly A. Scarlett	Durham
	Page Vernon[29]	Chapel Hill
	Lunsford Long	Chapel Hill
	James T. Bryan[30]	Hillsborough
16A	William G. McIlwain (Chief)	Wagram
	Regina M. Joe	Raeford
	John H. Horne, Jr.	Laurinburg
16B	J. Stanley Carmical (Chief)	Lumberton
	Herbert L. Richardson	Lumberton
	John B. Carter, Jr.	Lumberton
	Judith Milsap Daniels	Lumberton
	William J. Moore	Maxton
17A	Fredrick B. Wilkins, Jr. (Chief)	Reidsville
	Stanley L. Allen	Sandy Ridge
	James A. Grogan	Reidsville
17B	Charles Mitchell Neaves, Jr. (Chief)	Elkin
	Spencer Gray Key, Jr.	Elkin
	Angela B. Puckett	Westfield

DISTRICT	JUDGES	ADDRESS
	William F. Southern III	King
18	Wendy M. Enochs (Chief)[31]	Greensboro
	Susan Elizabeth Bray[32]	Greensboro
	H. Thomas Jarrell, Jr.	High Point
	Susan R. Burch	High Point
	Theresa H. Vincent	Summerfield
	William K. Hunter	High Point
	Sherry Fowler Alloway	Greensboro
	Polly D. Sizemore[33]	Greensboro
	Kimberly Michelle Fletcher	Greensboro
	Betty J. Brown	Greensboro
	Angela C. Foster	Greensboro
	Avery Michelle Crump	Browns Summit
	Jan H. Samet	Greensboro
	Angela B. Fox[34]	Greensboro
	Tabatha Holloway[35]	Greensboro
	Linda L. Falls[36]	Greensboro
19A	William G. Hamby, Jr. (Chief)	Kannapolis
	Donna G. Hedgepeth Johnson	Concord
	Martin B. McGee	Concord
	Brent Cloninger	Mount Pleasant
19B	Michael A. Sabiston (Chief)[37]	Troy
	James P. Hill, Jr.	Asheboro
	Jayrene Russell Maness[38]	Carthage
	Lee W. Gavin	Asheboro
	Scott C. Etheridge	Asheboro
	Donald W. Creed, Jr.	Asheboro
	Robert M. Wilkins	Asheboro
	William Heafner[38]	Asheboro
19C	Charles E. Brown (Chief)	Salisbury
	Beth Spencer Dixon	Salisbury
	William C. Kluttz, Jr.	Salisbury
	Kevin G. Eddinger	Salisbury
	Roy Marshall Bickett, Jr.	Salisbury
20A	Lisa D. Thacker (Chief)	Polkton
	Scott T. Brewer	Monroe
	Amanda L. Wilson	Rockingham
	William Tucker	Albemarle
20B	N. Hunt Gwyn (Chief)	Monroe
	Joseph J. Williams	Monroe
	William F. Helms	Matthews
	Stephen V. Higdon	Monroe
21	William B. Reingold (Chief)	Clemmons
	Chester C. Davis[40]	Winston-Salem
	William Thomas Graham, Jr.	Kernersville
	Victoria Lane Roemer	Winston-Salem
	Laurie L. Hutchins	Winston-Salem
	Lisa V. L. Menefee	Winston-Salem
	Lawrence J. Fine	Clemmons
	Denise S. Hartsfield	Winston-Salem
	George Bedsworth	Winston-Salem
	Camille D. Banks-Payne	Winston-Salem
	David Sipprell[41]	Winston-Salem

DISTRICT	JUDGES	ADDRESS
22A	L. Dale Graham (Chief)	Taylorsville
	H. Thomas Church	Statesville
	Deborah Brown	Mooresville
	Edward L. Hendrick IV	Taylorsville
	Christine Underwood	Olin
22B	Wayne L. Michael (Chief)	Lexington
	Jimmy L. Myers	Advance
	April C. Wood	Lexington
	Mary F. Covington	Thomasville
	Carlton Terry	Advance
	J. Rodwell Penry	Lexington
23	Mitchell L. McLean (Chief)	Wilkesboro
	David V. Byrd	Wilkesboro
	Jeanie Reavis Houston	Yadkinville
	Michael D. Duncan	Wilkesboro
24	Alexander Lyerly (Chief)	Banner Elk
	William A. Leavell III[42]	Bakersville
	R. Gregory Horne	Boone
	Theodore Wright McEntire	Spruce Pine
	F. Warren Hughes[43]	Burnsville
25	Robert M. Brady (Chief)	Lenoir
	Gregory R. Hayes	Hickory
	L. Suzanne Owsley	Hickory
	C. Thomas Edwards[44]	Morganton
	Buford A. Cherry	Hickory
	Sherrie Wilson Elliott	Newton
	Amy R. Sigmon	Newton
	J. Gary Dellinger	Newton
	Robert A. Mullinax, Jr.	Newton
	Mark L. Killian[45]	Newton
26	Lisa C. Bell (Chief)	Charlotte
	Rickye McKoy-Mitchell	Charlotte
	Louis A. Trosch, Jr.	Charlotte
	Regan A. Miller	Charlotte
	Becky Thorne Tin	Charlotte
	Thomas Moore, Jr.[46]	Charlotte
	Christy Townley Mann	Charlotte
	Ronald C. Chapman	Charlotte
	Donnie Hoover	Charlotte
	Paige B. McThenia	Charlotte
	Jena P. Culler	Charlotte
	Kimberly Y. Best-Staton	Charlotte
	Charlotte Brown-Williams	Charlotte
	John Totten, III[47]	Charlotte
	Elizabeth Thornton Trosch	Charlotte
	Theofanis X. Nixon	Charlotte
	Karen Eady-Williams	Charlotte
	Donald Cureton, Jr.	Charlotte
	Sean Smith	Charlotte
	Matt Osman	Charlotte
	Tyyawdi M. Hands[48]	Charlotte
	Gary Henderson[49]	Charlotte

DISTRICT	JUDGES	ADDRESS
	David Strickland[50]	Charlotte
27A	Ralph C. Gingles, Jr. (Chief)	Gastonia
	Angela G. Hoyle	Belmont
	John K. Greenlee	Gastonia
	James A. Jackson	Gastonia
	Thomas Gregory Taylor[51]	Belmont
	Michael K. Lands	Gastonia
	Richard Abernethy	Gastonia
	Pennie M. Thrower[52]	Gastonia
27B	Larry James Wilson (Chief)	Shelby
	Anna F. Foster	Shelby
	K. Dean Black	Denver
	Ali B. Paksoy, Jr.	Shelby
	Meredith A. Shuford	Lincolnton
28	J. Calvin Hill (Chief)	Asheville
	Rebecca B. Knight[53]	Asheville
	Patricia Kaufmann Young	Asheville
	Sharon Tracey Barrett	Asheville
	Ward D. Scott[54]	Asheville
	Edwin D. Clontz[55]	Candler
	Julie M. Kepple	Asheville
	Andrea Dray	Asheville
	Susan Marie Dotson-Smith[56]	Asheville
29A	C. Randy Pool (Chief)	Marion
	Laura Anne Powell	Rutherfordton
	J. Thomas Davis[57]	Forest City
	Robert K. Martelle[58]	Rutherfordton
29B	Athena F. Brooks (Chief)	Fletcher
	David Kennedy Fox[59]	Hendersonville
	Thomas M. Brittain, Jr.	Mills River
	Peter Knight	Hendersonville
	Emily Cowan[60]	Hendersonville
30	Richlyn D. Holt (Chief)	Waynesville
	Monica Hayes Leslie	Waynesville
	Richard K. Walker	Hayesville
	Donna Forga	Clyde
	Roy Wijewickrama	Waynesville
	Kristina L. Earwood	Waynesville

EMERGENCY DISTRICT COURT JUDGES

Thomas V. Aldridge, Jr.	Ocean Isle Beach
Kyle D. Austin	Pineola
Sarah P. Bailey	Rocky Mount
Grafton G. Beaman	Elizabeth City
Ronald E. Bogle[61]	Raleigh
Steven J. Bryant[62]	Bryson City
Samuel Cathey	Charlotte
Chester C. Davis[63]	Winston-Salem
Danny E. Davis[64]	Waynesville
Shelly H. Desvouges	Raleigh
M. Patricia DeVine	Hillsborough
John W. Dickerson[65]	Fayettesville

J. Keaton Fonvielle	Shelby
Thomas G. Foster, Jr.	Pleasant Green
Earl J. Fowler, Jr.	Asheville
David K. Fox[66]	Hendersonville
Jane Powell Gray[67]	Raleigh
Samuel G. Grimes[68]	Washington
Joyce A. Hamilton	Raleigh
Lawrence Hammond, Jr.	Asheboro
Jane V. Harper	Charlotte
Resa Harris[69]	Charlotte
Robert E. Hodges	Nebo
Shelly S. Holt	Wilmington
James M. Honeycutt	Lexington
William G. Jones[70]	Charlotte
Wayne G. Kimble	Jacksonville
David Q. LaBarre	Durham
William C. Lawton	Raleigh
Harold Paul McCoy, Jr.	Halifax
Lawrence McSwain	Greensboro
Fritz Y. Mercer, Jr.	Summerfield
Thomas F. Moore[71]	Charlotte
William M. Neely[72]	Asheboro
Thomas R.J. Newbern[73]	Aulander
Nancy C. Phillips	Elizabethtown
Dennis J. Redwing	Gastonia
Michael A. Sabiston[74]	Troy
Anne B. Salisbury	Cary
J. Larry Senter	Raleigh
Joseph E. Setzer, Jr.	Franklinton
Russell Sherrill III	Raleigh
Polly D. Sizemore[75]	Greensboro
Catherine C. Stevens	Chapel Hill
J. Kent Washburn	Burlington
Charles W. Wilkinson, Jr.	Oxford

RETIRED/RECALLED JUDGES

Claude W. Allen, Jr.	Oxford
Donald L. Boone	High Point
Joyce A. Brown	Supply
Hugh B. Campbell, Jr.	Charlotte
Daphene L. Cantrell[76]	Huntersville
T. Yates Dobson, Jr.	Smithfield
Harley B. Gaston, Jr.[77]	Belmont
James W. Hardison	Williamston
Jane V. Harper	Charlotte
James A. Harrill, Jr.	Winston-Salem
Roland H. Hayes	Gastonia
Philip F. Howerton, Jr.	Charlotte
Lillian B. Jordan	Randleman
James E. Martin	Greenville
Edward H. McCormick	Lillington
J. Bruce Morton	Greensboro

Otis M. Oliver	Dobson
Stanley Peele	Chapel Hill
Margaret L. Sharpe	Greensboro
Samuel M. Tate	Morganton
John L. Whitley	Wilson

1. Retired November 2012.
2. Sworn in 2 January 2013.
3. Retired 31 January 2012.
4. Term ended 31 December 2012.
5. Appointed Chief District Court Judge 8 February 2012.
6. Appointed 11 April 2012; Term ended 31 December 2012.
7. Sworn in 1 January 2013.
8. Sworn in 1 January 2013.
9. Deceased 25 May 2011.
10. Appointed 31 August 2011.
11. Retired 31 December 2012.
12. Sworn in 1 January 2013.
13. Term ended 31 December 2012.
14. Sworn in 1 January 2013.
15. Term ended 31 December 2012.
16. Sworn in 1 January 2013.
17. Resigned 18 May 2012.
18. Retired 28 February 2012.
19. Appointed 15 May 2012; Term ended 31 December 2012.
20. Appointed 30 August 2012.
21. Sworn in 1 January 2013.
22. Term ended 31 December 2012.
23. Appointed 11 June 2012.
24. Sworn in 2 January 2013.
25. Retired 31 December 2012.
26. Sworn in 1 January 2013.
27. Retired 31 December 2012.
28. Sworn in 1 January 2013.
29. Resigned 31 October 2011.
30. Appointed 3 February 2012.
31. Appointed Chief District Court Judge 6 May 2011.
32. Term ended 31 December 2012.
33. Term ended 31 December 2012.
34. Appointed 22 August 2011.
35. Sworn in 1 January 2013.
36. Sworn in 1 January 2013.
37. Retired 31 August 2012.
38. Appointed Chief District Court Judge 1 September 2012.
39. Appointed 1 December 2012.
40. Retired 31 December 2012.
41. Sworn in 1 January 2013.
42. Retired 1 August 2011.
43. Appointed 31 October 2011.
44. Appointed to Superior Court 14 December 2012.
45. Appointed 14 January 2013.
46. Retired 31 December 2012.
47. Term ended 31 December 2012.
48. Appointed 14 April 2011.
49. Sworn in 1 January 2013.
50. Sworn in 1 January 2013.
51. Term ended 31 December 2012.
52. Sworn in 1 January 2013.
53. Retired 1 August 2012.
54. Appointed 20 April 2011.
55. Appointed 21 April 2011.
56. Appointed 8 November 2012.
57. Term ended 31 December 2012.
58. Appointed 5 April 2013.
59. Retired 31 December 2012.
60. Sworn in 1 January 2013.
61. Resigned 24 May 2011.
62. Resigned 22 May 2012.
63. Appointed 10 January 2013.
64. Resigned 9 January 2012; Reappointed 6 August 2012; Resigned 17 April 2013.
65. Appointed 4 January 2013.
66. Appointed 8 January 2013.
67. Appointed 4 May 2012.
68. Appointed 11 March 2011.
69. Deceased 2 May 2011.
70. Resigned 12 Aril 2012.
71. Appointed 8 April 2013.
72. Resigned 28 July 2011.
73. Appointed 7 January 2013.
74. Appointed 5 September 2012.
75. Appointed 7 January 2013; Resigned 28 February 2013.
76. Deceased 16 October 2011.
77. Deceased 31 December 2011.

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ORDERS

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

JUDY CARDWELL, EMPLOYEE v. JENKINS CLEANERS, INC., EMPLOYER, MIDWEST EMPLOYERS CASUALTY COMPANY, CARRIER (KEY RISK INSURANCE COMPANY, THIRD-PARTY ADMINISTRATOR)

No. 374A10

(Filed 4 February 2011)

Workers' Compensation— going and coming rule—findings not sufficient

A workers' compensation case was remanded, and the Court of Appeals reversed, where the Industrial Commission did not find precisely where plaintiff fell, did not make findings about control of the area where defendant testified plaintiff fell, and application of the going and coming rule could not be determined.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, —— N.C. App. ——, 698 S.E.2d 131 (2010), affirming an opinion and award filed on 17 September 2009 by the North Carolina Industrial Commission. Heard in the Supreme Court 10 January 2011.

Pope McMillan Kutteh Privette Edwards & Schieck, PA, by Martha N. Peed and Anthony S. Privette, for plaintiff-appellant.

McAngus, Goudelock & Courie, P.L.L.C., by Jason C. McConnell, Danielle M. Crockford, and H. George Kurani, for defendant-appellees.

Sumwalt Law Firm, by Vernon Sumwalt; and Patterson Harkavy, LLP, by Burton Craige, for North Carolina Advocates for Justice, amicus curiae.

Hedrick, Gardner, Kincheloe & Garofalo, L.L.P., by M. Duane Jones and Ashley M. Ferrell, for North Carolina Association of Defense Attorneys, amicus curiae.

PER CURIAM.

In the Court of Appeals opinion below the majority concluded that plaintiff Judy Cardwell "was not on [her] employer's premises" when she slipped, fell, and broke her wrist yet also stated that the Industrial Commission "made no findings about employer's right to control or duty to maintain" the cement area outside the back door of defendant-employer's premises, where plaintiff testified she fell. *Cardwell v. Jenkins Cleaners, Inc.*, —— N.C. App. ——, ——, 698 S.E.2d 131, 135 (2010). Further, the Industrial Commission failed to find facts about precisely where plaintiff fell, referring instead to "plaintiff . . . walking through the parking lot to the back door [when] she slipped on black ice and fell."

In addition, our review of the evidence and record reflects that the Commission did not find as fact whether the cement area was part of defendant-employer's premises or part of the parking lot. The Industrial Commission found facts only regarding the degree of ownership or control defendant-employer exercised over the *parking lot*, not the cement area outside the back door, where plaintiff alleged she fell.

Without such findings, we are unable to determine whether the cement area is actually where plaintiff fell and whether it is " 'in such proximity and relation as to be in practical effect a part of the employer's premises,' " such that the "going and coming rule" would not apply. *Bass v. Mecklenburg Cnty.*, 258 N.C. 226, 233, 128 S.E.2d 570, 575 (1962) (quoting *Bountiful Brick Co. v. Giles*, 276 U.S. 154, 158, 72 L. Ed. 507, 509 (1928)); *Barham v. Food World, Inc.*, 300 N.C. 329, 332-34, 266 S.E.2d 676, 678-80 (1980); *see also* N.C.G.S. §§ 97-84, -85 (2009); *Adams v. AVX Corp.*, 349 N.C. 676, 680, 509 S.E.2d 411, 413 (1998) ("Under our Workers' Compensation Act, 'the Commission is the fact finding body.' " (citation omitted)).

Although the Commission need not find facts on every issue raised by the evidence, it is "required to make findings on *crucial* facts upon which the right to compensation depends." *Watts v. Borg*

Warner Auto., Inc., 171 N.C. App. 1, 5, 613 S.E.2d 715, 719 (emphasis added) (citation omitted), *aff'd per curiam*, 360 N.C. 169, 622 S.E.2d 492 (2005). Because the Commission has failed to make crucial findings of fact, its findings are insufficient to support the conclusion that plaintiff did not suffer "an 'injury by accident arising out of and in the course of employment' " and thus is not entitled to worker's compensation. *Cardwell*, ––– N.C. App. at –––, 698 S.E.2d at 135. Therefore, we reverse the Court of Appeals opinion affirming the opinion and award of the Industrial Commission and remand to that court for further remand to the Commission for additional proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

MICHAEL C. MUNGER, BARBARA HOWE, AND MARK WHITELEY CARES v. STATE OF NORTH CAROLINA; JAMES T. FAIN, III, SECRETARY OF THE NORTH CAROLINA DEPARTMENT OF COMMERCE, IN HIS OFFICIAL CAPACITY; REGINALD HINTON, ACTING SECRETARY OF THE NORTH CAROLINA DEPARTMENT OF REVENUE, IN HIS OFFICIAL CAPACITY; DAVID T. MCCOY, STATE BUDGET OFFICER FOR THE OFFICE OF STATE BUDGET AND MANAGEMENT, IN HIS OFFICIAL CAPACITY; MICHAEL F. EASLEY, GOVERNOR OF THE STATE OF NORTH CAROLINA, IN HIS OFFICIAL CAPACITY; GOOGLE INC.; AND MADRAS INTEGRATION, LLC

No. 130PA10

(Filed 4 February 2011)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, ––– N.C. App. –––, 689 S.E.2d 230 (2010), affirming an order dismissing all claims for relief filed by plaintiffs entered on 14 November 2008 by Judge Paul C. Ridgeway in Superior Court, Wake County. Heard in the Supreme Court 11 January 2011.

Robert F. Orr and Jeanette K. Doran for plaintiff-appellants.

Roy Cooper, Attorney General, by Norma S. Harrell, Special Deputy Attorney General, for defendant-appellees State of North Carolina, James T. Fain, III, Reginald Hinton, David T. McCoy, and Michael F. Easley.

Womble Carlyle Sandridge & Rice, PLLC, by Burley B. Mitchell, Jr. and Pressly M. Millen, for defendant-appellees Google Inc. and Madras Integration, LLC.

Troutman Sanders LLP, *by William G. Scoggin*, *for North Carolina Economic Developers Association and the N.C. Chamber*, *amici curiae.*

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

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

STATE OF NORTH CAROLINA v. ARTIVES JEROD FREEMAN

No. 113PA10

(Filed 4 February 2011)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, —— N.C. App. ——, 690 S.E.2d 17 (2010), ordering a new trial following a judgment imposing a sentence of life imprisonment without parole upon a jury verdict finding defendant guilty of first-degree murder and a judgment imposing a concurrent term of imprisonment for another conviction, both entered on 2 September 2008 by Judge Albert Diaz in Superior Court, Mecklenburg County. Heard in the Supreme Court 10 January 2011.

Roy Cooper, *Attorney General*, *by Robert C. Montgomery*, *Special Deputy Attorney General*, *for the State-appellant.*

Staples S. Hughes, *Appellate Defender*, *by Benjamin Dowling-Sendor*, *Assistant Appellate Defender*, *for defendant-appellee.*

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

STATE OF NORTH CAROLINA v. RONNIE WALLACE LONG

No. 265PA09

(Filed 4 February 2011)

On writ of certiorari pursuant to N.C.G.S. § 7A-32(b) to review an order on a motion for appropriate relief entered on 25 February 2009 by Judge Donald Bridges in Superior Court, Cabarrus County. Heard in the Supreme Court 24 March 2010.

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

Marilyn G. Ozer and William F.W. Massengale for defendant-appellant.

PER CURIAM.

Justice JACKSON took no part in the consideration or decision of this case. The remaining members of the Court are equally divided, with three members voting to affirm and three members voting to reverse the order of the superior court. Accordingly, the order of the superior court is affirmed. *See, e.g.*, *State v. Greene*, 298 N.C. 268, 258 S.E.2d 71 (1979); *State v. Johnson*, 286 N.C. 331, 210 S.E.2d 260 (1974).

AFFIRMED.

AFFIRMED.STATE OF NORTH CAROLINA v. GERALD T. PINKERTON

No. 321A10

(Filed 4 February 2011)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, —– N.C. App. —–, 697 S.E.2d 1 (2010), finding error in judgments entered on 22 August 2008 by Judge James F. Ammons, Jr. in Superior Court, Johnston County, and remanding for a new sentencing hearing. Heard in the Supreme Court 11 January 2011.

Roy Cooper, *Attorney General*, *by Charles E. Reece*, *Assistant Attorney General*, *for the State-appellant.*

Staples S. Hughes, *Appellate Defender*, *by David W. Andrews*, *Assistant Appellate Defender*, *for defendant-appellee.*

PER CURIAM.

The decision of the Court of Appeals is reversed for the reasons stated in the dissenting opinion.

REVERSED.

STATE OF NORTH CAROLINA v. ERIC GLENN LANE

No. 606A05

(Filed 11 March 2011)

1. Constitutional Law— criminal law—first-degree murder—competency to stand trial—knowing and voluntary waiver of counsel

The trial court properly allowed defendant's motion to proceed *pro se* in a prosecution for first-degree murder in which the death penalty was sought where defendant was found competent to stand trial under the standard in *Dusky v. United States*, 362 U.S. 389 (1993), and was never denied his constitutional right to self-representation (because he was allowed to proceed *pro se)*. Before allowing defendant to represent himself, the trial court conducted a thorough inquiry and determined that defendant's waiver of his constitutional right to counsel was knowing and voluntary. Defendant's calculation that death was preferable to life in prison was reached for his own reasons and through his own rational thought process.

2. Evidence— relevancy—expert testimony—alcohol withdrawal

The trial court properly excluded expert testimony from a first-degree murder prosecution as irrelevant where the expert would have testified about defendant's pattern of alcohol use and the potential consequences of alcohol withdrawal. The expert could offer no opinion about the severity of any symptoms defendant may have been experiencing at the time of his confession, nor did the expert indicate that symptoms that did occur would have made defendant more susceptible to suggestion or caused him to confess falsely. There was earlier evidence about defendant's condition when he confessed and testimony about his alcoholism, and the jury could already assess how withdrawal from alcohol affected the reliability of defendant's confession.

3. Discovery— violation—sanctions—exclusion of expert testimony

The trial court did not abuse its discretion in a first-degree murder prosecution by excluding an expert's testimony as a discovery sanction where there was an issue about the State's receipt of final reports from a potential expert witness for the defense. It could not be determined from the record whether the trial court's ruling that the proposed testimony was outside

the scope of the preliminary report that had been provided was correct, but the witness testified during *voir dire* that defense counsel had never requested a subsequent report, the trial court had already pursued other measures contemplated by N.C.G.S. § 15A-910, and the trial court struck the appropriate balance as to materiality.

4. Sentencing— capital—no significant history of prior criminal activity—not submitted

The trial court did not err in a first-degree murder sentencing proceeding by not submitting the statutory mitigating circumstance that defendant had no significant history of prior criminal activity where defendant instructed his counsel not to take any position or make any requests. The forecast of evidence sufficiently supported the trial court's threshold determination that no rational jury would have found that defendant's prior criminal activity was insignificant, and the trial court properly balanced the potentially severe prejudicial effect of the testimony of defendant's former wife against defendant's failure to request the instruction and any possible mitigating value.

5. Sentencing— capital—death—not disproportionate

A sentence of death for a first-degree murder was proportionate where defendant confessed to taking advantage of a trusting five-year-old child, raping and sodomizing her before putting her, while still alive, in a garbage bag sealed with duct tape, wrapping her in a tarp, discarding her body in a creek, and not seeking medical assistance or otherwise helping the victim before she succumbed to what he claimed was an accidental death. The sentence was not imposed under arbitrary influence and was more analogous to cases in which the death sentence was found proportionate than to those where it was found disproportionate.

Justice JACKSON took no part in the consideration or decision of this case.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by Judge Gary E. Trawick on 11 July 2005 in Superior Court, Wayne County, upon a jury verdict finding defendant guilty of first-degree murder. On 20 March 2008, the Supreme Court allowed defendant's motion to bypass the Court of Appeals as to his appeal of additional judgments. After hearing oral argument on 17 November 2008, the Supreme Court issued an opin-

ion on 12 December 2008, *State v. Lane*, 362 N.C. 667, 669 S.E.2d 321 (2008) (per curiam), as clarified by an order entered on 9 March 2009, remanding the case to the trial court for further hearings, findings of fact, and conclusions of law. Following entry of an order on remand by Judge D. Jack Hooks, Jr. on 22 June 2009 in Superior Court, Wayne County, the Court entered an order on 8 October 2009 allowing defendant's motion for supplemental briefing following the remand. Heard in the Supreme Court on the issues addressed in the supplemental briefs on 10 May 2010.

Roy Cooper, Attorney General, by Derrick C. Mertz, Assistant Attorney General, and Robert C. Montgomery, Special Deputy Attorney General, for the State.

Ann B. Petersen and James R. Glover for defendant-appellant.

HUDSON, Justice.

Defendant Eric Glenn Lane appeals his conviction and sentence to death for the first-degree murder of five-year-old Precious Ebony Whitfield. Defendant was found guilty of first-degree murder based on jury findings of malice, premeditation, and deliberation and under the felony murder rule. Defendant was also convicted of related charges of first-degree statutory rape, first-degree statutory sex offense, indecent liberties, and first-degree kidnapping. We find no error in defendant's trial or sentencing, and we further determine that defendant's sentence of death is not disproportionate to his crimes.

PROCEDURAL AND FACTUAL BACKGROUND

At about 4:45 p.m. on 17 May 2002, Michelle Whitfield dropped off her five-year-old daughter Precious and her two younger children at the Goldsboro home of Gladys Johnson, who was Precious's step-grandmother. Because Michelle worked evenings, Mrs. Johnson and two of her sons often watched the children for her. That night, Mrs. Johnson planned to be home by 5:30, but stopped off on her way home to pick up some things for dinner. In the meantime, her younger son Travion had Precious do her homework before allowing Precious to play at a neighbor's house.

Precious and her friend Michael rode up and down his driveway on their bikes, with Precious on a borrowed red-and-white bicycle. The two saw defendant in his nearby yard and went over to see if they could play on his swing set. After swinging for awhile, with defendant helping to push Precious, the children went inside de-

fendant's house for a few minutes to see the goldfish and eels defendant kept in a tank. Defendant gave Precious a soda, and she and Michael played on the swing set for several minutes longer before getting back on their bikes and returning to Michael's house.

Around 6:30 p.m., Michael's mother told Precious that it was time to go home, as Michael and his family were leaving for the evening. Precious left on the red-and-white bicycle, and Michael's mother assumed she had gone back to Mrs. Johnson's house. However, when Mrs. Johnson sent Travion to get Precious for dinner at about 7:00 p.m., he was unable to find her at Michael's house or elsewhere in the neighborhood. After repeated searches on their own, and under the mistaken belief that they could not file an official report until Precious had been missing for twenty-four hours, Precious's family called law enforcement the following morning, Saturday, 18 May 2002.

Deputies commenced a general search for Precious and questioned several people, including defendant, as part of a neighborhood canvass. Defendant told a detective that Precious and Michael had been at his house for about ten minutes late Friday afternoon, playing on his swing set and seeing his goldfish and eels. A brief search of defendant's house, with his consent, yielded no sign of Precious. Detectives returned twice more to defendant's house on Saturday, once checking a shed on his property. His story was consistent about his interactions with Precious and Michael on Friday, and law enforcement continued pursuing other leads.

Despite extensive efforts and manpower, law enforcement agencies were unable to find Precious. During the early afternoon of Sunday, 19 May 2002, local residents fishing in a nearby creek discovered Precious, with her upper body wrapped in a trash bag, her legs pulled up to her chest with duct tape, and duct tape also wrapped around her head such that her face and hair were not visible. The crotch of her shorts and panties had been jaggedly cut, and that area was bloody and red. Deputies responded within roughly thirty minutes of the residents' 911 call reporting the body, which was not touched in that interval. An autopsy later showed that Precious had suffered some blunt force trauma and also had several bruises and lacerations, and there was evidence of sexual assault. The official cause of death was "asphyxia secondary to suffocation"; the medical examiner concluded that Precious had been alive when she was put into the trash bag and died in part because she had vomited while struggling against the tape, then breathed some of the

vomit back into her lungs. A red-and-white bicycle, later identified as the one Precious had been riding, was also recovered in the creek, and a blue tarp rolled up with duct tape at one end was found in a nearby ditch.

While law enforcement investigated the scene at the creek, Sammy Sasser passed by and learned that the body of a missing girl had been discovered there. He then went to the Sheriff's Department to tell them what he had seen while driving in that area on Friday evening. Mr. Sasser reported that he observed a man with a red scooter with a basket, on the left side of the bridge, along with a "raincoat or something wrapped up in a clump" with duct tape lying about eight to ten feet behind the scooter. He described the man as a small- to medium-framed person wearing a blue jacket and lighter shade helmet. Several other witnesses later corroborated Mr. Sasser's account, variously testifying at trial that they had seen a white male on a red scooter or red moped with a black basket in the area of the bridge going over the creek between 7:15 and 7:45 on Friday night. The witnesses reported seeing the man struggling with a large bundle wrapped in a blue tarp and with a small red-and-white bicycle.

Based on this information and their knowledge that defendant had a red scooter, Detectives Mike Kabler and Shawn Harris returned to defendant's house. Defendant agreed to be interviewed at the Sheriff's Department, where he essentially repeated the story he had told earlier: that Precious and Michael had been at his house for a brief period in the late afternoon or evening on Friday and then left. He said he did not see Precious again that night.

Defendant again consented to a search of his residence and storage sheds and went with detectives at approximately 10:45 p.m. on Sunday night to conduct the search, which took roughly two and a half hours. In defendant's storage sheds, deputies found a red scooter with a black basket and a white helmet, as well as rolls of duct tape and electrical tape, both of which held blue fibers consistent with the tarp found where Precious's body was discovered. Deputies also seized trash bags similar to the one wrapped around Precious's upper body, and a blue coat with a red spot on it. Defendant gave another, formal statement to detectives, confirming his earlier story that he had not seen Precious or Michael after they left his house early Friday evening.

That Tuesday morning, 21 May 2002, Detectives Kabler and Tony Morris picked defendant up at his home for a prearranged appoint-

ment to give a statement to a State Bureau of Investigation (SBI) agent at the agency's Greenville office. Special Agent Joseph Smith met with defendant and detected "no impairments," although defendant had told Detectives Kabler and Morris that morning that he was an alcoholic, occasionally suffered from seizures, and was hung over and feeling sick from drinking the previous night. In the course of the interview, defendant initially implicated himself in Precious's death by stating that he had "wrapped the young'n in duct tape." He ultimately gave the following full confession, first orally and then reduced to writing, corrected, and signed:

> I, Eric Lane, came home from work on Friday, May 17, 2002, at about 3:00 p.m. or 3:30 p.m. I . . . started drinking beer. Michael . . . and Precious . . . came over to my house at about ten or 15 minutes after I got home. I had drank about three beers before they got there. They [] were riding bicycles. I was lying in the backyard in front of the swing. They asked if they could swing. I said yes. They asked me to push them on the swing so I did. . . . Precious asked for something to drink. I went in the house and got some—got them some Pepsi. They came to the door and Precious stepped in the house. . . . I told them to go look at the eels which were in the living room. They then went to [defendant's son's] room to look at the goldfish. They stayed in the house about ten minutes. They then went back outside and played on the swing again. I went back out with them.
>
> . . .
>
> After about five minutes . . . [they] left. . . .
>
> . . . I was still drinking. About 15 minutes later, Precious came back to the house riding a white and red bicycle. She asked if she could look at the eels again so we went in the house. At first I sat at the kitchen table while Precious played with [defendant's son's] toys in his room. She played in his room for ten or 15 minutes. I was still drinking beer.
>
> I got up and started feeding the eels and she came into the living room with me. She was wearing jean shorts/skirt. I don't remember what color her shirt was. She was wearing white tennis shoes. I think I was wearing tan shorts. I wasn't wearing a shirt. I was wearing my white cap with "USA" and American flag on it.
>
> I started playing with her, tickling her. She fell on the floor laughing. We were both [on] the floor playing. The next thing I

remember I woke up on top of her. I pushed myself up with my hand which was on her shoulder. She was unconscious. My shorts were down as well as my underwear. I pulled up her shorts and maybe her panties. They were not all the way down. I shook her trying to get her to wake up. I had my hands on her shoulders while shaking her.

I started to walk around the house and tried to figure out what happened. . . . I then walked outside where I saw her bicycle. I put it in the white building. I walked around the building for ten or 15 minutes trying to figure out what to do. I knew I had to get her out so I grabbed a blue tarp in the white building and got a roll of duct tape out of the other building. I grabbed the trash bag out of the trash can because it was the only one I had. It was white with red handles. I wrapped her in the trash bag and then taped the bag around her. I put the tarp around her and wrapped her in the tarp. I taped the tarp around her. I drank for a minute. I got her and a couple of beers and went to the white building. I put her in the middle of my scooter where you put your feet. My scooter is red. . . . I hung the bicycle on the scooter basket. I then left on the scooter.

I went to the creek. [Defendant described the route he took]. . . . I got to [the] creek, parked the scooter and got Precious and the bicycle off the scooter. The tarp came off of her when I was getting her off. I don't know what time it was but it was getting dark.

A car came so I ran and threw the bicycle in the creek and [hid] under the bridge. I sat there and drank the two beers I had and threw the bottles in the creek. I laid the body at the edge of the water under the bridge where someone could find it.

I grabbed the tarp and went to the scooter. I took the same path back home. The tarp blew off on the way back. I didn't stop to get it. I just went home.

. . . I guess I raped her, too, but I don't remember.

I was wearing a white helmet when I took Precious to the creek.

When I pulled out of my driveway, the body almost fell off the scooter. I stopped and pulled her back onto the scooter. . . . I was wearing a red pullover shirt and a blue jacket and tan shorts. The

> deputies have all the clothing that I was wearing except for the red shirt, which is still at the house. There was no blood on the floor of my house. I remember seeing a black SUV at the end of my driveway when I stopped to pull the tarp back on the scooter.
>
> I remember that when Precious and I were in the living room, I started tickling her and we both were on the floor. I tickled her between her legs and her private parts area. Her pants came down. Somehow my pant[s] came down also. I don't remember actually having sex with her but I'm pretty sure I did. I don't remember looking for signs that we had sex. I thought she was dead when I put the trash bag over her. She never moved so I thought I had suffocated her with my body or her neck twisted and she died.

Agent Smith later recounted that as part of his interviewing technique, he suggested to defendant that he may not have remembered raping Precious because he had blacked out; according to Agent Smith, defendant subsequently adopted this explanation in his confessions. Defendant never claimed that his inability to remember was related to his alcohol consumption, but he did express shame and remorse with statements such as "I'm sick. I'm a sick person. I wish I was dead," and "I'm a rapist and a killer. I wish I was dead. . . ."

Detectives Kabler and Morris drove defendant back to the Wayne County Sheriff's Department, where they re-interviewed him and he gave a statement with the same timeline and details of what he had told Agent Smith. Defendant also maintained that he "d[id] not remember but if the girl was sexually molested then I must have did [sic] it," and he recounted how he had wrapped Precious's body in a tarp and disposed of her at the creek. After being arrested and booked, defendant suffered an apparent seizure, but he did not require medical attention and went unassisted to his cell. Based on the new information provided by defendant, deputies conducted another search of his home, where they recovered the shirt and shoes defendant said he had been wearing the day Precious died. Deputies also obtained a piece of defendant's living room carpet.

Subsequent forensic analysis of the items taken during the searches of defendant's home did not yield any definitive matches. However, the trash bag in which Precious was found was determined to be consistent with others taken from defendant's home. Likewise, blue fibers found on defendant's gloves and clothes, his scooter, the roll of duct tape taken from his home, Precious's body and clothing,

the trash bag and duct tape around her body, and defendant's carpet and bed cover—twenty-two items in all—were determined to be consistent with the blue tarp fabric. A hair collected from the living room carpet sample was "microscopically consistent" with Precious's hair, as were hairs taken from defendant's vacuum cleaner. Defendant, or his maternal relatives, "could not be ruled out" as the source of the mitochondrial DNA of a hair found in Precious's anus. An SBI analyst also physically matched the torn ends of the duct tape from the blue tarp and the trash bag to the roll belonging to defendant.

On 7 April 2003, defendant was indicted in Wayne County for first-degree murder, first-degree statutory rape, first-degree statutory sex offense, indecent liberties, lewd and lascivious conduct, and first-degree kidnapping. The murder indictment listed three aggravating circumstances that would support imposition of the death penalty: (1) "The defendant had been previously convicted of a felony involving the use or threat of violence to the person," N.C.G.S. § 15A-2000(e)(3) (2009); (2) "The capital felony was committed while the defendant was engaged . . . in the commission of, or an attempt to commit, or flight after committing or attempting to commit" the offenses of "rape[,] sex offense [and] kidnapping," *id.* § 15A-2000(e)(5) (2009); and (3) "The capital felony was especially heinous, atrocious, or cruel, *id.*" § 15A-2000(e)(9) (2009).

In response to a defense motion requesting an evaluation of defendant's competence to stand trial, defendant was committed to Dorothea Dix Hospital on 5 March 2004, where he remained for three months. At a motions hearing in April, the trial date was set for October 2004. Just before the beginning of defendant's capital trial, defense counsel gave notice to the trial judge that they intended to raise a claim that defendant was mentally retarded. Around the same time defendant sent a letter to the trial judge expressing his unhappiness with his attorneys and stating his desire to proceed *pro se*. The judge questioned defendant at length concerning his request and committed him again to Dix for further evaluation of his capacity to represent himself. Defendant withdrew the request a week later. Following a hearing, the trial judge entered an order on 13 October 2004, finding defendant competent to stand trial.

Jury selection then began, resulting in twelve jurors being seated by 4 November 2004. However, following allegations of juror misconduct—and over defendant's objections and insistence that the trial not be delayed—the trial court discharged the seated jurors and continued the case to a later trial date. At that point,

defendant again informed the trial judge that he wanted to represent himself from then on. Defendant was sent to Dix for further evaluation of his capacity to proceed *pro se*, and the trial judge heard defendant's request on 23 November 2004. Expert witnesses testified about defendant's mental disorders and illiteracy, and defendant answered questions about his understanding of the charges against him, the potential penalties for being found guilty, and the conduct of the proceedings.

At the conclusion of the hearing, the trial judge entered an order allowing defendant to discharge his court-appointed counsel and proceed *pro se*. The trial court found as fact that defendant's "literacy level at best would be found to be at the third grade level," but is "probably or more likely in the range of kindergarten through the second grade," and that defendant "has been found to suffer from anxiety disorders, probably Post Traumatic Stress Disorder, and to have other mental symptoms" that were "carefully considered" by the trial court. In addition, after noting that defendant had previously been found to be competent to stand trial, the judge found that the trial court "had explained to [defendant] in detail" his constitutional right to counsel, "the benefits of having assigned counsel, as well as the disadvantages or potential disadvantages of representing himself," and that he "would be held to the very same standards in the trial of these matters as would an attorney."

The trial court both found as fact and concluded as a matter of law that defendant was "clearly advised of his right to the assistance of counsel, including his right to the assignment of counsel, that he understands and appreciates the consequences of his decision and comprehends the nature of the charges and proceedings and the range of permissible punishments." In addition, the trial court concluded:

> 3. That . . . while the defendant is largely illiterate, the court has carefully considered the same and the court has pointed out to [defendant] the disadvantages he faces as a result of his limited reading and writing ability. That [defendant] is well aware of these. The court specifically concludes that his lack of ability to read and write at a higher level should not and does not stand in the way of his right to make a free, voluntary and informed decision.
>
> 4. That the court concludes further regarding his anxiety disorders and possible Post Traumatic Stress Disorder that the court

has considered carefully the same and the court does find that they do not render him incompetent to proceed to trial under the normal statutory and constitutional standards and thus, do not render him unable to arrive at the decision to represent himself, as he has previously been found competent.

5. That the court further concludes this day that those disorders as well as the other difficulties he has faced emotionally, psychologically and mentally, do not render him incompetent to proceed to trial or to make this decision.

6. That the court concludes that under the Constitution of the United States and the State of North Carolina, the existing law of the United States as set forth by our Supreme Court in the case law of the State of North Carolina and specifically under the General Statutes of North Carolina, this defendant is entitled to represent himself[.]

The trial court also directed that two attorneys be appointed as standby counsel for defendant.

Defendant's next trial began in May 2005 before a new trial judge, with defendant seated at counsel table and standby counsel seated behind him. Following the selection of twelve jurors and the beginning of the selection of alternate jurors, standby counsel pointed out to the trial judge that the way in which potential jurors were being called appeared to violate statutory law. Defendant moved to excuse the entire jury pool, and the State agreed that such action was most likely proper. The trial court dismissed the seated jurors and ordered that a new *venire* be summoned.

The case recommenced on 1 June 2005, and defendant informed the trial court that he wanted standby counsel to represent him before the jury, but only if such action would not delay the trial. Both standby counsel indicated to the trial court that they were ready to proceed, and the trial moved forward with standby counsel presenting defendant's case to the jury through the end of the guilt-innocence phase of the capital trial. On 8 July 2005, the jury found defendant guilty of first-degree murder based both on malice, premeditation, and deliberation and under the felony murder rule, as well as guilty of first-degree kidnapping, first-degree statutory rape, first-degree statutory sex offense, and indecent liberties. The trial court dismissed the remaining charge of lewd and lascivious conduct.

At the outset of the penalty proceeding, defendant indicated that he had instructed defense counsel to take no part in those proceedings, either by cross-examining the State's witnesses or presenting mitigating evidence in defendant's support. The prosecutor noted that "although [defendant has] lawyers he's told [them] not to act like lawyers," which was "similar" to representing himself. At the prosecutor's request, the trial court reiterated that he had previously questioned defendant about this decision, and determined that defendant was aware of, and competent to waive, his right to counsel.

On 11 July 2005, following a sentencing proceeding in which neither the State nor defendant presented any additional evidence, the jury found two aggravating circumstances regarding the murder, that defendant committed the murder while engaged in the commission of rape, first-degree sexual offense, or kidnapping, and that the murder was especially heinous, atrocious, or cruel. Jurors found one nonstatutory mitigator, that defendant has a learning disability. After determining that the mitigating circumstance was insufficient to outweigh the aggravators, the jury recommended death. Defendant was sentenced to death, plus additional lengthy terms of incarceration for the noncapital convictions. That same day the trial court directed that notice of appeal be entered on behalf of defendant with this Court.

On 20 March 2008, this Court allowed defendant's motion to bypass the Court of Appeals as to his appeals from the noncapital convictions. We remanded the case on 12 December 2008 for the trial court to conduct a hearing, in light of *Indiana v. Edwards*, 554 U.S. 164, 171 L. Ed. 2d 345 (2008), issued after defendant's trial, to determine (1) whether defendant fell within the "borderline competent" or "gray area" of mentally ill defendants described in *Edwards*; (2) if so, whether the court in its discretion would have precluded self-representation for defendant and appointed counsel pursuant to *Edwards*; and (3) if so, whether defendant was prejudiced by his period of self-representation. *State v. Lane*, 362 N.C. 667, 668, 669 S.E.2d 321, 322 (2008) (per curiam).

Following the hearing held on remand, the trial court entered extensive findings of fact based on the expert witness testimony from psychiatrists and psychologists for both the State and the defense at the two competency hearings held in the fall of 2004, as well as at the June 2009 hearing. The trial court further made special findings of fact, including that "defendant at all times understood the nature and object of the proceedings against him, comprehended his own situa-

tion in reference to those proceedings, and was able to assist in his defense in a rational manner," such that "any . . . failure regarding his comprehension of his own situation in reference to the proceedings was or would be a result of defendant's willful, volitional failure to consider discovery and the evidence against him."

The Court then concluded that defendant was competent to stand trial and to discharge his counsel and proceed *pro se*. Finding that defendant did not suffer from any mental health disorder or illness as "severe as contemplated in *Edwards* or such that he cannot conduct trial proceedings by himself," the trial court opined that although defendant "present[s] a complex mental health picture," as a matter of law defendant "does not fit the definition of 'gray area' defendant or fit into the category of 'borderline-competent,' " as defined in *Edwards*. That order and the other arguments presented in defendant's appeal as of right from his trial and sentence of death returned to this Court for additional oral arguments on 10 May 2010.

ANALYSIS

[1] Defendant first argues that the trial court erred by granting his motion to discharge appointed counsel and proceed *pro se* from 23 November 2004 until 1 June 2005. Defendant maintains that the undisputed facts show that, as articulated in *Indiana v. Edwards*, he comes within the category of "gray area" or "borderline competent" defendants who are competent to stand trial but nonetheless lack the capacity to conduct trial proceedings without the assistance of counsel.

The foundational case concerning the right to self-representation is *Faretta v. California*, in which the United States Supreme Court held that the Sixth and Fourteenth Amendments guarantee the right to assistance of counsel and further concluded that a criminal defendant likewise "has a constitutional right to proceed *without* counsel when he voluntarily and intelligently elects to do so." 422 U.S. 806, 807, 45 L. Ed. 2d 562, 566 (1975). The competence of the defendant in *Faretta* was not in question, because "[t]he record affirmatively show[ed] that [the defendant] was literate, competent, and understanding" in choosing to waive his Sixth Amendment right to counsel. *Id.* at 835, 45 L. Ed. 2d at 582. Nevertheless, the Supreme Court also established that, as with any constitutional right, a defendant must knowingly and voluntarily waive its benefits. *Id.* at 835, 45 L. Ed. 2d at 581-82.

In *Godinez v. Moran*, the Supreme Court refined its holding in *Faretta*, addressing the right to self-representation for those criminal defendants whose competence is at issue. 509 U.S. 389, 391-93, 125 L. Ed. 2d 321, 327-28 (1993). The defendant in *Moran* was found to be competent under the standard articulated in *Dusky v. United States*, 362 U.S. 402, 402, 4 L. Ed. 2d 824, 825 (1960) (per curiam), namely, "whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him." *Moran*, 509 U.S. at 392, 125 L. Ed. 2d at 327-28. After finding that the defendant was knowingly and intelligently waiving his right to counsel, the trial court allowed his motion to discharge his attorneys and plead guilty to the capital murder charges against him. *Id.* at 392-93, 125 L. Ed. 2d at 328. Defendant later appealed, arguing that the trial court should not have allowed him to represent himself, as he was not competent to do so.

The Supreme Court "reject[ed] the notion that competence to plead guilty *or to waive the right to counsel* must be measured by a standard that is higher than (or even different from) the *Dusky* standard." *Id.* at 398, 125 L. Ed. 2d at 331 (emphasis added). Nevertheless, because the trial court must conduct the additional, second step of inquiring whether such waiver is made knowingly and voluntarily, "[i]n this sense, there *is* a 'heightened' standard for pleading guilty and for waiving the right to counsel, but it is not a heightened standard of *competence*." *Id.* at 400-01, 125 L. Ed. 2d at 333. Having satisfactorily responded to both queries, the defendant in *Moran* was allowed to represent himself and plead guilty. *Id.* at 401-02, 125 L. Ed. 2d at 334.

The Supreme Court has observed that the purpose of this second inquiry is "to determine whether the defendant actually *does* understand the significance and consequences of a particular decision and whether the decision is uncoerced." *Id.* at 401 n.12, 125 L. Ed. 2d at 333 n.12; *see also Faretta*, 422 U.S. at 835, 45 L. Ed. 2d at 581-82 ("Although a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation, he should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.' " (citation omitted)). Accordingly, "the competence that is required of a defendant seeking to waive his right to counsel is the competence to *waive the right*, not the competence to represent himself," mean-

ing that "a criminal defendant's ability to represent himself has no bearing upon his competence to *choose* self-representation." *Moran*, 509 U.S. at 399-400, 125 L. Ed. 2d at 332-33; *see also Faretta*, 422 U.S. at 834, 45 L. Ed. 2d at 581 ("The right to defend is personal. The defendant, and not his lawyer or the State, will bear the personal consequences of a conviction. It is the defendant, therefore, who must be free personally to decide whether in his particular case counsel is to his advantage. And although he may conduct his own defense ultimately to his own detriment, his choice must be honored out of 'that respect for the individual which is the lifeblood of the law.' " (citation omitted)).

The Supreme Court considered a related, but distinct, issue in *Indiana v. Edwards*, which involved "a criminal defendant whom a state court found mentally competent to stand trial if represented by counsel but not mentally competent to conduct that trial himself." 554 U.S. at 167, 171 L. Ed. 2d at 350. In *Edwards* the trial court *refused* to allow the defendant to represent himself, *id.* at 169, 171 L. Ed. 2d at 352, and the Court accordingly was faced with whether the State may *deny* the defendant's constitutional right to proceed *pro se* in those circumstances, *id.* at 167, 171 L. Ed. 2d at 350. Defining such a defendant as one whose competence falls into the "gray area" "between *Dusky's* minimal constitutional requirement that measures a defendant's ability to stand trial and a somewhat higher standard that measures mental fitness for another legal purpose," *id.* at 172, 171 L. Ed. 2d at 354, the Supreme Court reaffirmed its analysis and holding from *Moran* that a gray-area defendant may be *permitted* to represent himself, *id.* at 173, 171 L. Ed. 2d at 355.

Nonetheless, the Court also concluded that "the Constitution permits a State to limit that defendant's self-representation right by insisting upon representation by counsel at trial—on the ground that the defendant lacks the mental capacity to conduct his trial defense unless represented." *Id.* at 174, 171 L. Ed. 2d at 355. In such circumstances "judges [may] take realistic account of the particular defendant's mental capacities by asking whether a defendant who seeks to conduct his own defense at trial is mentally competent to do so." *Id.* at 177-78, 171 L. Ed. 2d at 357. Indeed, the trial judge "will often prove best able to make more fine-tuned mental capacity decisions, tailored to the individualized circumstances of a particular defendant." *Id.* at 177, 171 L. Ed. 2d at 357.

This line of cases supports the principle that all criminal defendants, if competent to stand trial, enjoy the constitutional right to

self-representation, as set forth in *Faretta*, though that right is not absolute. For a defendant whose competence is at issue, he must be found to meet the *Dusky* standard before standing trial. If that defendant, after being found competent, seeks to represent himself, the trial court has two choices: (1) it may grant the motion to proceed *pro se*, allowing the defendant to exercise his constitutional right to self-representation, if and only if the trial court is satisfied that he has knowingly and voluntarily waived his corresponding right to assistance of counsel, pursuant to *Moran*; or (2) it may deny the motion, thereby denying the defendant's constitutional right to self-representation because the defendant falls into the "gray area" and is therefore subject to the "competency limitation" described in *Edwards*. 554 U.S. at 175-76, 171 L. Ed. 2d at 355-56. The trial court must make findings of fact to support its determination that the defendant is "unable to carry out the basic tasks needed to present his own defense without the help of counsel." *Id*. at 175-76, 171 L. Ed. 2d at 356 (citations omitted).

Even before *Edwards*, North Carolina had established a similar framework through statute and precedent from this Court. *See* N.C.G.S. § 15A-1242 (2009) (enacted in 1977 and permitting a defendant to proceed *pro se* "only after the trial judge . . . is satisfied that [he] . . . [h]as been clearly advised of his right to the assistance of counsel," "[u]nderstands and appreciates the consequences of this decision," and "[c]omprehends the nature of the charges and proceedings and the range of permissible punishments"); *State v. LeGrande*, 346 N.C. 718, 722-23, 487 S.E.2d 727, 729 (1997) ("Before a defendant is allowed to waive appointed counsel, the trial court must insure that . . . . the defendant . . . 'clearly and unequivocally' waive[s] his right to counsel and instead elect[s] to proceed *pro se*. . . . [and] knowingly, intelligently, and voluntarily waive[s] his right to in-court representation." (citations omitted)).

Here defendant was never denied his constitutional right to self-representation because the trial court allowed his motion to proceed *pro se*. As such, the Supreme Court's holding in *Edwards*, that the State may deny that right if a defendant falls into the "gray area" of competence, does not guide our decision here.[1] Rather, after de-

1. We recognize that our 2008 order remanding this case instructed the trial court to conduct a hearing in light of the holding in *Edwards*, which was issued while this case was pending on appeal and was thus retroactively applicable. *Griffith v. Kentucky*, 479 U.S. 314, 328, 93 L. Ed. 2d 649, 661 (1987); *see State v. Morgan*, 359 N.C. 131, 154, 604 S.E.2d 886, 900 (2004), *cert. denied*, 546 U.S. 830, 163 L. Ed. 2d 79 (2005).

fendant was found competent to stand trial under the *Dusky* standard, and pursuant to the law as set forth in *Faretta*, *Moran*, *LeGrande*, and N.C.G.S. § 15A-1242, before allowing defendant's motion to represent himself, the trial court properly conducted a thorough inquiry and determined that defendant's waiver of his constitutional right to counsel was knowing and voluntary.

The transcript reveals that when defendant first indicated he wished to discharge defense counsel and proceed *pro se*, at the beginning of his trial in October 2004, the trial court questioned him about his reasons and sent him to Dorothea Dix Hospital for evaluation of his capacity to do so. In the course of that exchange, the trial court emphasized that it had "to make sure that whatever decision [defendant] make[s], [he] fully understand[s] what [he's] doing" by waiving his right to counsel, "[n]ot just as far as punishment, but as to a trial in and of itself." The trial court also advised defendant of the import of this Court's decision in *State v. Ali*, 329 N.C. 394, 404, 407 S.E.2d 183, 189 (1991), which stated that defense attorneys are required to abide by their clients' wishes when there is an absolute impasse over trial tactics or strategy.

Defendant acknowledged to the trial court that he had consistently and regularly chosen to refuse to meet with defense counsel since his incarceration over two years earlier. Defendant further informed the trial court that he had likewise declined to meet with a number of mental health experts. Although defendant told the trial court he wanted to represent himself not because of disagreement over trial strategy but because he simply did not want a lawyer, he withdrew his request less than a week later.

While the trial court was weighing whether to declare a mistrial based on juror misconduct at the beginning of the October 2004 trial, defendant voiced his strong objection to any delay in the proceedings and suggested that if defense counsel moved for a mistrial, he would seek to discharge them. At that time, the trial court and defendant had their longest discussion concerning defendant's beliefs and expectations regarding his trial. Defendant repeatedly indicated that

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Such remand was appropriate to afford the trial court the opportunity to revisit its decision to allow defendant to proceed *pro se*, because *Edwards* represented a material change in constitutional law by providing the definition of a "gray area" defendant and signaling when a defendant whose competence is at issue may be denied the constitutional right to self-representation. Nevertheless, because the trial court confirmed that it would have granted defendant's motion even with the benefit of the Supreme Court's guidance in *Edwards*, that case is ultimately inapposite.

the did not feel any jury would be able to overlook the age of the victim in this case. Moreover, although defendant believed in his innocence and hoped to be set free, if found guilty he would rather be sentenced to death than to life in prison. However, he also emphasized that this preference "don't make any [sic] crazy, suicidal or incompetent," as he was "a country boy. You lock me down 24 hours, you might as well kill me, plain and simple." At one point defendant also stated, "I'm trying to figure out, sir, what I got to do to prove I'm competent. I went to Dorothea Dix. The doctors say I'm competent. I know what is going on, and I know this man right here [defense counsel] is trying to delay this trial for some reason."

After the trial court declared a mistrial, defendant renewed his motion to discharge counsel and proceed *pro se*, and the trial court had him transferred back to Dorothea Dix Hospital for further evaluation. On 23 November 2004, the trial court conducted a hearing to inquire into defendant's motion. During the hearing, both before and after expert witness testimony, the trial court questioned defendant at length about his reading and writing skills, as well as his understanding of his right to assistance of counsel, the nature of the charges against him, including the possible punishments if he were found guilty of those charges, and the potential consequences of representing himself, such as "forfeit[ing] certain valuable legal rights and legal protections as a result of [defendant's] lack of knowledge" stemming from no legal training. At all times defendant indicated that he was aware of the implications of proceeding *pro se* but that he was nonetheless "freely," "voluntarily," and "intelligently" waiving his right to counsel.

At this hearing the trial court heard from a number of expert witnesses, including Robert Rollins, M.D., who had examined defendant several times at Dorothea Dix Hospital. Dr. Rollins recounted that defendant had indicated his intention to discharge counsel and not put up a defense, as he was "tired" and "ready for it to be over," which comported with earlier representations defendant had made to the trial court objecting to any delay and expressing his wish either to be found not guilty or be sentenced to death.

Dr. Rollins stated his opinion that defendant was competent to make the decision not to put up a defense, even if "it was questionable that [defendant] is acting with a reasonable degree of rational understanding," and despite the diagnosis of several mental disorders, including learning and expressive language disorders, depressive disorder, personality disorder, and alcohol dependence.

Although he did not believe defendant's decision to proceed *pro se* to be either "reasonable or rational," Dr. Rollins nonetheless concluded that "if the test of competency to dismiss his attorneys and represent himself is understanding and appreciating the consequences of the decision, comprehending the nature of the charges and proceedings and range of permissible punishments, in my opinion he's competent."

Dr. Claudia Coleman, a psychologist with whom defendant had mostly refused to meet, also gave her opinion that defendant suffered from post-traumatic stress disorder and severe anxiety disorder and that he did not actually understand the consequences of discharging counsel, notwithstanding his statements to the contrary.[2]

In its order allowing defendant's motion to proceed *pro se*, the trial court found that defendant "has been clearly advised of his right to the assistance of counsel" and "that he understands and appreciates the consequences of his decision and comprehends the nature of the charges and proceedings and the range of permissible punishments, in accordance with [N.C.G.S. §] 15A-1242." The court recognized that defendant "is largely illiterate," noted that it had "pointed out to [defendant] the disadvantages he faces as a result of his limited reading and writing ability," and found that defendant "is well aware of these." Significantly, "[t]he court specifically conclude[d] that [defendant's] lack of ability to read and write at a higher level should not and does not stand in the way of his right to make a free, voluntary and informed decision." Likewise, defendant's "anxiety disorders and possible Post Traumatic Stress Disorder . . . do not render [defendant] unable to arrive at the decision to represent himself, as he has previously been found competent," and "those disorders as well as the other difficulties [defendant] has faced emotionally, psychologically and mentally, do not render him incompetent . . . to make this decision" to proceed *pro se*.[3]

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2. Dr. Coleman was the sole witness at the hearing on remand from this Court, held on 1 June 2009. She testified to her opinion that defendant was not competent to conduct trial proceedings.

3. In its order on remand concluding that defendant did not fall into the "gray area" defined in *Edwards*, the trial court entered additional findings and conclusions, including that it found Dr. Rollins's testimony to be "more impressive and controlling . . . based upon the more extensive involvement with, opportunity to observe and communication with the defendant." The trial court also found that "[d]efendant can communicate orally in an effective manner . . . . has organized thinking, suffers from no delusions or hallucinations. . . . can concentrate; his orientation is intact, as is his current memory," and he has no "failure to comprehend his own situation."

We conclude that the trial court's inquiry was sufficient to support its determination that defendant knowingly and voluntarily waived his right to assistance of counsel and chose instead to exercise his constitutional right to self-representation. The orders reflect that the trial court took into full account all the expert witness testimony concerning defendant's functional illiteracy and mental disorders and nonetheless concluded that these conditions did not affect his ability to make the decision to proceed *pro se*. Defendant was repeatedly advised that discharging counsel would likely harm his defense, particularly in light of his limited reading and writing skills, yet he expressed time and again his wish to proceed *pro se*. Likewise, the trial court questioned defendant several times about the reasons underpinning that desire. Although we may disagree with defendant's calculation that a sentence of death is preferable to a lifetime of confinement, we recognize that he reached his decision for his own personal reasons and through his own rational thought process, as he retained the right to do.

Defendant was able to respond to the trial court's inquiries in a manner that indicated that he (1) understood the charges and proceedings against him and the range of possible punishments, (2) had been clearly advised of his right to counsel, and (3) appreciated the consequences of his decision to waive that right. N.C.G.S. § 15A-1242; *see also Moran*, 509 U.S. at 401 n.12, 125 L. Ed. 2d at 333 n.12 (noting that the purpose of the "knowing and voluntary" inquiry is "to determine whether the defendant actually *does* understand the significance and consequences of a particular decision and whether the decision is uncoerced").

Under *Faretta*, defendant's "technical legal knowledge . . . was not relevant to an assessment of his knowing exercise of the right to defend himself." 422 U.S. at 836, 45 L. Ed. 2d at 582; *accord LeGrande*, 346 N.C. at 726, 487 S.E.2d at 731. Where, as here, a defendant chooses that right, *Edwards* does not alter that principle.[4] Defendant was well aware of his limitations, and "the record . . . establish[es] that he kn[e]w what he [wa]s doing and his choice [wa]s made with eyes open." *Faretta*, 422 U.S. at 835, 45 L. Ed. 2d at 582 (citation and internal quotation marks omitted). For the foregoing reasons, we

4. Likewise, a criminal defendant who retains counsel remains the ultimate authority on certain aspects of how his defense will be presented. *See State v. Ali*, 329 N.C. 394, 404, 407 S.E.2d 183, 189 (1991) ("[W]hen counsel and a fully informed criminal defendant client reach an absolute impasse as to such tactical decisions, the client's wishes must control; this rule is in accord with the principal-agent nature of the attorney-client relationship.").

conclude that the trial court properly allowed defendant's motion to proceed *pro se*.

Defendant next argues that the trial court erred by excluding expert testimony from Dr. Wilkie Wilson, a neuropharmacologist and research scientist who studies the effects of drugs and alcohol on the brain. Dr. Wilson would have testified concerning defendant's pattern of alcohol use and the potential consequences of alcohol withdrawal, including seizures. His testimony was barred by the trial court on relevancy grounds and as a sanction against the defense because the trial court found that the report Dr. Wilson had provided to the State was insufficient to satisfy the rules of discovery.

Relevancy

[2] Under our Rules of Evidence, " '[r]elevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence," N.C.G.S. § 8C-1, Rule 401 (2009), and generally "[a]ll relevant evidence is admissible," except as otherwise provided in the law, *id.* Rule 402 (2009). "Evidence which is not relevant is not admissible." *Id.* A trial court's rulings on relevancy are technically not discretionary, though we accord them great deference on appeal. *State v. Wallace*, 104 N.C. App. 498, 502, 410 S.E.2d 226, 228 (1991) (citation omitted), *appeal dismissed and disc. rev. denied*, 331 N.C. 290, 416 S.E.2d 398, *cert. denied*, 506 U.S. 915, 121 L. Ed. 2d 241 (1992); *see also State v. Lawrence*, 352 N.C. 1, 17-18, 530 S.E.2d 807, 817-18 (2000) (reviewing trial court's exclusion of expert witness testimony on behalf of defendant for error and finding none), *cert. denied*, 531 U.S. 1083, 148 L. Ed. 2d 684 (2001).

However, "a determination of relevancy under Rule 401 does not necessarily end the inquiry as to whether a trial court erred in sustaining an objection to proffered expert witness testimony." *State v. Burgess*, 345 N.C. 372, 388, 480 S.E.2d 638, 646 (1997) (citation omitted). Such testimony is admissible if it will "assist the trier of fact to understand the evidence or to determine a fact in issue," N.C.G.S. § 8C-1, Rule 702 (2009), partly explained by this Court as "whether the opinion expressed is really one based on the special expertise of the expert, that is, whether the witness because of his expertise is in a better position to have an opinion on the subject than is the trier of fact," *State v. Wilkerson*, 295 N.C. 559, 568-69, 247 S.E.2d 905, 911 (1978) (citation omitted). Although an expert is permitted to offer "[t]estimony in the form of an opinion or infer-

ence" even if it "embraces an ultimate issue to be decided by the trier of fact," N.C.G.S. § 8C-1, Rule 704 (2009), such testimony may properly be excluded if it amounts to no more than pure speculation or conjecture, *State v. Clark*, 324 N.C. 146, 159-60, 377 S.E.2d 54, 62-63 (1989).

Here, during *voir dire* examination, outside the presence of the jury, Dr. Wilson stated that he spent about fifteen to twenty minutes with defendant and his attorney, during which defendant told Dr. Wilson about his drinking history, including that he "drank as much as two cases of beer a day, . . . plus some scotch." Dr. Wilson also recounted that defendant told him he "just didn't remember much about anything," and he drank "just . . . enough alcohol to prevent himself from going crazy and into withdrawal"; otherwise, he would be "sick . . . shaking, . . . very anxious and miserable." When asked whether he discussed with defendant if defendant had understood what he was saying when he confessed to the murder, Dr. Wilson responded in pertinent part:

> [N]o, sir that wasn't, that wasn't the issue for me.
>
> . . . I wouldn't be qualified to talk about—my expertise stops at the—I can—I can talk about what generally happens to the brain, what happens to the central nervous system under the influence and withdrawal of drugs. But as for a particular individual at a particular circumstance and me doing some kind of examination of him, that would be beyond my level of expertise.
>
> So I'm not—I'm not qualified to talk to [defendant] about how he was feeling at [the time of his confessions to law enforcement] and whether or not [sic] make some evaluation of the quality of what he said or those circumstances.
>
> I can only tell you in general what happens to people in various circumstances, such as intoxication or alcohol withdrawal. But I can't tell you, there was no sense in me talking to [defendant] about [his crime or confession]. I wasn't really interested in what he said or whatever else.
>
> . . . .
>
> I was asked to come in and talk about his alcohol use, alcohol use at that level, and the consequences of withdrawing from that alcohol abuse; and that's what I was interested in.

Dr. Wilson then continued that his "ultimate opinion [wa]s . . . that [defendant] used alcohol at a profoundly high level. So high in fact that when he stopped using alcohol the central nervous system reacted by becoming hyperexcitable and going [] into alcohol withdrawal," which would produce other symptoms like anxiety and a rise in blood pressure and heart rate, perhaps resulting in a seizure.

Dr. Wilson repeatedly stated that he "d[id] not have any evidence that [defendant] in this circumstance had this kind of hyperexcitability on-going" when defendant made his confession; nor could Dr. Wilson "tell you what was going on in [defendant's] brain at that time." Thus, Dr. Wilson admitted that "what [defendant] said I have no way of evaluating" and that he "can only tell you that people that are going through alcohol withdrawal have very disturbed brain function." In response to a question from defense counsel, Dr. Wilson said he did not have the expertise to determine whether defendant's confession was false based on defendant's being in a state of alcohol withdrawal when the confession was made; he also averred that he was not there to offer any testimony to that effect.

At the conclusion of voir dire, the trial court ruled that Dr. Wilson's testimony was not relevant during the guilt-innocence phase of defendant's trial because Dr. Wilson could not "state opinions of the defendant's mental condition at the time of the interrogation." The trial court observed that Dr. Wilson was unable to say if defendant's confession was true or false or whether it was induced, and an earlier pretrial order by another judge had already determined the confession to be voluntary. As such, and emphasizing again that Dr. Wilson had repeatedly stated that he could not "render an opinion as to whether the confession was false or true" or what defendant's condition was at the time he made his confession, the trial court excluded the testimony.

In light of our deferential standard of review, we are not persuaded that the trial court erred in excluding Dr. Wilson's testimony. Defense counsel argued that the proffered testimony was relevant to the jury's consideration of "the overall reliability of the confession." However, Dr. Wilson could offer no opinion about the severity of any symptoms defendant may have been experiencing at the time of his statement, nor did he indicate that those symptoms—if they occurred—would have made defendant more susceptible to suggestion or somehow caused him to confess falsely to raping and murdering a five-year-old girl.

At that point in the trial, the jury had previously heard from detectives regarding defendant's demeanor and comportment during their interviews with him and when he made his confession. Each detective stated his belief that defendant was not intoxicated at the time of law enforcement's interactions with him, which supported defendant's averments to them that he had not been drinking. Detectives did recount, however, that defendant reported that he had consumed twelve beers the night before and that he felt sick and hung over when they picked him up on the morning of the day he ultimately confessed. Two officers from the Wayne County Detention Center likewise testified that defendant stated he was not impaired nor did he seem to be impaired when he was booked and processed, but they confirmed that defendant appeared to suffer a seizure shortly after going outside for a cigarette before being taken to his cell. Defendant's stepmother also testified about defendant's heavy drinking, albeit in general terms.

Dr. Wilson repeatedly stated that he could not offer an opinion whether this particular defendant, at the time he made his confession, was experiencing any specific symptoms of alcohol withdrawal. Rather, he could only say that defendant was an extremely heavy drinker and that heavy drinkers generally experience certain effects on their nervous systems when withdrawing from alcohol. Given the earlier evidence from detectives about defendant's condition, as well as testimony from defendant's stepmother concerning his alcoholism, the jury could already assess how withdrawal from alcohol affected the reliability of defendant's confession, if at all.

In sum, Dr. Wilson's testimony would not "assist the trier of fact to understand the evidence or to determine a fact in issue," N.C.G.S. § 8C-1, Rule 702, and would instead have likely suggested that defendant was definitively experiencing particular withdrawal symptoms. Furthermore, Dr. Wilson could not testify regarding the existence of a direct connection between any such symptoms and the reliability of defendant's confession. Accordingly, this testimony was properly excluded by the trial court under Rule 401. As we held in *State v. Lawrence*, we conclude here that "[h]aving the expert testify as requested by defendant would tend to confuse, rather than help, the jury." 352 N.C. at 17-18, 530 S.E.2d at 818; *see also State v. Weeks*, 322 N.C. 152, 165-67, 367 S.E.2d 895, 903-04 (1988) (concluding that when the defendant sought testimony from psychiatrists and a psychologist not only to describe his mental disorders, but also to define his state of mind at the actual time of the killings with which he

was charged, the latter testimony was properly barred because it would have allowed "the experts [to] tell the jury that certain legal standards had not been met").

Discovery Sanction

[3] The trial court also excluded Dr. Wilson's testimony pursuant to its authority under N.C.G.S. § 15A-910, which states:

> (a) If at any time during the course of the proceedings the court determines that a party has failed to comply with this Article or with an order issued pursuant to this Article, the court in addition to exercising its contempt powers may
>
> (1) Order the party to permit the discovery or inspection, or
>
> (2) Grant a continuance or recess, or
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> (3) Prohibit the party from introducing evidence not disclosed, or
>
> (3a) Declare a mistrial, or
>
> (3b) Dismiss the charge, with or without prejudice, or
>
> (4) Enter other appropriate orders.
>
> (b) Prior to finding any sanctions appropriate, the court shall consider both the materiality of the subject matter and the totality of the circumstances surrounding an alleged failure to comply with this Article or an order issued pursuant to this Article.

N.C.G.S. § 15A-910 (2009). We review such a decision for abuse of discretion. *See State v. Thomas*, 291 N.C. 687, 692, 231 S.E.2d 585, 588 (1977) ("Imposition of these sanctions rests entirely within the discretion of the trial judge. The exercise of that discretion, absent abuse, is not reviewable on appeal." (citations omitted)).

The record and transcripts from the pretrial and trial proceedings in this case reflect an ongoing issue related to the State's receipt of final reports from potential defense expert witnesses. On 8 January 2004, the State filed a motion for production of such reports, noting that "it has been the experience [of the prosecutors] in previous capital murder trials that defense experts rarely produce a written report of their findings and examinations" and requesting an order "requiring any defense experts to be called at trial to prepare written reports

of their findings and to provide said reports, findings and any raw data used in the compilation and formulation of said findings to the State's attorneys prior to trial." That motion was allowed on 2 February 2004, and the defense was ordered to provide the reports and data no later than thirty days before trial was scheduled to begin in May 2004.

Nevertheless, the defense did not provide any reports, and after the trial was continued past the May 2004 date, the trial court again ordered defendant to submit to the prosecution by 6 August 2004 "any and all reports of experts which the defendant intends to call at the trial of this matter." On 6 August, the State received "a Fax from the defendant's attorney purporting to be several 'preliminary reports,' each indicating the need for further information upon which to give expert opinions," yet the State received nothing further from the defense as of 24 September 2004, about two weeks before the scheduled start date of the new trial. The State then filed another motion to compel discovery, which the trial court allowed on 27 September 2004, again ordering the defense to provide "any and all reports of experts which the defendant intends to call during any portion of the trial or sentencing of this matter . . . by **October 6, 2004**."

The State continued to raise the issue as the trial opened in mid-October 2004 and again after defendant's new trial began in May 2005. Toward the end of jury selection, after defendant had asked that standby counsel resume serving as his attorneys, defense counsel alerted the trial court that they might need some additional time to prepare their experts, as these potential witnesses "had stopped doing whatever they were doing" the previous fall, after defendant's first trial had been suspended. The prosecutor then reminded the trial court that he had already mentioned on several occasions that he had received only partial reports from the defense's potential expert witnesses. He added:

> I want to make sure I keep everybody on alert we fully intend that all discovery would be complied with. I'm not complaining about [defense counsel]. I know they have issues to deal with but I fully plan to object when somebody whips out a report or starts to give some report and haven't prepared a written report.

Defense counsel agreed with what the State was entitled to and promised they would "do [their] best." The prosecutor observed that more than a year had passed since the trial court had entered orders compelling defense compliance with discovery, and he added that the

law had since changed, making such compliance a statutory requirement. In response to this exchange, the trial court stated:

> I will say to the defendant I tried my best so far to bend over backward to be fair to [defendant]. Everybody needs to understand I'll try to bend over equally backwards to be fair to the state. You know, rules will have to be complied with at least in spirit . . . .
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> . . .
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> . . . . I want the state to be [] able to put on what they need to put on. I want [the defense] to be able to put on what [the defense] need[s] to put on. It's not going to be a trial by ambush on either side.

Defense counsel acknowledged their responsibilities, and the trial moved forward from there, with the prosecutor raising the issue of expert witness reports on at least one other occasion.

On 1 July 2005, near the close of the State's case-in-chief and in anticipation of defendant's presentation of evidence, defense counsel informed the trial court of their intention to call two expert witnesses and asserted that the prosecutor had these witnesses' reports. With respect to Dr. Wilson, however, the prosecutor stated he was "not in receipt of what [he] consider[ed] to be a report" and had only been provided "a slightly longer than one page, slightly double-spaced letter" from defense counsel and an e-mail from Dr. Wilson. Defense counsel maintained that the e-mail was the final report. The trial court told defense counsel that the rules require "more than a cursory report, some summary of his testimony and conclusions" and then instructed, "I want to give you fair warning that if [the prosecutor] doesn't have a report and the witness gets up here and starts testifying beyond that, . . . the rule says I stop it."

On 6 July 2005, when the defense sought to call Dr. Wilson as an expert witness, the State immediately objected. Defense counsel stated that Dr. Wilson would not be testifying to any subjects outside the scope of the e-mail report previously provided to the prosecutor, but also observed that Dr. Wilson might be asked "hypothetical questions of the testimony that's already been given in the trial." The State then read into the record the first paragraph of the e-mail Dr. Wilson had sent:

> Dear [defense counsel]: You asked for a report of my findings in the case of [defendant]. This e-mail, which [sic] is a prelimi-

> nary report of the materials that I have reviewed, my conversation with [defendant] and the conclusions that I have reached at this time. I will continue working on this case until I testify, and I will use e-mail to keep you updated about any new conclusions that I reach.

The prosecutor added, "I must have stood up 15 times during the course of this trial . . . on the record as well as off and asked for the continuation of the final report, or whatever it is we're talking about here, and I haven't gotten anything else." After allowing the State to question Dr. Wilson on voir dire, outside the presence of the jury, the trial court issued a ruling that "there is no report furnished with the opinions to the State, which is violative of the discovery rules, and that the report furnished is incomplete based on the opinions stated."

The report itself is not in the record. Thus, we are unable to determine whether the trial court's ruling that Dr. Wilson's proposed testimony was outside the scope of his "preliminary report" is incorrect. Nevertheless, we note that Dr. Wilson also testified during voir dire that defense counsel had never requested that he write a subsequent or follow-up report. Moreover, the trial court had already pursued other measures contemplated by N.C.G.S. § 15A-910, including issuing an order to compel, allowing several extensions of time to provide the requisite final reports, and repeatedly warning that such testimony would be excluded if a final report was not provided. The statute further directs a trial court to balance any sanction for failure to comply against "the materiality of the subject matter and the totality of the circumstances surrounding an alleged failure to comply." N.C.G.S. § 15A-910(b). In light of the trial court's ruling that Dr. Wilson's testimony was irrelevant, in which we have already found no error, we believe the trial court struck the appropriate balance here as to materiality, and we see no abuse of discretion in the sanction imposed on defendant.

[4] Next, defendant argues that the trial court committed prejudicial error by failing to submit the statutory mitigating circumstance in N.C.G.S. § 15A-2000(f)(1), that defendant "has no significant history of prior criminal activity," thereby entitling him to a new sentencing proceeding.

In *State v. Hurst* we reviewed the case law concerning the (f)(1) mitigating circumstance and stated:

> We reaffirm that the (f)(1) circumstance must be submitted whenever the trial court finds substantial evidence on which a

> reasonable jury could determine that a defendant has no significant history of prior criminal activity. However, when the judge makes a threshold determination supported by findings on the record that no rational jury could find a defendant's criminal history to be insignificant and declines to instruct as to (f)(1), that determination is entitled to deference. Therefore, whenever a party contends that the trial court erred in deciding not to provide an (f)(1) instruction, we will review the whole record in evaluating whether the trial court acted correctly, bearing in mind our admonition that any reasonable doubt regarding the submission of a statutory or requested mitigating factor should be resolved in favor of the defendant. Although the doctrine of invited error does not apply, as noted above, a whole record review will necessarily include consideration of the parties' positions as to whether the instruction should be given.

360 N.C. 181, 197, 624 S.E.2d 309, 322 (alteration in original) (internal citation and internal quotation marks omitted), *cert. denied*, 549 U.S. 875, 166 L. Ed. 2d 131 (2006). We noted as well that "substantial evidence" is "of such a nature that ' "a rational jury could conclude that defendant had no *significant* history of prior criminal activity," ' " *id.* at 194, 624 S.E.2d at 320 (quoting *State v. Barden*, 356 N.C. 316, 372, 572 S.E.2d 108, 143 (2002) (citations omitted), *cert. denied*, 538 U.S. 1040, 155 L. Ed. 2d 1074 (2003)), and "significant" is in turn defined as " 'likely to have influence or effect upon the determination by the jury of its recommended sentence,' " *id.* (quoting *State v. Walls*, 342 N.C. 1, 56, 463 S.E.2d 738, 767 (1995) (citation omitted), *cert. denied*, 517 U.S. 1197, 134 L. Ed. 2d 794 (1996)).

During the penalty proceeding, defendant instructed his counsel not "to take any position or make any requests or otherwise advocate." Nevertheless, at the outset of the sentencing proceeding, defense counsel stated for the record two actions that he maintained "we would have or should have done" had they been allowed by defendant to do so: (1) object to any State attempt to have the trial court instruct the jury on the statutory aggravating circumstance in N.C.G.S. § 15A-2000(e)(3), that defendant had previously been convicted of a violent felony, namely, the felonious restraint of his former wife, and (2) seek to exclude certain evidence from defendant's former spouse about the tumultuous nature of their relationship.

In response to the trial court's queries about the forecast of testimony by defendant's former wife, the State maintained that she

would recount an incident on 29 September 1998, when defendant "kidnapped his exwife [sic] from a convenient [sic] store by the use of force and violence, and took her to a wooded area . . . and the activities which occurred during the time . . . that he held her." Following review of police reports about the matter, the trial court stated that "the testimony would be very restricted" and could not refer to whether defendant had a knife, any prior assaults by defendant on his former wife, or any type of spousal abuse that did not rise to the level of a felony, as contemplated by the (e)(3) aggravating circumstance. However, after the State argued that the statements did not sufficiently reflect the violent nature of the incident, the trial court agreed to hear voir dire testimony from defendant's former wife.

The trial court heard the voir dire testimony and again ruled that defendant's former wife would not be allowed to "testify about the weapon, the lotion or the sexual activity" but could describe the incident that gave rise to defendant's conviction for felonious restraint as well as speak generally about domestic violence in their marriage without providing details of any specific instances. In light of those limitations, the State decided not to seek an instruction on the (e)(3) aggravating circumstance and did not have defendant's former wife testify before the jury.

When discussion turned to the mitigating circumstances that would be presented, the trial court initially indicated it would submit the (f)(1) mitigator to the jury. Although the jury had earlier heard about defendant's two prior convictions for driving while impaired and his felonious restraint conviction, the trial court stated its conclusion that "under the testimony the jury can find one way or the other." However, the trial court also considered that defendant had not requested the instruction, as well as the State's averment that if the (f)(1) mitigator was given, the prosecution would seek to introduce evidence of the felonious restraint conviction after all, meaning the testimony of defendant's former wife would be heard by the jury.[5]

5. The transcript reflects that the grounds for the trial court's exclusion of certain portions of the ex-wife's testimony, namely, that defendant had a knife and a bottle of lotion and forced her into sexual activity, were that those facts were outside the scope of defendant's conviction for felonious restraint and thus inadmissible with respect to submission of the (e)(3) aggravating circumstance. However, although not explicitly discussed, given that the (f)(1) mitigating circumstance refers to "prior criminal *activity*," these portions likely would have been allowed into evidence by the trial court in reference to that mitigator. Indeed, the State makes this very point in its brief to this Court.

She had recounted that defendant had forcibly restrained her inside a car, driven her to a wooded area, kept her there for some time using physical threats and a knife, and coerced her into sexual activity based on her fear for her safety. She also testified that there had been physical and sexual violence during their marriage. Following this discussion, the trial court decided not to instruct the jury on the (f)(1) mitigating circumstance.

In light of the deference to be accorded the trial court, as articulated in *Hurst*, the forecast evidence sufficiently supports the trial court's threshold determination that no rational jury would have found that defendant's prior criminal activity was insignificant. Our review of the whole record finds no error in the trial court's conclusion that testimony that defendant had violently abducted his former wife and forced her to engage in sexual activity was " 'likely to have influence or effect upon the determination by the jury of its recommended sentence.' " *Hurst*, 360 N.C. at 194, 624 S.E.2d at 320 (citation omitted). The trial court properly balanced the potentially severely prejudicial effect of the testimony of defendant's former wife against defendant's failure to request the instruction and any possible mitigating value from submission of the (f)(1) circumstance.

PRESERVATION ISSUES

Defendant raises three additional issues that he concedes have previously been decided by this Court contrary to his position, urging us to reexamine our prior analysis while preserving his right to argue these issues on federal review of his case: (1) that the trial court erred by instructing the jury that they had to be unanimous in their response to Issue Four, namely, that the aggravating circumstances were not sufficiently substantial to impose the death penalty when considered with the mitigating circumstance; (2) that the trial court erred by instructing the jury that if it answered "yes" to Issue Four, it had the "duty" to impose the death penalty; and (3) that the trial court erred in its definition of mitigating circumstances.

Having considered defendant's arguments, we see no reason to revisit or depart from our earlier holdings. *See State v. McCarver*, 341 N.C. 364, 388-94, 462 S.E.2d 25, 38-42 (1995), *cert. denied*, 517 U.S. 1110, 134 L. Ed. 2d 482 (1996) (rejecting the argument that the instruction on a unanimous answer to Issue Four is error); *State v. Skipper*, 337 N.C. 1, 57, 446 S.E.2d 252, 283 (1994) (rejecting the argument that it is error for the trial court to instruct the jury that it is the jury's duty to recommend a death sentence if it answers "yes"

to Issue Four (citations omitted)), *cert. denied*, 513 U.S. 1134, 130 L. Ed. 2d 895 (1995), *superseded on other grounds by statute*, N.C.G.S. § 15A-2002, *as recognized in State v. Price*, 337 N.C. 756, 448 S.E.2d 827 (1994), *cert. denied*, 514 U.S. 1021, 131 L. Ed. 2d 224 (1995); *State v. Robinson*, 336 N.C. 78, 121-22, 443 S.E.2d 306, 327-28 (1994) (rejecting the argument that the definition of mitigating circumstances is erroneous), *cert. denied*, 513 U.S. 1089, 130 L. Ed. 2d 650 (1995).

PROPORTIONALITY REVIEW

[5] In accordance with statute, we last consider whether the record supports the aggravating circumstances found by the jury, whether the death sentence "was imposed under the influence of passion, prejudice, or any other arbitrary factor," and whether the death sentence "is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." N.C.G.S. § 15A-2000(d)(2) (2009).

The jury found both of the aggravating circumstances submitted for its consideration: (1) the murder was committed while defendant was engaged in the commission of rape, first-degree sexual offense, or kidnapping, N.C.G.S. § 15A-2000(e)(5); and (2) the murder was especially heinous, atrocious, or cruel, *id.* § 15A-2000(e)(9). After a thorough examination of the transcripts, record on appeal, briefs, and arguments of counsel, we conclude that the jury's finding of these circumstances beyond a reasonable doubt was fully supported by the evidence. The jury also found the mitigating circumstance that defendant suffered from a learning disability, but did not find the catchall mitigating circumstance.

Defendant maintains in his brief to this Court that his death sentence should be vacated because it was "imposed under the influence of passion, prejudice and other arbitrary factors," yet fails to present any argument in support of this position or direct this Court to anything in the record or transcripts that would support such a ruling. Our own careful review has likewise revealed no such arbitrary influence.

Finally, "we must determine whether the death sentence was excessive or disproportionate by comparing the present case with other cases in which we have found the death sentence to be disproportionate." *Hurst*, 360 N.C. at 207, 624 S.E.2d at 328 (citing *State v. Smith*, 359 N.C. 199, 223, 607 S.E.2d 607, 624, *cert. denied*, 546 U.S. 850, 163 L. Ed. 2d 121 (2005)); N.C.G.S. § 15A-2000(d)(2). Defendant

asserts that these standards for proportionality review are unconstitutionally vague and arbitrary, an argument that we considered and rejected in *State v. Garcia*, 358 N.C. 382, 429, 597 S.E.2d 724, 756 (2004) (citation omitted), *cert. denied*, 543 U.S. 1156, 161 L. Ed. 2d 122 (2005), and decline to revisit here.

This Court has held the death penalty to be disproportionate in eight cases: *State v. Kemmerlin*, 356 N.C. 446, 487-89, 573 S.E.2d 870, 897-99 (2002); *State v. Benson*, 323 N.C. 318, 328-29, 372 S.E.2d 517, 522-23 (1988); *State v. Stokes*, 319 N.C. 1, 19-27, 352 S.E.2d 653, 663-68 (1987); *State v. Rogers*, 316 N.C. 203, 234-37, 341 S.E.2d 713, 731-33 (1986), *overruled on other grounds by State v. Gaines*, 345 N.C. 647, 676-77, 483 S.E.2d 396, 414, *cert. denied*, 522 U.S. 900, 139 L. Ed. 2d 177 (1997), *and by State v. Vandiver*, 321 N.C. 570, 573, 364 S.E.2d 373, 375 (1988); *State v. Young*, 312 N.C. 669, 686-91, 325 S.E.2d 181, 192-94 (1985); *State v. Hill*, 311 N.C. 465, 475-79, 319 S.E.2d 163, 170-72 (1984); *State v. Bondurant*, 309 N.C. 674, 692-94, 309 S.E.2d 170, 181-83 (1983); and *State v. Jackson*, 309 N.C. 26, 45-47, 305 S.E.2d 703, 716-18 (1983). We conclude that this case is not substantially similar to any of these cases.

Here defendant confessed to taking advantage of a trusting five-year-old child, then raping and sodomizing her before putting her, while still alive, in a garbage bag sealed with duct tape, wrapping her in a tarp, and discarding her body in a creek. Unlike *Stokes*, in which this Court found the death sentence to be excessive and disproportionate despite a finding of the (e)(9) aggravating circumstance, this defendant was neither a juvenile nor was he acting with an older accomplice. Similarly, unlike *Bondurant*, in which this Court likewise vacated the death sentence, this defendant did nothing to seek medical assistance for the victim or otherwise help her before she succumbed to what he claimed was an accidental death.

We have also held that the (e)(9) aggravating circumstance is "sufficient, standing alone, to affirm a death sentence," *State v. Morgan*, 359 N.C. 131, 174, 604 S.E.2d 886, 912 (2004) (citations omitted), *cert. denied*, 546 U.S. 830, 163 L. Ed. 2d 79 (2005), as is the (e)(5) aggravating circumstance, *State v. Zuniga*, 320 N.C. 233, 274-75, 357 S.E.2d 898, 923-24, *cert. denied*, 484 U.S. 959, 98 L. Ed. 2d 384 (1987). In addition, defendant was found guilty of both felony murder and first-degree murder done with premeditation and deliberation, either of which may be punished by death, but " ' finding of premeditation and deliberation indicates a more calculated and cold-blooded crime' for which the death penalty is more often appropri-

ate." *State v. Taylor*, 362 N.C. 514, 563, 669 S.E.2d 239, 276 (2008) (citations omitted), *cert. denied*, U.S. , 175 L. Ed. 2d 84 (2009).

We note as well that, after comparing defendant's case with those in which we have found the death sentence to be proportionate, *State v. Al-Bayyinah*, 359 N.C. 741, 762, 616 S.E.2d 500, 515 (2005), *cert. denied*, 547 U.S. 1076, 164 L. Ed. 2d 528 (2006), we find defendant's case to be more analogous to these cases. After considering "all cases which are roughly similar in facts to the instant case, although we are not constrained to cite each and every case we have used for comparison," *State v. McNeill*, 360 N.C. 231, 254, 624 S.E.2d 329, 344 (citing *Al-Bayyinah*, 359 N.C. at 760-61, 616 S.E.2d at 514), *cert. denied*, 549 U.S. 960, 166 L. Ed. 2d 281 (2006), our sound judgment and experience leads us to conclude that the death sentence imposed here is not excessive or disproportionate, taking into account both the crime and the defendant, *id.* at 253, 624 S.E.2d at 344 (citing *Garcia*, 358 N.C. at 426, 597 S.E.2d at 754).

CONCLUSION

For the foregoing reasons we find that defendant received a fair trial and capital sentencing proceeding free of prejudicial error, and the death sentence recommended by the jury and imposed by the trial court is not excessive or disproportionate.

NO ERROR.

Justice JACKSON took no part in the consideration or decision of this case.

LIBERTARIAN PARTY OF NORTH CAROLINA; SEAN HAUGH, AS EXECUTIVE DIRECTOR OF THE PARTY; PAMELA GUIGNARD AND RUSTY SHERIDAN, AS LIBERTARIAN CANDIDATES FOR MAYOR OF CHARLOTTE, NORTH CAROLINA; JUSTIN CARDONE AND DAVID GABLE, AS LIBERTARIAN CANDIDATES FOR CHARLOTTE CITY COUNCIL; RICHARD NORMAN AND THOMAS LEINBACH, AS LIBERTARIAN CANDIDATES FOR WINSTON-SALEM CITY COUNCIL; AND JENNIFER SCHULZ, AS A REGISTERED VOTER, PLAINTIFFS, AND THE NORTH CAROLINA GREEN PARTY; ELENA EVERETT, AS CHAIR, AND KAI SCHWANDES, AS CO-CHAIR OF THE PARTY; NICHOLAS TRIPLETT, AS A PROSPECTIVE NORTH CAROLINA GREEN PARTY CANDIDATE FOR PUBLIC OFFICE; HART MATTHEWS AND GERALD SURH, AS MEMBERS OF THE PARTY AND QUALIFIED VOTERS, INTERVENORS v. STATE OF NORTH CAROLINA; ROY COOPER, AS ATTORNEY GENERAL OF THE STATE OF NORTH CAROLINA; NORTH CAROLINA STATE BOARD OF ELECTIONS; AND GARY O. BARTLETT, AS EXECUTIVE DIRECTOR OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS, DEFENDANTS

No. 479A09

(Filed 11 March 2011)

1. Appeal and Error— preservation of issues—failure to argue

The only issue for Supreme Court consideration was whether the signature requirement for party recognition violates Article I, sections 12, 14, and 19 of the North Carolina Constitution. Appellants abandoned at the Court of Appeals arguments concerning other sections of the state constitution as well as arguments pertaining to N.C.G.S. §§ 163-96(a)(1) and 163-97.1.

2. Elections— equal protection—ballot access restrictions—political parties—associational rights—signature requirement

A *de novo* review revealed the Court of Appeals erred in applying strict scrutiny, but correctly concluded that the signature requirement for party recognition on the ballot under N.C.G.S. § 163-96(a)(2) does not violate Article I, Section 12, 14, or 19 of the Constitution of North Carolina. The two percent party recognition requirement may burden minor political parties somewhat, but it does not impose a severe burden. When a State ballot access provision does not severely burden associational rights, the interests of the State need only be sufficiently weighty to justify the limitation imposed on the party's rights.

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

Justice NEWBY dissenting.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, —– N.C. App. ——, 688 S.E.2d 700 (2009), affirming an order entered 27 May 2008 by Judge Robert H. Hobgood in Superior Court, Wake County. On 28 January 2010, the Supreme Court retained plaintiffs and intervenors' notice of appeal as to a substantial constitutional question pursuant to N.C.G.S. § 7A-30(1). Heard in the Supreme Court on 9 September 2010.

Tharrington Smith, L.L.P., by Kenneth A. Soo and Adam S. Mitchell, for plaintiff-appellants; and Elliot Pishko Morgan, P.A., by Robert M. Elliot, and American Civil Liberties Union of North Carolina Legal Foundation, by Katherine Lewis Parker, for intervenor-appellants.

Roy Cooper, Attorney General, by Alexander McC. Peters Special Deputy Attorney General, for defendant-appellees.

Allison J. Riggs for Southern Coalition for Social Justice, Democracy North Carolina, FairVote Action, League of Women Voters—North Carolina, Common Cause North Carolina, North Carolinians for Free and Proper Elections, and the John Locke Foundation, amici curiae.

Jason B. Kay and Robert F. Orr for North Carolina Institute for Constitutional Law, amicus curiae.

TIMMONS-GOODSON, Justice.

This is a case of first impression that requires us to decide whether the ballot access requirements of N.C.G.S. § 163-96(a)(2) violate Article I, Section 12, 14, or 19 of the Constitution of North Carolina. We hold that N.C.G.S. § 163-96(a)(2) is constitutional with respect to Article I, Sections 12, 14, and 19 and adopt the United States Supreme Court's analysis for determining the constitutionality of ballot access provisions. Accordingly, we modify and affirm the opinion of the Court of Appeals.

BACKGROUND

On 21 September 2005, the Libertarian Party of North Carolina ("N.C. Libertarian Party") filed a complaint against North Carolina's State Board of Elections seeking a declaratory judgment to resolve whether North Carolina's ballot access statutes violate certain rights under the Constitution of North Carolina. The N.C. Libertarian Party also sought recognition as a political party and injunctive relief to

keep its candidates on the ballots in various 2005 municipal elections. On 27 April 2006, the North Carolina Green Party ("N.C. Green Party") was allowed to intervene. The trial court conducted a nonjury trial for which the parties stipulated to the following facts:

A. Historically, states, including North Carolina, have imposed requirements on political parties to gain and retain recognition for their parties and their affiliated candidates.

B. To gain recognition in North Carolina, a political party has been required to submit a petition with the signatures of a number of registered voters supporting the recognition of that party; once a party has obtained recognition as a political party, its candidates have been listed on ballots throughout North Carolina.

C. From 1935 through 1981, the North Carolina signature requirement was 10,000 registered voters. North Carolina Code of 1935 § 5913.

. . . .

H. In 1983, the General Assembly increased the number of registered voter signatures required for recognition of a new political party ["recognition requirement"] . . . to two percent of the number who voted in the last gubernatorial election. 1983 Sess. Laws C. 576, § 1. Parties who are seeking recognition as political parties in North Carolina may begin gathering these signatures as soon as the gubernatorial election is over.

I. For the 2008 election, a party [had to] submit 69,734 signatures from registered voters in order to gain recognition as a political party pursuant to N.C.G.S. § 163-96. These signatures [had to] be submitted to the State Board of Elections by the first day of June.

J. The population of North Carolina, the number of registered voters in North Carolina, the number of voters who vote in North Carolina's gubernatorial elections and, consequently, the number of signatures required to gain recognition as a political party have steadily increased from 1996 to the present [2008]. . . . As of April 12, 2008, 5,733,762 persons were registered to vote in North Carolina. This being so, the number of signatures required for recognition as a political

party—69,734—is 1.21% of the total registered voters in North Carolina as of April 12, 2008.

K. In order to retain recognition, a political party has historically been required to receive a threshold percentage of the votes cast statewide in the most recent gubernatorial or presidential election.

L. From 1935 to 1949, the ballot retention requirement was 3% of the statewide vote. North Carolina Code of 1935 § 5913.

. . . .

N. In the [1949] legislative session, the General Assembly raised the ballot retention requirement to 10% of the statewide vote.

O. Only one party other than the Democratic or Republican Party, the American Party in 1968, has ever met the 10% requirement. The Democratic and Republican Parties are the only two political parties to maintain continuous recognition since the enactment of N.C.G.S. §§ 163-96 and -97.

P. Effective January 1, 2007, after the filing of this action on September 21, 2005, the General Assembly amended N.C.G.S. § 163-96 to lower the retention requirement to 2%. 2006 Sess. Laws C. 234, §§ 1 and 2.

Q Once a political party is officially recognized, under [N.C.G.S.] § 163-96 its candidate must receive at least 2% of the statewide vote for governor or president for the party to remain officially recognized and for its candidates to be listed on the ballot for any office anywhere in the state ["retention requirement"]. Thus, even if candidates of the party receive more than two percent of the vote in a particular city or county, they cannot be listed on the ballot and their party identified in ballots in that community if the party did not receive two percent of the vote statewide.

. . . .

LL Persons desiring to get on the ballot in North Carolina can also qualify as unaffiliated candidates pursuant to N.C.G.S. § 163-122 and as write-in candidates pursuant to N.C.G.S. § 163-123, though in neither circumstance will the candidate's political party appear with a party label. N.C.G.S. § 163-122

> requires unaffiliated candidates for statewide office to submit signatures of registered voters equal to two percent of the voters who voted in the most recent gubernatorial election; for district or local offices, signatures equal to four percent of the registered voters in that district or locality must be submitted. N.C.G.S. § 163-123 requires write-in candidates for statewide office to submit 500 signatures of registered voters.

The parties also stipulated that the N.C. Libertarian Party has continuously existed since 1976 and has achieved recognition as a political party in most state elections since then by using the petition process set forth in N.C.G.S. § 163-96(a)(2). In contrast, the N.C. Green Party has never met the petition requirements, gained recognition as a political party under section 163-96, or received the benefits of party recognition.

On 27 May 2008, the trial court entered judgment for defendants. The North Carolina Court of Appeals issued a divided opinion on 20 October 2009 holding no error in the trial court's judgment. The N.C. Libertarian Party and the N.C. Green Party come to this Court with a notice of appeal based upon a dissent and a constitutional question.

[1] Appellants ask this Court to determine whether Article I, Sections 1, 12, 10, 14, and 19, as well as Article VI, Sections 1 and 6, of the Constitution of North Carolina are violated by various statutes constituting North Carolina's ballot access framework. At the Court of Appeals, however, appellants abandoned arguments concerning all sections of the state constitution except Article I, Sections 12, 14, and 19. *Libertarian Party of N.C. v. State*, —— N.C. App. ——, ——, 688 S.E.2d 700, 706 (2009) (concluding that appellants abandoned arguments implicating Article I, Sections 1 and 10, and Article VI, Sections 1 and 6). There, appellants also abandoned arguments pertaining to N.C.G.S. §§ 163-96(a)(1) and 163-97.1.[1] *Id.* at ——, 688 S.E.2d at 706. Because appellants do not take issue with the determination of the Court of Appeals that these constitutional and statutory claims were

1. In their brief to this Court, appellants allege the unconstitutionality of additional election law provisions. However, appellants abandoned those claims by failing to provide in their brief a "reason or argument" to explain the purported unconstitutionality. N.C. R. App. P. 28(b)(6) (2008). The additional provisions include, *inter alia*, unfavorable placement on the ballot of candidates from parties other than the two major political parties, N.C.G.S. § 163-165.6 and the prohibition against a political party allowing registered voters of other parties to vote in its primary, *id.* §§ 163-59, -119.

abandoned, those claims are not before this Court. The only issue for our consideration, then, is whether the signature requirement for party recognition under N.C.G.S. § 163-96(a)(2) violates Article I, Section 12, 14, or 19 of the Constitution of North Carolina. We review this matter de novo. *Piedmont Triad Reg'l Water Auth. v. Sumner Hills, Inc.*, 353 N.C. 343, 348, 543 S.E.2d 844, 848 (2001) ("[D]e novo review is ordinarily appropriate in cases where constitutional rights are implicated." (citations omitted)).

ANALYSIS

I.

[2] For the first time, this Court is asked to review the constitutionality of N.C.G.S. § 163-96(a)(2) under our state constitution. Defining "political party," the statute provides as follows:

> (a) Definition.—A political party within the meaning of the election laws of this State shall be either:
>
> (1) Any 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; or
>
> (2) Any group of voters which shall have filed with the State Board of Elections petitions for the formulation of a new political party which are signed by registered and qualified voters in this State equal in number to two percent (2%) of the total number of voters who voted in the most recent general election for Governor. Also the petition must be signed by at least 200 registered voters from each of four congressional districts in North Carolina. To be effective, the petitioners must file their petitions with the State Board of Elections before 12:00 noon on the first day of June preceding the day on which is to be held the first general State election in which the new political party desires to participate. The State Board of Elections shall forthwith determine the sufficiency of petitions filed with it and shall immediately communicate its determination to the State chairman of the proposed new political party.

N.C.G.S. § 163-96(a) (2009).[2] Appellants contend the right to ballot access is a fundamental right warranting strict scrutiny. Ultimately, appellants believe N.C.G.S. § 163-96(a)(2) fails strict scrutiny because the State has not shown the statute to be narrowly tailored to advance a compelling state interest. We are not persuaded.

When interpreting the Constitution of North Carolina, we are not bound by federal court rulings, so long as our decision comports with the United States Constitution. *State ex rel. Martin v. Preston*, 325 N.C. 438, 449-50, 385 S.E.2d 473, 479 (1989) (citations omitted). When it comes to determining the constitutionality of ballot access provisions, we find the Supreme Court's analysis in *Timmons v. Twin Cities Area New Party* and its progeny compelling. *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 451-52, 170 L. Ed. 2d 151, 161-62 (2008); *Clingman v. Beaver*, 544 U.S. 581, 586-87, 161 L. Ed. 2d 920, 930 (2005) (plurality); *Cal. Democratic Party v. Jones*, 530 U.S. 567, 581-82, 147 L. Ed. 2d 502, 514 (2000); *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 357-59, 137 L. Ed. 2d 589, 597-98 (1997).

In *Twin Cities*, the Supreme Court considered whether Minnesota's antifusion laws[3] violated a minor party's First and Fourteenth Amendment associational rights. *Id.* at 354-55, 137 L. Ed. 2d at 595-96. The Court reasoned that if these rights were severely burdened, the challenged statutes must be strictly scrutinized to determine whether they were "narrowly tailored and advance a compelling state interest." *Id.* at 358, 137 L. Ed. 2d at 598. If the rights were not severely burdened, the interests of the State "need only be sufficiently weighty to justify the limitation imposed on the party's rights." *Id.* at 364, 137 L. Ed. 2d at 601 (internal quotation marks omitted) (citing *Burdick v. Takushi*, 504 U.S. 428, 434, 119 L. Ed. 2d 245, 254 (1992), and *Norman v. Reed*, 502 U.S. 279, 288-89, 116 L. Ed. 2d 711, 723 (1992)). To make this sufficiency determination, the court weighs "the character and magnitude of the burden the State's rule imposes on [associational] rights against the interests the State contends justify that burden, and consider[s] the extent to which the State's concerns make the burden necessary." *Id.* at 358, 137 L. Ed. 2d at 598 (citations and

2. Subsection (a) of the statute is almost exactly the same today as it was when this litigation was initiated in 2005. The only exception is the reduction of the retention requirement of subsection (a)(1) from ten percent to two percent effective 1 January 2007. Act of July 26, 2006, ch. 234, sec.1, 2006 N.C. Sess. Laws 1018, 1018.

3. Antifusion laws prohibit "the nomination by more than one political party of the same candidate for the same office in the same general election." *Twin Cities*, 520 U.S. at 354 n.1, 137 L. Ed. 2d at 595 n.1 (citation omitted).

internal quotation marks omitted). Accordingly, "[l]esser burdens . . . trigger less exacting review, and a State's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions." *Id.* (internal quotation marks omitted) (citing *Burdick*, 504 U.S. at 434, 119 L. Ed. 2d at 254, and *Norman*, 502 U.S. at 288-89, 116 L. Ed. 2d at 723).

For almost two decades, the Supreme Court has applied the analysis used in *Twin Cities* for associational rights cases sounding under the First Amendment and the Due Process Clause of the Fourteenth Amendment. *Wash. State Grange*, 552 U.S. at 445, 451-52, 170 L. Ed. 2d at 157, 161-62; *Beaver*, 544 U.S. at 585-87, 161 L. Ed. 2d at 929-30; *Cal. Democratic Party*, 530 U.S. at 569, 581-82, 147 L. Ed. 2d at 506, 514; *Twin Cities*, 520 U.S. at 354, 358, 137 L. Ed. 2d at 595, 598; *Norman*, 502 U.S. at 288-89, 116 L. Ed. 2d at 722-23. But there has been some debate about its applicability in equal protection challenges to ballot access provisions. *Rogers v. Corbett*, 468 F.3d 188, 193-94 (3d Cir. 2006), *cert. denied*, 552 U.S. 826, 169 L. Ed. 2d 38 (2007).

We join a growing number of federal courts applying the Supreme Court's associational rights analysis to equal protection challenges in the context of ballot access restrictions on political parties and candidates. *See Barr v. Galvin*, 626 F.3d 99, 109-10 (1st Cir. 2010); *Rogers*, 468 F.3d at 194; *Belitskus v. Pizzingrilli*, 343 F.3d 632, 643 n.8 (3d Cir. 2003); *Fulani v. Krivanek*, 973 F.2d 1539, 1542-44 (11th Cir. 1992). We do so because the interests of equal protection bear a strong relationship to the associational rights protected by our state constitution's free speech and assembly provisions. N.C. Const. art. I, §§ 12, 14; *cf. Anderson v. Celebrezze*, 460 U.S. 780, 793, 75 L. Ed. 2d 547, 561 (1983) ("A burden that falls unequally on new or small political parties or on independent candidates impinges, by its very nature, on associational choices protected by the First Amendment."); *Rogers*, 468 F.3d at 193-94 (noting a relationship between equal protection claims and associational rights protected by the First Amendment). Indeed, in ballot access cases "equal protection challenges essentially constitute a branch of the associational rights tree." *Republican Party of Ark. v. Faulkner Cnty.*, 49 F.3d 1289, 1293 n.2 (8th Cir. 1995). We are thus persuaded that the analysis used by the Supreme Court in *Twin Cities* is the proper approach for determining whether N.C.G.S. § 163-96(a)(2) violates our state constitution's due process, free speech and assembly, and equal protection provisions.

II.

The reasoning behind the Supreme Court's severe burdening requirement in *Twin Cities* and preceding cases applies equally in North Carolina. On one hand, "[t]he First Amendment protects the right of citizens to associate and to form political parties for the advancement of common political goals and ideas." *Twin Cities*, 520 U.S. at 357, 137 L. Ed. 2d at 597 (citations omitted). "On the other hand, it is also clear that States may, and inevitably must, enact reasonable regulations of parties, elections, and ballots to reduce election- and campaign-related disorder." *Id.* at 358, 137 L. Ed. 2d at 598 (citations omitted).

In North Carolina, statutes governing ballot access by political parties implicate individual associational rights rooted in the free speech and assembly clauses of the state constitution. N.C. Const. art. I, § 12 ("The people have a right to assemble together to consult for their common good . . . ."); *id.* § 14 ("Freedom of speech . . . shall never be restrained . . . ."). Because citizens form parties to express their political beliefs and to assist others in casting votes in alignment with those beliefs, such statutes inherently affect individual associational rights. *See Anderson*, 460 U.S. at 786-88, 75 L. Ed. 2d at 56-57; *McLaughlin v. N.C. Bd. of Elections*, 65 F.3d 1215, 1221 (4th Cir. 1995) (concluding that restrictions on ballot access for political parties "always implicate substantial voting, associational and expressive rights protected by the First and Fourteenth Amendments."), *cert. denied*, 517 U.S. 1104, 134 L. Ed. 2d 472 (1996). " '[T]he right to form a [recognized] party for the advancement of political goals means little if a party can be kept off the election ballot and thus denied an equal opportunity to win votes.' " *McLaughlin*, 65 F.3d at 1221 (first alteration in original) (citations omitted). Indeed, ballot access rights, though distinct from voting rights, are central to the administration of our democracy. John V. Orth, *The North Carolina State Constitution* 48 (1995) ("Popular sovereignty means elections, and for elections to express the popular will, the right to assemble and consult for the common good must be guaranteed.").

While these rights are of utmost importance to our democratic system, they are not absolute. *Burdick*, 504 U.S. at 433, 119 L. Ed. 2d at 252-53. In the interest of fairness and honesty, the State "may, and inevitably must, enact reasonable regulations of parties, elections, and ballots to reduce election- and campaign-related disorder." *Twin Cities*, 520 U.S. at 358, 137 L. Ed. 2d at 598 (citations omitted); *see*

also Burdick, 504 U.S. at 433, 119 L. Ed. 2d at 253 ("[A]s a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." (citation and quotation marks omitted)). For these reasons, not all infringements of the right to ballot access warrant strict scrutiny. *Buckley v. Am. Const. Law Found., Inc.*, 525 U.S. 182, 206, 142 L. Ed. 2d 599, 618 (1999) (Thomas, J., concurring). In fact, requiring "every voting, ballot, and campaign regulation" to meet strict scrutiny " 'would tie the hands of States seeking to assure that elections are operated equitably and efficiently.' " *Id.* (quoting *Burdick*, 504 U.S. at 433, 119 L. Ed. 2d at 253). Hence, strict scrutiny is warranted only when this associational right is severely burdened. *See Twin Cities*, 520 U.S. at 358, 137 L. Ed. 2d at 598.

In the present case, the two percent party recognition requirement of N.C.G.S. § 163-96(a)(2) may burden minor political parties somewhat, but it does not impose a severe burden. First, minority parties seeking recognition pursuant to N.C.G.S. § 163-96(a)(2) have over three and one-half years to acquire the requisite number of signatures.[4] Second, section 163-96(a) places few restrictions on signatories. While these persons must be "registered and qualified voters in this State," they need not register with or promise to vote for candidates of the party seeking recognition. N.C.G.S. § 163-96(a)(2). Signatories are even allowed to vote in a primary of a major party. *See id.* Third, a handful of supporters can acquire the requisite number of signatures. During the 2004-2008 election cycle, for example, over eighty-five thousand signatures were collected for the Libertarian Party by only five people.

Moreover, section 163-96(a)(2) does not impose a severe burden in that the two percent signature requirement is readily achievable. For instance, in 2008 the two percent threshold required signatures from only 69,734 of North Carolina's approximately 5,734,000 registered voters. Further, a minor party has met the two percent recognition requirement eight times in the past five gubernatorial elections.[5] In 2008 the N.C. Libertarian Party's gubernatorial candidate acquired close to three percent of the vote, Elaine F. Marshall, N.C.

4. The relevant period runs from as soon as the previous gubernatorial election is over until the first day of June preceding the next general state election in which the party wants to participate. N.C.G.S. § 163-96(a)(2).

5. 1992—Libertarian; 1996—Libertarian, Natural Law, Reform; 2000—Libertarian, Reform; 2004—Libertarian; 2008—Libertarian.

Dep't of Sec'y of State, *North Carolina Manual* 2007-2008, at 1028 (indicating the Libertarian candidate for governor received 121,584 of 4,268,941 votes), thereby assuring the Party's status as a recognized political party through 2012. N.C.G.S. § 163-96(a)(1). This success indicates the Party may have turned a corner in popular support, effectively graduating it from the recognition requirements of section 163-96(a)(2).

Finally, our state's voter recognition requirements are less burdensome than the Georgia ballot access provisions upheld by the United States Supreme Court in *Jenness v. Fortson*, 403 U.S. 431, 442, 29 L. Ed. 2d 554, 563 (1971). The ballot access statutes at issue in *Jenness* gave a political party only one hundred and eighty days to acquire signatures totaling at least "five per cent. of the total number of electors eligible to vote in the last election." *Id.* at 433, 29 L. Ed. 2d at 557-58 (citations omitted). In contrast, N.C.G.S. § 163-96(a)(2) contains only a two percent requirement and gives parties in North Carolina an additional three years to collect petition signatures.

III.

When a state ballot access provision does not severely burden associational rights, the interests of the State "need only be sufficiently weighty to justify the limitation imposed on the party's rights." *Twin Cities*, 520 U.S. at 364, 137 L. Ed. 2d at 601 (citations and internal quotation marks omitted). Usually, "a State's important regulatory interests [are] enough to justify reasonable, nondiscriminatory restrictions." *Id.* at 358, 137 S.E.2d at 598 (citations and internal quotation marks omitted); *see also Wash. State Grange*, 552 U.S. at 452, 170 L. Ed. 2d at 162 (observing that the Supreme Court has " 'repeatedly upheld reasonable, politically neutral regulations that have the effect of channeling expressive activity at the polls' " (quoting *Burdick*, 504 U.S. at 438, 119 L. Ed. 2d at 256)); *Beaver*, 544 U.S. at 593-94, 161 L. Ed. 2d at 934-35 (majority) (citations omitted).

Here, the avoidance of "voter confusion, ballot overcrowding," and "frivolous candidacies" is an important regulatory interest. *See Munro v. Socialist Workers Party*, 479 U.S. 189, 194-95, 93 L. Ed. 2d 499, 505 (1986). At the same time, the two percent signature recognition requirement imposes a reasonable hurdle to ballot access. Unlike in some jurisdictions, signatories are not disqualified in North Carolina for having voted in another party's primary or for refusing to register as a member of the party seeking recognition. *Compare*, *e.g.*, Ohio Rev. Code Ann. § 3513.05 (LexisNexis 2005 & Supp. 2010)

(requiring petition signatures for a candidate to come from members of the same political party as the candidate), *and Storer v. Brown*, 415 U.S. 724, 726-27, 39 L. Ed. 2d 714, 721 (1974) (involving a statute disqualifying voters in the immediately preceding primary election from signing petitions in support of independent candidates), *with* N.C.G.S. § 163-96(a)(2). The North Carolina recognition requirements at issue are also more permissive than the Georgia ballot access requirements that were upheld by the Supreme Court and which required a new party to reach a five percent signature threshold within one hundred and eighty days. *Jenness*, 403 U.S. at 433, 29 L. Ed. 2d at 558. Further, we see no indication that the recognition requirements here discriminate against minor parties or "operate to freeze the political status quo" of a two-party system. *Id.* at 438, 29 L. Ed. 2d at 560. As a result, we conclude that the State's important regulatory interests are "sufficiently weighty" to justify the reasonable burden placed by N.C.G.S. § 163-96(a)(2) on appellants' associational rights.

CONCLUSION

In sum, we hold that the Court of Appeals erred in applying strict scrutiny but correctly concluded that N.C.G.S. § 163-96(a)(2) does not violate Article I, Section 12, 14, or 19 of the Constitution of North Carolina. Accordingly, we modify and affirm the decision of the Court of Appeals upholding the trial court's judgment in favor of the State.

MODIFIED AND AFFIRMED.

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

Justice NEWBY dissenting.

"A frequent recurrence to fundamental principles is absolutely necessary to preserve the blessings of liberty." N.C. Const. art. 1, § 35. This case invites us to return to these fundamental democratic principles, specifically, the right of open access to the election ballot. Ballot access implicates our citizenry's freedom of association, freedom of speech, and freedom to vote. While the State has an interest in the orderly administration of elections, my fear is that North Carolina's signature requirement, N.C.G.S. § 163-96(a)(2) (2007), may unduly limit election ballot access. The majority finds the signature requirement statute to be a non-"severe" infringement of this fundamental right and deferentially reviews the statute. Because I believe

an encroachment of this fundamental right deserves strict scrutiny, I respectfully dissent. I would remand this case to allow the trial court to conduct a thorough strict scrutiny review of § 163-96(a)(2).

While I agree with the majority that ballot access is a fundamental right, I disagree with the treatment of the right. Traditionally, the infringement of a fundamental right demands that a court apply strict scrutiny. The majority, however, now says that a statute limiting the fundamental right of ballot access is an exception to this rule: rather than apply strict scrutiny, a court will first evaluate the extent of the infringement, and if the infringement is not "severe," then the court will apply a deferential review. I believe this to be an unwarranted and imprudent departure from North Carolina's constitutional jurisprudence.

I agree that fundamental rights are not absolute and a burden on a fundamental right may be permissible. However, under our existing jurisprudence, once we determine that a fundamental right is burdened, the strict scrutiny standard is the sole inquiry used to determine whether that burden is permissible—there is no initial threshold inquiry. *See*, *e.g.*, *Rhyne v. K-Mart Corp.*, 358 N.C. 160, 180, 594 S.E.2d 1, 15 (2004) ("If the statute at issue affects the exercise of a fundamental right . . . *we apply strict scrutiny*." (emphasis added)). A burden on a fundamental right is permissible only when the State succeeds in demonstrating that the burden is narrowly tailored to further a compelling interest. *See*, *e.g.*, *State v. Petersilie*, 334 N.C. 169, 186-87, 432 S.E.2d 832, 842-43 (1993) (permitting a restraint on speech because it survived strict scrutiny); *cf. Blankenship v. Bartlett*, 363 N.C. 518, 524-27, 681 S.E.2d 759, 764-66 (2009) (applying intermediate scrutiny to "quasi-fundamental" right).

In place of traditional strict scrutiny, the majority introduces the "severe burden" inquiry of *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358-59, 117 S. Ct. 1364, 1369-70, 137 L. Ed. 2d 589, 597-98 (1996). *Twin Cities* is not persuasive authority for the majority's abandonment of the strict scrutiny test for a direct burden on ballot access rights. In *Twin Cities*, "[t]he laws [did] not directly limit the party's access to the ballot" but concerned whether a candidate's name could appear multiple times on a ballot. *Id.* at 363, 117 S. Ct. at 1372, 137 L. Ed. 2d at 601.

Moreover, *Twin Cities* highlights a critical flaw in the "severe burden" inquiry: the inquiry is entirely too subjective. In *Twin Cities*, the trial judge and six Justices of the Supreme Court of the United

States found the burdens to be minor, *id.* at 355, 359, 117 S. Ct. at 1368, 1370, 137 L. Ed. 2d at 596, 598-99; but three appellate judges determined that the laws in *Twin Cities* were actually "severe" burdens, *id.* at 363-64, 117 S. Ct. at 1372, 137 L. Ed. 2d at 601, as did three dissenting Justices, *see id.* at 370-71, 117 S. Ct. at 1376, 137 L. Ed. 2d at 606 (Stevens, Ginsburg & Souter, JJ., dissenting) (disputing the majority's conclusion that the laws were "minor burdens" and calling the burdens "significant"). The federal judiciary was divided 7-to-6 regarding the severity of the burden. The majority's approach allows a trial court to subjectively assess the degree of burden, rather than relying upon the nature of the protected right, to determine the standard of review. Thus, a citizen, after having already established that a statute burdens a fundamental right, must now convince a court that the burden is "severe" enough, or else the court will defer to the legislature. For instance, here, the majority decided that the signature requirement statute did not impose a sufficiently "severe" burden on a fundamental right, despite the statute's impact of excluding the Green Party from the ballot and forcing the Libertarian Party to spend almost $130,000 to access the ballot.

In contrast to the majority, I believe strict scrutiny is the appropriate test for a burden on the fundamental right of access to the ballot. Any review that is less demanding than strict scrutiny will be an inadequate safeguard of this foundational democratic principle.

Access to the ballot is an extension of the freedom of association. The freedom to associate with others to advocate for personal beliefs is a cornerstone of our democratic society, but "[t]he right to form a party for the advancement of political goals means little if a party can be kept off the election ballot and thus denied an equal opportunity to win votes." *Williams v. Rhodes*, 393 U.S. 23, 31, 89 S. Ct. 5, 10-11, 21 L. Ed. 2d 24, 31 (1968); *see also* Alexis de Tocqueville, *Democracy in America* 71-72 (Andrew Hacker ed., Henry Reeve trans., Washington Square Press 1972) (1863) (observing that the freedom of political associations permits "the partisans of an opinion [to] unite in electoral bodies, and choose delegates to represent them in a central assembly. This is, properly speaking, the application of the representative system to a party.").

Access to the ballot is also an extension of the freedom of speech. "In our political life, third parties are often important channels through which political dissent is aired." *Williams*, 393 U.S. at 39, 89 S. Ct. at 14, 21 L. Ed. 2d at 36 (Douglas, J., concurring); *Munro*

v. Socialist Workers Party, 479 U.S. 189, 200, 107 S. Ct. 533, 540, 93 L. Ed. 2d 499, 509 (1986) (Marshall & Brennan, JJ., dissenting) ("[A minor party's] very existence provides an outlet for voters to express dissatisfaction with the candidates or platforms of the major parties."). "The minor party's often unconventional positions broaden political debate, expand the range of issues with which the electorate is concerned, and influence the positions of the majority, in some instances ultimately becoming majority positions." *Munro*, 479 U.S. at 200, 107 S. Ct. at 540, 93 L. Ed. 2d at 509.

Further, ballot access implicates the right to vote. The inclusion of additional political parties facilitates voting by increasing the options on the ballot, *Williams*, 393 U.S. at 31, 89 S. Ct. at 11, 21 L. Ed. 2d at 31 ("[T]he right to vote is heavily burdened if that vote may be cast only for one of two parties at a time when other parties are clamoring for a place on the ballot."), while simultaneously increasing the information conveyed to voters, *see Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 220, 107 S. Ct. 544, 552, 93 L. Ed. 2d 514, 527 (1986) ("To the extent that party labels provide a shorthand designation of the views of party candidates on matters of public concern, the identification of candidates with particular parties plays a role in the process by which voters inform themselves for the exercise of the franchise." (citation omitted)). At our nation's inception, the founders warned that unduly restricting ballot access could make illusory the right to vote: "It is *essential* to such a government that it be derived from the great body of the society, not from an inconsiderable proportion or a favored class of it; otherwise a handful of tyrannical nobles, exercising their oppressions by a delegation of their powers, might aspire to the rank of republicans and claim for their government the honorable title of republic." *The Federalist* No. 39, at 233 (James Madison) (Henry Cabot Lodge ed., 1888).

This Court has consistently interpreted the North Carolina Constitution to provide the utmost protection for the foundational democratic freedoms of association, speech, and voting. *See, e.g.*, *State v. Frinks*, 284 N.C. 472, 477-83, 201 S.E.2d 858, 862-65 (1974) (upholding restriction on right to assemble because necessary to assure safety and convenience); *State v. Petersilie*, 334 N.C. 169, 182-84, 432 S.E.2d 832, 839-41 (1993) (infringement of political speech receives strict scrutiny); *Northampton Cnty. Drainage Dist. No. One v. Bailey*, 326 N.C. 742, 745-47, 392 S.E.2d 352, 355-56 (1990) (infringement of right to equal vote receives strict scrutiny). It is

inconsistent for the majority to now afford the fundamental right of ballot access, which is clothed in this triumvirate of fundamental rights, less protection than one of these rights receives individually.

Because I believe strict scrutiny is appropriate, I also question whether the trial court properly applied the standard to § 163-96(a)(2). The trial court ruled that the statute survived strict scrutiny, and the Court of Appeals affirmed its decision. *Libertarian Party of N.C. v. State*, —– N.C. App. —–, —–, 688 S.E.2d 700, 707-09 (2009). Based on the trial court's findings, however, it appears the trial court improperly maintained a presumption of constitutionality during its strict scrutiny analysis.

In my view, the presumption of constitutionality places an initial burden on the challenger of a statute, who must clearly demonstrate a conflict with a constitutional right before we proceed any further in our review. *See State ex rel. Att'y-Gen. v. Knight*, 169 N.C. 333, 352, 85 S.E. 418, 427 (1915) ("When the constitutionality of an act of the General Assembly is questioned, the courts place the act by the side of the Constitution, with the purpose and the desire to uphold it if it can be reasonably done, but under the obligation, if there is an irreconcilable conflict, to sustain the will of the people as expressed in the Constitution, and not the will of the legislators, who are but agents of the people.").

If a challenger clearly shows that a statute infringes on a fundamental right—as happened in the case at hand—strict scrutiny is applied, meaning the State bears the burden of demonstrating that the statute is narrowly tailored to further a compelling interest. *Stephenson v. Bartlett*, 355 N.C. 354, 377, 562 S.E.2d 377, 393 (2002). If the challenger succeeds in demonstrating that the statute is in conflict with only a quasi-fundamental right, the State then bears the burden of showing the statute is substantially related to an important government interest. *See Dep't of Transp. v. Rowe*, 353 N.C. 671, 675, 549 S.E.2d 203, 207 (2001). However, if the challenger shows a conflict with a non-fundamental right, then the challenger bears the burden of demonstrating that the statute is not rationally related to a legitimate State interest. *See id.* Thus, the presumption of constitutionality is a precursor—rather than an alternative—to constitutional review.

In this case, if the trial court assumed the plaintiffs and intervenors had demonstrated a conflict with a fundamental right, then the initial presumption of constitutionality was defeated and the

State had the burden of demonstrating that the statute is narrowly tailored to further a compelling interest. The trial court, however, retained the presumption of constitutionality during its strict scrutiny analysis and failed to shift the burden to the State. For example, it seems the State never demonstrated that the 2% requirement in § 163-96(a)(2) was narrowly tailored to accomplish a compelling interest: the State's witness, Gary Bartlett, could not recall any legislative studies or debates regarding the 2% requirement, and he disclosed that any discussion about the requirement "was basically, 'Okay, this looks good; let's try it,' that sort of conversation." In fact, Mr. Bartlett admitted that he believed 1% would accomplish the State's objective. Because the strict scrutiny standard was not properly applied to this fundamental right, I would remand the case to allow the trial court to conduct a thorough strict scrutiny review of § 163-96(a)(2).

Today's decision jeopardizes a quintessential component of our democracy by examining this statute under a deferential standard of review, rather than a strict scrutiny analysis. Given the vital role ballot access plays in our democratic society, we should only condone an infringement of this right when absolutely necessary. I do recognize the State's interest in the orderly administration of elections, and I do believe it is within the province of the General Assembly to place necessary restrictions on ballot access. However, such restrictions burden a fundamental right, and I believe the judicial branch must strictly scrutinize them to ensure that the General Assembly imposes only narrowly tailored, necessary burdens. After reviewing the trial court's findings, it appears a misunderstanding of our constitutional presumptions infected the trial court's application of the strict scrutiny standard. Having clarified our precedent, I would remand this case to the trial court to strictly scrutinize North Carolina's signature requirement statute. Accordingly, I respectfully dissent.

STATE OF NORTH CAROLINA v. NEIL MATTHEW SARGEANT

No. 355A10

(Filed 11 March 2011)

1. Evidence— hearsay—catchall exception—exclusion an abuse of discretion

The trial court in a first-degree murder trial abused its discretion in sustaining the State's objection to defendant's proffer of a witness's hearsay statement pursuant to Rule of Evidence 804(b)(5). The statement, provided in connection with the witness's agreement with the State to testify at the trial of a defendant also charged with the first-degree murder of the present victim, had sufficient guarantees of trustworthiness: the witness had personal knowledge of the underlying events, never recanted his statement, the agreement between the witness and the State appeared designed to ensure the witness's truthfulness, and the State could have called the witness as an adverse witness, subjecting him to meaningful cross-examination.

2. Evidence— hearsay—catchall exception—erroneous exclusion prejudicial

The trial court's erroneous exclusion of a witness's hearsay statement in a first-degree murder trial prejudiced defendant where the case hinged on the credibility of the witnesses and the exclusion of the statement deprived the jury of evidence that was relevant and material to its role as finder of fact. The Court of Appeals' decision to remand for a new trial was affirmed.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, —– N.C. App. —–, 696 S.E.2d 786 (2010), ordering a new trial following a judgment imposing a sentence of life imprisonment without parole upon a jury verdict finding defendant guilty of first-degree murder and judgments imposing additional terms of imprisonment for other convictions, all entered by Judge Ronald K. Payne on 24 April 2008 in Superior Court, Watauga County. Heard in the Supreme Court 16 November 2010.

Roy Cooper, *Attorney General*, *by John G. Barnwell*, *Assistant Attorney General*, *for the State-appellant.*

Staples S. Hughes, *Appellate Defender*, *by Benjamin Dowling-Sendor*, *Assistant Appellate Defender*, *for defendant-appellee.*

EDMUNDS, Justice.

In this case, we consider whether the trial court correctly excluded the hearsay statement made by one of the participants in a murder. The excluded statement implicated the State's only eyewitness, not defendant, as the instigator of the crime. Because we find that the trial court's findings of fact are not based upon competent evidence and that the record in its entirety does not support its conclusions of law, we determine that the trial court erred. We further conclude that defendant Neil Matthew Sargeant was prejudiced by the error. Accordingly, we modify and affirm the Court of Appeals opinion reversing defendant's convictions and remanding for a new trial.

On the morning of 8 November 2005, two people walking near a covered bridge on Sleepy Hollow Lane in a rural part of Watauga County noticed a Subaru automobile parked nearby. Seeing smoke issuing from the car, they went to a friend's house and asked him to call 911. Deputy Kelly Redmond of the Watauga County Sheriff's Department responded and observed smoke rising through the vehicle's partially opened sunroof. No one was near the car or in its passenger area, but when Deputy Redmond opened the trunk, he found that it was filled with smoke and contained the body of the victim, Stephen Harrington. The victim's hands were bound with duct tape and his head was "completely covered" with duct tape "similar to the way that a mummy's head would [be] wrapped up." Although the body was partially burned, Deborah Radisch, M.D., Associate Chief Medical Examiner for North Carolina, testified that she performed the autopsy and determined the cause of death was asphyxia from smothering. She added that because the duct tape covered the victim's mouth and nose, he probably would have lost consciousness in "sixty to ninety seconds" and died within "five to ten minutes." The absence of carbon monoxide in the victim's blood indicated that he was not breathing when the fire reached him.

During the investigation of the crime, Watauga County Sheriff's Detective Dee Dee Rominger took a statement from Matthew Brandon Dalrymple (Dalrymple) on 10 September 2007. In his statement, Dalrymple related that he and defendant Neil Matthew Sargeant (defendant) were at defendant's house in Boone on the evening of 7 November 2005, where they smoked marijuana and snorted cocaine while playing video games. Dalrymple stated that he fell asleep on a couch about 7:00 p.m. but awoke around 11:00 p.m. and went into the kitchen, where he saw Kyle Triplett (Triplett) chok-

ing "a guy." As Dalrymple watched, Triplett hit the victim in the temple with the butt of a pistol, knocking him down. After kicking the victim in the side and stomping on the back of his head, Triplett used duct tape first to secure the victim's hands behind his back and then to tape the victim's head "from chin to his for[e]head."

Dalrymple continued that Triplett pointed the pistol at Dalrymple and ordered him to drive. As Dalrymple prepared to follow Triplett's instructions, he passed defendant in the hallway. Defendant asked what was going on, but Dalrymple did not respond. Dalrymple said he heard defendant repeat, "What the f[—-] is going on," then add, "Get this s[—-] out of my house." Dalrymple dressed and went outside, where he observed drag marks on the ground and saw Triplett putting the victim into the trunk of the victim's car and closing the lid. Dalrymple stated that he saw the victim's leg move. As Triplett drove away in the victim's car, Dalrymple entered the car belonging to defendant's girlfriend and asked defendant to come with him. Dalrymple drove defendant as they followed Triplett to a covered bridge where Dalrymple saw Triplett moving around inside the victim's car, which subsequently began to burn. Triplett then walked to the trunk of that car, which also began to burn. Triplett left the trunk open and joined Dalrymple and defendant in the other car, after which they left at high speed.

At the time Dalrymple's statement was taken, the State was preparing to try Triplett for Harrington's murder. Accordingly, on 13 September 2007, the State entered into an agreement with Dalrymple, under which Dalrymple would give "truthful testimony concerning the events surrounding the death of Stephen Harrington if called upon by the [S]tate to do so." The truthfulness of Dalrymple's trial testimony would be measured against his 10 September 2007 statement to investigators. The agreement also granted Dalrymple use immunity by providing that "the State will not use the statement against [Dalrymple] in any state criminal proceedings, and will not use any evidence derived from such statement against him in any state judicial proceeding." However, Dalrymple never testified against Triplett. During his trial, Triplett pleaded guilty on 20 September 2007 to second-degree murder, first-degree kidnapping, robbery with a dangerous weapon, burning personal property, and conspiracy to sell cocaine.

The State then proceeded to try defendant capitally for the murder of Harrington. Defendant was charged with first-degree murder, in violation of N.C.G.S. § 14-17; robbery with a dangerous weapon, in

violation of N.C.G.S. § 14-87; first-degree kidnapping, in violation of N.C.G.S. § 14-39; and burning of personal property, in violation of N.C.G.S. § 14-66.

At defendant's trial, the State presented Triplett as a witness. Triplett had made two prior statements to investigators. In the first, a rather disjointed narration taken the day after the murder, Triplett told investigators he was awakened by sounds of a struggle and heard someone yell, "Why me," but did not immediately come out of his room. When he emerged from his room a short time later to use the bathroom, he had his back turned to the commotion and covered his ears. Triplett told the investigators he did not see the victim's face, which had been covered with gray tape. Triplett related that he "had to pick [the victim] up" and, when doing so, noticed that the hands had been bound and had turned blue and that the body was lifeless. According to Triplett, defendant and Dalrymple said to him that it "could have been you." Defendant had a pistol and made Triplett drive to a covered bridge while Dalrymple followed in another car. Triplett added that he lit the tape on the victim's arms. At defendant's trial, this statement was read to the jury by State Bureau of Investigation Special Agent Wade Colvard.

Triplett made a second, more detailed statement the day before he testified against defendant. In his second statement, Triplett reported that defendant called him and told him to come to defendant's house, put on gloves, grab the victim when the victim came through the door, and put a gun to his head. Triplett stated that he complied with defendant's instructions when the victim arrived and that defendant afterwards wrapped the victim's head with duct tape. Triplett added that, once the victim was felled, Dalrymple kicked him in the face and took between four and six ounces of cocaine from the victim's pocket. Triplett said that he and defendant dragged the victim's body to the car and put it in the trunk and that they drove to the covered bridge, followed by Dalrymple, who was driving another car. Defendant sprayed lighter fluid on the body and Triplett ignited it. At defendant's trial, Triplett provided detailed testimony on behalf of the State that was consistent with his second statement. Under cross-examination, Triplett testified that he did not remember saying some of the things contained in his 8 November 2005 statement and that other things he had said then were not true. Although the State presented additional evidence of defendant's guilt, it did not call Dalrymple as a witness against defendant.

After the State rested its case-in-chief, defendant presented evidence that portrayed Triplett as the principal assailant in the attack upon the victim. However, when defendant called Dalrymple as a witness, Dalrymple refused to testify, invoking his rights under the Fifth Amendment to the Constitution of the United States. Because Dalrymple's refusal rendered him unavailable to defendant, defendant moved to introduce Dalrymple's 10 September 2007 statement as a hearsay exception pursuant to N.C.G.S. § 8C-1, Rule 804(b)(5). The State objected, arguing that the statement lacked indicia of reliability and was inadmissable because it was not trustworthy. After considering the arguments of counsel and conducting additional research, the trial court made oral findings of fact and conclusions of law on the record, then sustained the State's objection.

At the conclusion of all the evidence, the jury convicted defendant of first-degree murder, first-degree kidnapping, robbery with a dangerous weapon, and burning personal property. Although the jury had been death-qualified, the State elected not to offer evidence of aggravating circumstances. Accordingly, the trial court sentenced defendant to a term of life imprisonment without parole for the murder. In addition, the court sentenced defendant to a consecutive term of 100 to 129 months for first-degree kidnapping, then consolidated the remaining charges and imposed an additional consecutive sentence of 60 to 81 months.

Defendant appealed. In a divided decision, the Court of Appeals reversed defendant's convictions and remanded the case for a new trial. *State v. Sargeant*, —— N.C. App. ——, ——, 696 S.E.2d 786, 800 (2010). The majority held that Dalrymple's statement was admissible under the residual hearsay exception found in Rule 804(b)(5) of the Rules of Evidence. *Id.* at , 696 S.E.2d at 799. The dissenting judge disagreed, concluding that the statement was inadmissible. *Id.* at ——, 696 S.E.2d at 809 (Ervin, J., dissenting). In its opinion, the Court of Appeals also considered the procedure used by the trial court to take the verdicts in this case. Briefly stated, the trial court on different days took verdicts on the various theories of first-degree murder that were submitted to the jury, a process fully described in the opinion of the Court of Appeals. *Id.* at ——, 696 S.E.2d at 789-92 (majority). Although we agree with the Court of Appeals majority that the procedure was erroneous, our resolution of the hearsay issue obviates the need to analyze whether the error, which is unlikely to recur upon retrial, was prejudicial. Accordingly, we consider whether the trial court abused its discretion in sustaining the State's objection when

defendant proffered Dalrymple's hearsay statement pursuant to the residual hearsay exception found in Rule 804(b)(5). *State v. Smith*, 315 N.C. 76, 97, 337 S.E.2d 833, 847 (1985) ("[A]missibility of hearsay statements pursuant to the Rule 803(24) residual hearsay exception is within the sound discretion of the trial court.").

[1] "Hearsay is not admissible except as provided by statute or by these rules." N.C.G.S. § 8C-1, Rule 802 (2009). Although Dalrymple's statement was unquestionably hearsay in that it was being offered by defendant for the truth of its contents, *id.*, Rule 801(a), (c) (2009), defendant contended that it was admissible under the residual hearsay exception codified at N.C.G.S. § 8C-1, Rule 804(b)(5). That rule states:

> The following [is] not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> . . . .
>
> (5) . . . . A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it gives written notice stating his intention to offer the statement and the particulars of it, including the name and address of the declarant, to the adverse party sufficiently in advance of offering the statement to provide the adverse party with a fair opportunity to prepare to meet the statement.

Id., Rule 804(b)(5) (2009). We gave guidance to the trial courts for applying this exception when we stated that:

> Once a trial court establishes that a declarant is unavailable pursuant to Rule 804(a) of the North Carolina Rules of Evidence, there is a six-part inquiry to determine the admissibility of the hearsay evidence proffered under Rule 804(b)(5). *State v. Fowler*, 353 N.C. 599, 608-09, 548 S.E.2d 684, 696 (2001), *cert.*

> *denied*, 535 U.S. 939, 152 L. Ed. 2d 230 (2002); *State v. Triplett*, 316 N.C. 1, 8-9, 340 S.E.2d 736, 741 (1986). Rule 803(24) of the North Carolina Rules of Evidence is essentially identical to Rule 804(b)(5), but it does not require that the declarant be unavailable. *Triplett*, 316 N.C. at 7, 340 S.E.2d at 740. Under either of the two residual exceptions to the hearsay rule, the trial court must determine the following: (1) whether proper notice has been given, (2) whether the hearsay is not specifically covered elsewhere, (3) whether the statement is trustworthy, (4) whether the statement is material, (5) whether the statement is more probative on the issue than any other evidence which the proponent can procure through reasonable efforts, and (6) whether the interests of justice will be best served by admission. *State v. Smith*, 315 N.C. 76, 91-98, 337 S.E.2d 833, 844-48 (1985); *accord* N.C.G.S. § 8C-1, Rule 804(b)(5) (2001); *see also Triplett*, 316 N.C. at 8-10, 340 S.E.2d at 740-41.

State v. Valentine, 357 N.C. 512, 517-18, 591 S.E.2d 846, 852 (2003).

We agree with the parties that five of these factors have been satisfied and the only question presented here is whether the statement is trustworthy. "To be admissible under the residual exception to the hearsay rule, the hearsay statement must possess 'guarantees of trustworthiness' that are equivalent to the other exceptions contained in Rule 804(b)." *State v. McLaughlin*, 316 N.C. 175, 179, 340 S.E.2d 102, 104 (1986) (quoting *United States v. Bailey*, 581 F.2d 341, 348 (3d Cir. 1978)).

> When determining the trustworthiness, the following considerations are at issue: (1) whether the declarant had personal knowledge of the underlying events, (2) whether the declarant is motivated to speak the truth or otherwise, (3) whether the declarant has ever recanted the statement, and (4) whether the declarant is available at trial for meaningful cross-examination.

Valentine, 357 N.C. at 518, 591 S.E.2d at 852-53 (citations omitted); *see also Triplett*, 316 N.C. at 10-11, 340 S.E.2d at 742. Although this list of factors is not exhaustive, *see Triplett*, 316 N.C. at 10-11, 340 S.E.2d at 742, the trial court cited *Triplett* and limited its analysis to these four considerations. The record establishes that Dalrymple had personal knowledge and never recanted his statement. Accordingly, we consider whether competent evidence in the record indicates that he was motivated to speak the truth and was available for meaningful cross-examination.

When ruling on an issue involving the trustworthiness of a hearsay statement, a trial court must make findings of fact and conclusions of law on the record. *Valentine*, 357 N.C. at 518, 591 S.E.2d at 853. We have held that admitting evidence under the catchall hearsay exception set out in Rule 803(24) (Hearsay exceptions; availability of declarant immaterial) is error when the trial court fails to make adequate findings of fact and conclusions of law sufficient to allow a reviewing court to determine whether the trial court abused its discretion in making its ruling. *State v. Smith*, 315 N.C. at 97, 337 S.E.2d at 847. If the trial court either fails to make findings or makes erroneous findings, we review the record in its entirety to determine whether that record supports the trial court's conclusion concerning the admissibility of a statement under a residual hearsay exception. *See State v. Daughtry*, 340 N.C. 488, 514, 459 S.E.2d 747, 760 (1995), *cert. denied*, 516 U.S. 1079, 133 L. Ed. 2d 739 (1996); *see also Valentine*, 357 N.C. at 518-19, 591 S.E.2d at 853. If we conclude that the trial court erred in excluding Dalrymple's hearsay statement, we consider whether defendant was prejudiced. N.C.G.S. §§ 15A-1442(4)(c), -1443 (2009).

The trial court made oral findings of fact that were commingled with its conclusions of law. These intertwined findings and conclusions included several errors. For instance, in assessing Dalrymple's motivation to speak the truth, the trial court stated that Dalrymple's refusal to testify "kept the death penalty in play in his own criminal case and therefore [Dalrymple] has acted against his own self interests by refusing to testify when called by the defense in this matter." Although this analysis supports admitting the statement, it is incorrect in two respects. First, the agreement between Dalrymple and the State required only that he testify for the State and put him under no obligation to testify on behalf of defendant. Second, the trial court's analysis addressed only Dalrymple's decision not to testify, not his motivation to be truthful at the time he made his statement. Accordingly, this finding by the trial court is not supported by competent evidence in the record.

Next, this Court has stated that a factor to be considered when determining the admissibility of hearsay evidence under Rule 803(24) is "the practical availability of the declarant at trial for meaningful cross-examination. [This factor] also must be considered in weighing the 'circumstantial guarantees of trustworthiness' under Rule 804(b)(5)." *Triplett*, 316 N.C. at 11, 340 S.E.2d at 742 (internal citation omitted). The trial court found that admitting Dalrymple's statement

"would put the Court in position in every case where a co-defendant makes an out of Court statement that could be under some circumstances considered exculpatory as to that co-defendant against another co-defendant admissible into evidence even though it's an unsworn statement by the co-defendant simply taking the Fifth Amendment and refusing to testify and not being subject to cross-examination." This analysis is so broad as to effectively nullify Rule 804(b)(5), which permits admission of a hearsay statement when the conditions set out in the rules of evidence are satisfied.

In addition, this finding also assumes that Dalrymple would be completely unavailable for cross-examination. However, the record reveals that while Dalrymple's invocation of his rights under the Fifth Amendment to the Constitution of the United States unquestionably rendered him "unavailable" to *defendant* as a witness for purposes of Rule 804(b)(5), the terms of the agreement did not preclude his testimony under all circumstances. Under the agreement, the State provided Dalrymple use immunity so that his testimony and his statement could not be used against him if he were called as a witness *by the State*. Because Dalrymple's agreement contained no provision for immunity if he were called by defendant, his invocation of his Fifth Amendment rights was predictable. However, if the trial court had admitted Dalrymple's hearsay statement during defendant's presentation of evidence, the State could have responded by calling Dalrymple as an adverse witness and cross-examining him to undermine his testimony and reinforce its theory that defendant was the most culpable of the lot. N.C.G.S. § 8C-1, Rule 607 (2009). In that scenario, since the State called him to testify, Dalrymple's agreement providing him use immunity would trump his Fifth Amendment rights, subjecting him to meaningful cross-examination, as set out in *Triplett*, 316 N.C. at 11, 340 S.E.2d at 742.

In addition, the trial court made no findings on the effect of the agreement on Dalrymple's motivation to speak truthfully. We emphasize again that the issue is not whether Dalrymple's statement is objectively accurate; the determinative question is whether Dalrymple was motivated to speak truthfully when he made it. The agreement between Dalrymple and the State, reached when Dalrymple provided his statement, appears designed to ensure his truthfulness. According to the terms of the agreement, Dalrymple's statement was not taken in the anticipation that it would be admitted at trial. Instead, it was taken for the secondary purposes of establishing what Dalrymple's trial testimony would be and to provide a

gauge by which his testimony would be measured in determining whether he kept his end of the bargain. Believing that he would be called upon to testify and that his statement would be made available to the defendant on trial (at that time, presumably Triplett), Dalrymple knew he would be subject to cross-examination by the State if he deviated from his statement and by the defendant on trial if he did not. Accordingly, he knew that any falsehoods could be exposed, possibly depriving him of the benefit of his bargain and thereby giving him a motivation to speak truthfully.

Thus, our review of the record indicates that, of the four considerations identified in *Valentine* and *Triplett* as being useful in determining the trustworthiness of a hearsay statement, all the evidence indicated that Dalrymple had personal knowledge and never recanted. As to the other two considerations, Dalrymple's motivation to speak the truth and his availability for meaningful cross-examination, the court's conclusions that these considerations had not been satisfied were made on the basis of inaccurate and incomplete findings of fact used to reach unsupported conclusions of law. Accordingly, the trial court erred in excluding Dalrymple's hearsay statement.

[2] Having determined that the trial court's exclusion of Dalrymple's statement was error, we must consider whether defendant was prejudiced by its exclusion. Although trials are mechanisms for ferreting out the truth, in this case it is apparent that the objective facts of what happened the night the victim was killed are elusive. Both Dalrymple and Triplett gave initial statements in the immediate aftermath of the murder. As detailed above, Dalrymple's statement implicated Triplett and, to a lesser extent, defendant, while Triplett's statement implicated defendant and Dalrymple. Faced with these fundamentally inconsistent and incompatible statements, the State negotiated first with Dalrymple, providing use immunity in the apparent expectation of calling him as a witness against Triplett. However, when Triplett entered a negotiated plea to reduced charges mid-trial and the State turned its attention to the task of proceeding against defendant, the prosecutor elected to present Triplett, not Dalrymple, as its eyewitness. When defendant offered Dalrymple's statement to the jury as part of his defense, the State successfully resisted. Although we are cognizant that circumstances may change as a case progresses, the reason for the State's decision to jettison Dalrymple in favor of Triplett is not in the record. Nevertheless, with that decision Dalrymple became an albatross to the prosecution but a poten-

tial lifeline for defendant. As a matter of fundamental fairness, the exclusion of Dalrymple's statement deprived the jury of evidence that was relevant and material to its role as finder of fact.

The impact of the exclusion of this evidence is apparent from the record. This case hinged upon the credibility of the witnesses. The jurors asked several questions of the court during their deliberations, including one relating to perjury: "Are there any possible consequences/punishments/repercussions to a witness for lying under oath? Specifically a witness who made a plea agreement with the State?" Since Triplett was the only cooperating codefendant who testified, this skeptical question surely referred to him. In addition, defendant was on trial for his life when he tendered Dalrymple's hearsay statement. As to the murder charge, the jury was instructed on first-degree murder on three different theories (premeditation and deliberation, lying in wait, and felony murder), second-degree murder, and not guilty. As to the robbery charge, the jury was instructed on robbery with a dangerous weapon, common law robbery, and not guilty. Consequently, as to these offenses, the jury was required to decide not only defendant's guilt *vel non* but also, if he were found guilty, the degree of his guilt and the basis or bases of a first-degree murder conviction. The jury's verdicts as to all these matters were based upon incomplete information.

Defendant has shown a reasonable possibility that the admission of Dalrymple's statement implicating Triplett would have led to a different verdict against him. N.C.G.S. § 15A-1443(a) (2009); *see, e.g.*, *State v. Augustine*, 359 N.C. 709, 731, 616 S.E.2d 515, 531 (2005) (citing N.C.G.S. § 15A-1443 and noting that to "establish prejudice," a defendant must show "a reasonable possibility that a different result would have been reached" had an evidentiary ruling not been made), *cert. denied*, 548 U.S. 925, 165 L. Ed. 2d 988 (2006). Accordingly, the trial court's exclusion of Dalrymple's statement was prejudicial error. We affirm the decision of the Court of Appeals to remand for a new trial.

MODIFIED AND AFFIRMED.

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

DONALD C. McCASKILL, PETITIONER v. DEPARTMENT OF STATE TREASURER, RETIREMENT SYSTEMS DIVISION, RESPONDENT

No. 292A10

(Filed 11 March 2011)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, —— N.C. App. ——, 695 S.E.2d 108 (2010), affirming an order entered on 23 February 2009 by Judge Orlando F. Hudson, Jr. in Superior Court, Durham County. On 7 October 2010, the Supreme Court allowed petitioner's petition for discretionary review of additional issues. Heard in the Supreme Court 11 January 2011.

Stark Law Group, PLLC, by Thomas H. Stark and Seth A. Neyhart, for petitioner-appellant.

Roy Cooper, Attorney General, by Robert M. Curran, Special Deputy Attorney General, for respondent-appellee.

PER CURIAM.

As to the issues before us on appeal of right, because the Secretary of the Department of Health and Human Services lacked authority to sign the settlement agreement binding the State Retirement System, the executory portions of the agreement are unenforceable. Accordingly, the parties to the agreement are otherwise restored to the positions they held as of 3 July 2002. As to the additional issue, we determine that discretionary review was improvidently allowed.

AFFIRMED IN PART; DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

Justice JACKSON took no part in the consideration or decision of this case.

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

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001P11	State v. Lacy Lee Williams, Jr.	Def's *Pro Se* Petition for Writ of Mandamus (COAP10-411)	Denied
002P11	State v. Ricky Bartlett	1. Def's PDR Under N.C.G.S. § 7A-31 (COA10-360) 2. Def's *Pro Se* PWC to Review Decision of COA (COA10-360) 3. Def's *Pro Se* Motion to Proceed In Forma Pauperis 4. Def's *Pro Se* Motion to Appoint Counsel	1. Denied 2. Dismissed Without Prejudice 3. Allowed 4. Dismissed as Moot
004P11	Lynn A. Rolls v. Frederick Alvin Rolls	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA10-328)	Denied
008P11	State v. Chris Alan Jones	1. State's Motion for Temporary Stay (COA10-475) 2. State's Petition for Writ of Supersedeas 3. State's PDR under N.C.G.S. § 7A-31	1. Allowed **01/10/11** 2. 3.
014P11	State v. James Dean Martin	1. Def's NOA Based Upon a Constitutional Question (COA09-1692) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. —— 2. Denied 3. Allowed
015P11	State v. Vernon Morrell Smith	1. Def's *Pro Se* PWC to Review Order of COA (COAP10-249) 2. Def's *Pro Se* Motion to Proceed In Forma Pauperis 3. Def's *Pro Se* Motion to have COA Rule on Habeas Corpus 4. Def's *Pro Se* Motion to Appoint Counsel	1. Dismissed 2. Allowed 3. Denied 4. Dismissed as Moot
016P11	State v. Cassie Scott Johnson	Def's *Pro Se* Motion to Exhaust the State	Dismissed
024P11	State v. Emmanuelle Khnak Dancy	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA10-258)	Denied
029P11	State v. Richard Eugene Foy	1. Def's Motion for Temporary Stay (COA10-331) 2. Def's Petition for Writ of Supersedeas	1. Allowed **01/19/11** 2. Allowed **01/19/11**

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030P11	State v. Brian Keith Perry	Def's *Pro Se* Motion for PDR (COA10-488)	Denied
032P11	Waldo Fenner v. City/County Board of Adjustment	Plt's *Pro Se* Motion for Notice of Appeal (COA10-1188)	Dismissed Ex Mero Motu
033A11	State v. Omar Sidy Mbacke	1. State's Motion for Temporary Stay (COA09-1395) 2. State's Petition for Writ of Supersedeas 3. State's Notice of Appeal Based Upon a Dissent	1. Allowed **01/20/11** 2. Allowed **01/20/11** 3. –––
034P08-3	Alfred Abdo, Jr., and Abdo Demolition & Property Restoration v. The Hon. Dennis J. Winner and Steven D. Cogburn, Successor to Robert H. Christie, Jr.	Plt's *Pro Se* Motion for NOA of Right from COA (COA10-755)	Denied
034P11	State v. Cory Lendell Joyner	1. State's Motion for Temporary Stay (COA10-353) 2. State's Petition for Writ of Supersedeas 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **01/25/11** 2. 3. **Jackson, J., Recused**
055P02-9	State v. Henry Ford Adkins	Def's *Pro Se* Motion for Petition for Writ of Habeas Corpus (COAP10-937)	Denied **01/04/11**
059P10-2	Horace K. Pope, Jr., Employee v. Johns Manville, Employer and St. Paul Travelers Indemnity Company, Carrier	1. Defs' Motion for Temporary Stay (COA09-281-2) 2. Defs' Petition for Writ of Supersedeas 3. Defs' PDR Under N.C.G.S. § 7A-31 (COA09-571) 4. North Carolina Association of Defense Attorneys' Motion for Leave to File Amicus Brief	1. Allowed **10/11/10** Dissolved the Stay **12/15/10** 2. Denied 3. Denied 4. Dismissed as Moot

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

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084P10	Asheville Jet, Inc., d/b/a/ Million Air Asheville v. The City of Asheville, N.C. Municipal Corp.; Asheville Regional Airport Authority; and The County of Buncombe	1. Def's (Asheville Reg. Airport Auth.) NOA Based Upon a Constitutional Question (COA08-1549) 2. Def's (Asheville Reg. Airport Auth.) PDR Under N.C.G.S. § 7A-31 3. Def's (City of Asheville) NOA Based Upon a Constitutional Question 4. Def's (City of Asheville) PDR Under N.C.G.S. § 7A-31 5. Def's Motion to Withdraw Petitions for Discretionary Review and Notice of Appeals	1. —— 2. —— 3. —— 4. —— 5. Allowed **Jackson, J., Recused**
112P10	Hazel Hawkins, as Personal Repres. of the Estate of Neal Hawkins, Jr., Deceased and as Personal Representative of Statutory Beneficiaries v. SSC Hendersonville Operating Company, LLC d/b/a The Brian Center Health & Rehab.—Hendersonville	1. Plt-Appellant's Motion for Temporary Stay 2. Plt-Appellant's Petition for Writ of Supersedeas 3. Plt-Appellant's PDR	1. Allowed **03/17/10** 2. 3.
113PA10	State v. Artives Jerod Freeman	Def's Motion to Take Judicial Notice	Dismissed as Moot
114A10	State v. Kenneth Bernard Davis	1. Def's NOA Based Upon A Constitutional Question (COA09-278) 2. State's Motion to Dismiss Appeal 3. Def's *Pro Se* Motion to File Motion for Appropriate Relief Pursuant to the All Writs Act	1. 2. 3. Dismissed **12/15/10**
130PA10	Michael C. Munger, et al. v. State of North Carolina, et al.	Defs' (Google, Inc. and Madras Integration, LLC) Motion for Judicial Notice	Dismissed as Moot **Jackson, J., Recused**
139A96-2	State v. Lorenzo Manley	1. Def's *Pro Se* PWC to Review the Order of Pitt County Superior Court 2. Def's *Pro Se* Motion to Appoint Counsel	1. Dismissed 2. Dismissed as Moot

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148P10-2	State v. Lance Adam Goldman	1. Def's *Pro Se* PWC to Review Order of COA (COA08-1408) 2. Def's *Pro Se* Motion for Leave to Proceed In Forma Pauperis 3. Def's *Pro Se* Motion to Appoint Counsel	1. Dismissed 2. Allowed 3. Dismissed as Moot
171P10	David E. Combs v. City Electric Supply Co., et al.	1. Defs' PDR Under N.C.G.S. § 7A-31 (COA09-108) 2. Plt's Motion for Leave to File Response to Petition	1. 2. Allowed **11/19/10**
211P10	State v. Thomas Lee Brennan	1. State's Motion to Temporary Stay (COA09-1362) 2. State's Petition for Writ of Supersedeas 3. State's NOA Based Upon a Constitutional Question 4. State's Alternative PDR Under N.C.G.S. § 7A-31	1. Allowed **05/21/10** 2. 3. 4.
230PA10	Langdon B. Raymond v. NC Police Benevolent Assoc., Inc., a N.C. Corp.; Southern States Police Benevolent Assoc., Inc., a FL Corp.; and John Midgette	*Amicus Curiae* Nat'l Assoc. of Police Organizations' Motion for Leave to Participate in Oral Argument	Allowed **12/20/10**
235P10	State v. John Edward Brewington	1. State's Motion for Temporary Stay (COA09-956) 2. State's Petition for Writ of Supersedeas 3. State's NOA Based Upon a Constitutional Question 4. State's Alternative PDR	1. Allowed **06/04/10** 2. 3. 4.
252P10	In re: L.D.B.	1. Petitioner's PDR Under N.C.G.S. § 7A-31 (COA10-177) 2. Petitioner's (Sampson County Dept. Of Social Services) Motion for Withdrawal of PDR	1. —— 2. Allowed **1/27/11**
266P10	David Neal Whisnant and Lois Miller Whisnant v. Carolina Farm Credit, ACA	1. Def's PDR Under N.C.G.S. § 7A-31 (COA09-180) 2. North Carolina Bankers Association's Motion for Leave to File Amicus Curiae Brief	1. Denied 2. Dismissed as Moot

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

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267P10	North Carolina Farm Bureau Mutual Insurance Company, Inc. v. Gervis E. Sadler, Individually and by and through Steve Anthony, his Attorney-in-Fact	Plt's PDR Under N.C.G.S. § 7A-31 (COA09-1054)	Allowed
287P09-2	State v. Jonathan Elwood Walker, Sr.	Def's *Pro Se* Motion for PDR (COAP10-878)	Dismissed **Jackson, J., Recused**
313P10	Cheyenne Saleena Stark, a Minor, Cody Brandon Stark, a Minor, by Their Guardian ad Litem Nicole Jacobsen v. Ford Motor Company, a Delaware Corporation	1. Def's PDR Under N.C.G.S. § 7A-31 (COA09-286) 2. Motion for Cary Silverman to be Admitted Pro Hac Vice 3. Motion for Mark A. Behrens to be Admitted Pro Hac Vice 4. Motion by the National Association of Manufacturers, et al., for Leave to File Amici Curiae Brief 5. Motion by NC Association of Defense Attorneys, et al., for Leave to File Amici Curiae Brief 6. Motion by Product Liability Advisory Council for Leave to File Amicus Brief	1. Allowed 2. 3. 4. Dismissed Without Prejudice to Refile Pursuant to 28(i) N.C. R. App. P. 5. Dismissed Without Prejudice to Refile Pursuant to 28(i) N.C. R. App. P. 6. Dismissed Without Prejudice to Refile Pursuant to 28(i) N.C. R. App. P.
322P10	State v. Marcus Arnell Craven	1. State's Motion for Temporary Stay (COA09-1138) 2. State's Petition for Writ of Supersedeas 3. State's NOA Based Upon a Constitutional Question 4. State's Alternative PDR Under N.C.G.S. § 7A-31 5. Def's Motion to Dismiss Appeal 6. Def's Conditional PDR Under N.C.G.S. § 7A-31	1. Allowed **08/05/10** 2. 3. 4. 5. 6.

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323P10-2	State v. Lacy Lee Williams, Jr.	Def's *Pro Se* Petition for Writ of Mandamus (COAP09-396)	Denied
323P10-3	State v. Lacy Lee Williams, Jr.	Def's *Pro Se* Motion for Re-evaluation / Additional Review by The Full Court (En Banc)	Dismissed
323P10-4	State v. Lacy Lee Williams, Jr.	Def's *Pro Se* Petition for Writ of Mandamus (COAP11-5)	Denied
324P10	State v. Rodney Flynn McNeill	1. State's Motion for Temporary Stay (COA09-1585) 2. State's Petition for Writ of Supersedeas 3. State's PDR Under N.C.G.S. § 7A-31 4. Def's Conditional PDR Under N.C.G.S. § 7A-31	1. Allowed **08/06/10** Dissolved the Stay **02/03/11** 2. Denied 3. Denied 4. Dismissed as Moot
326P01-2	State v. Lanie Philip Loflin	Def's *Pro Se* Motion for NOA (COAP01-0057)	Dismissed Ex Mero Motu
340P10-2	State v. Derrick Young	Def's *Pro Se* PWC to Review the Order of the COA (COAP09-539)	Dismissed
351P04-4	State v. Robert Lee Thacker	1. Defendant's *Pro Se* PWC to Review the Order of the COA (COAP10-696) 2. Def's *Pro Se* Motion to Appoint Counsel 3. Def's *Pro Se* Motion to Proceed In Forma Pauperis	1. Dismissed 2. Dismissed as Moot 3. Allowed
362P10	In re the Adoption of K.A.R., a Minor Child	Petitioners' (Katy and Eric Larson) PDR Under N.C.G.S. § 7A-31 (COA09-1544)	Denied
365PA10	State v. Julie Anne Yencer	State's Motion to File Corrected New Brief	Allowed **12/21/10**
368P10	Brian W. Cail and wife, Dana S. Cail, and Jerry M. Deal v. Dr. Robert A. Cerwin; Christina Cerwin, John M. Dunlow, Substitute Trustee; Canusa Mortgage Corporation; and D.B. Lancaster	Def's (Christina Cerwin) PDR Under N.C.G.S. § 7A-31 (COA06-304)	Denied **Jackson, J., Recused**
373P10	State v. Renny Deanjelo Mobley	Def's PDR Under N.C.G.S. § 7A-31 (COA09-975)	Denied

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

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376P02-5	State v. Robert Wayne Stanley	1. Def's *Pro Se* PWC to Review Order of COA 2. Def's *Pro Se* Motion for Petition for Writ of Error Coram Nobis Under the All Writs Act	1. Dismissed 2. Dismissed
381P10-3	State v. David E. Simpson	1. Def's *Pro Se* PWC to Review Order of COA (COAP09-398) 2. Def's *Pro Se* Motion for Writ of Mandanna 3. Def's *Pro Se* Petition for Writ of Habeas Corpus (COAP09-398) 4. Def's *Pro Se* Motion to Proceed In Forma Pauperis	1. Dismissed 2. Dismissed 3. Denied **1/27/11** 4. Allowed **1/27/11**
382P10	State v. John Lewis Wray, Jr.	1. State's Motion for Temporary Stay (COA09-304) 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 **09/07/10** 2. 3. 4.
386P10	State v. Paul Brantley Lewis	1. State's Motion for Temporary Stay (COA08-1595) 2. State's Petition for Writ of Supersedeas 3. State's NOA Based Upon a Dissent 4. State's Alternative PDR 5. Def's Motion to Dismiss Appeal	1. Allowed **09/07/10** 2. 3. 4. 5.
399P10	State v. John Graylon Welch	1. Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA09-1512) 2. Def's NOA Based Upon A Constitutional Question 3. Def's PDR Under N.C.G.S. § 7A-31 4. State's Motion to Dismiss Appeal	1. Dismissed 2. 3. 4.
416P10	State v. Jeffrey Antonio Williams	Def's PDR Under N.C.G.S. § 7A-31 (COA09-1095)	Denied
420P10	Rebecca Davis v. Margaret Swan	Def's PDR Under N.C.G.S. § 7A-31 (COA09-321)	Denied
427P10-3	State v. Lorenzo Richardson	Def's *Pro Se* Motion for Notice of Appeal (COAP10-949)	Dismissed Ex Mero Motu

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427P10-4	State v. Lorenzo Richardson	Def's *Pro Se* Motion for Notice of Appeal (COAP10-949)	Dismissed Ex Mero Motu
433P10	State v. Rashaan Ali	1. Def's NOA Based Upon a Constitutional Question (COA09-867) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. —— 2. Denied 3. Allowed
434P10	David W. Petersen and Judith S. Petersen v. Polk-Sullivan, LLC	Plt's PDR Under N.C.G.S. § 7A-31 (COA09-1251)	Denied **Jackson, J., Recused**
435A96-5	State v. Walic Christopher Thomas	1. Def's Motion to Stay Petition for Writ of Certiorari 2. Def's PWC to Review Decision of Superior Court of Guilford County 3. Def's *Pro Se* Motion to Withdraw All Appeals	1. 2. 3. Dismissed
435P10	State v. William Littleton	Def's *Pro Se* Motion to Hear This Case or to Dismiss (COAP10-765)	Dismissed
441P10	Harco National Insurance Company v. Grant Thornton LLP	Def's PDR Under N.C.G.S. § 7A-31 (COA09-996)	Denied
443P10	Candace Hedges, Employee v. Wake County Public School System, Employer and Key Risk Management Services, Servicing Agents	Def's PDR Under N.C.G.S. § 7A-31 (COA09-1305)	Denied
444P10	The N.C. State Bar v. Creighton W. Sossoman, Attorney	1. Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA09-1269) 2. Def's *Pro Se* Petition for Writ of Supersedeas 3. Def's *Pro Se* Motion for Temporary Stay	1. 2. 3. Allowed **01/05/11** **Martin, J., Recused**
447P09-02	William L. Underwood v. Teresa W. Underwood	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA08-1131-2) 2. Plt's Motion in the Alternative for PWC to Review Decision of COA	1. Allowed 2. Dismissed as Moot

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

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456P09-2	Parkway Urology, P.A. d/b/a Cary Urology, P.A. v. NCDHHS and Raleigh Hematology Oncology Associates, PC, et al. Wake Radiology Oncology Services, PLLC v. NCDHHS and Raleigh Hematology Oncology Associates, PC, et al. Rex Hospital, Inc. v. NCDHHS and Raleigh Hematology Oncology Associates, PC, et al.	1. Petitioner's (Rex Hospital, Inc.) PDR Under N.C.G.S. § 7A-31 (COA09-1490) 2. Petitioner's (Wake Radiology Oncology Services, PLLC) PDR Under N.C.G.S. § 7A-31	1. Denied 2. Denied
458P10	State v. Nakia Nickerson	1. State's Motion for Temporary Stay (COA09-1511) 2. State's Petition for Writ of Supersedeas 3. State's PDR Under N.C.G.S. § 7A-31 4. State's Motion to Withdraw PDR and Petition for Writ of Supersedeas 5. State's Motion for Temporary Stay 6. State's Petition for Writ of Supersedeas 7. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **10/25/10** Dissolved the Stay **11/30/10** 2. Dismissed as Moot **11/30/10** 3. Dismissed as Moot **11/30/10** 4. Dismissed as Moot **11/30/10** 5. Allowed **11/30/10** 6. 7.
464P10	State v. Christopher Lee Allen Vaughan	1. Def's PDR Under N.C.G.S. § 7A-31 (COA10-166) 2. Def's Motion, in the Alternative, for PWC to Review Decision of COA	1. Denied 2. Dismissed as Moot
470P10	State v. John Durham Brigman	Def's PDR Under N.C.G.S. § 7A-31 (COA10-46)	Denied

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474P10	Rosa Faye Autry v. Ray Lynn Autry	Def's PDR Under N.C.G.S. § 7A-31 (COA09-1495)	Denied **01/18/11**
477P10	In the Matter of: K.D.L.	1. State's Motion for Temporary Stay (COA09-1653) 2. State's Petition for Writ of Supersedeas 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **11/04/10** 2. 3.
478P10	State v. John Carpenter	1. Def's *Pro Se* PWC to Review Order of COA (COAP10-528) 2. Def's *Pro Se* Motion to Appoint Counsel 3. Def's *Pro Se* Motion to Proceed In Forma Pauperis	1. Dismissed 2. Dismissed as Moot 3. Allowed
479A09	Libertarian Party, et al. and N.C. Green Party, et al. v. State of North Carolina, et al.	Amicus (N.C. Institute of Constitutional Law) Motion for Leave to Withdraw as Counsel	Allowed **01/12/11**
479P10	State v. Elijah Omar Nabors	1. State's Motion for Temporary Stay (COA10-176) 2. State's Petition for Writ of Supersedeas 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **11/05/10** 2. 3.
484P10	State v. Roderick Surratt	Def's PDR Under N.C.G.S. § 7A-31 (COA10-184)	Denied
485P10	Teresa W. Wood v. Teachers' and State Employees' Retirement System, et al.	Plt's PDR Prior to Determination of COA Under N.C.G.S. § 7A-31(b) (COA10-1241)	Denied
491P10	R S & M Appraisal Services, Inc. v. Alamance County v. Ronald S. McCarthy and Kimberly Horton	Def's (Alamance County) PWC to Review Order of COA (COA10-1180)	Denied
492P10	State v. Leobardo Saucedo Garcia	Def's *Pro Se* Motion for PDR (PWC-D)	Denied
494P10	State v. Christopher Martin	Def's *Pro Se* Motion for PDR (COAP10-459)	Dismissed
495P10	State v. John Bradley Granger	Def's *Pro Se* PWC to Review Decision of COA (COA09-1166)	Denied

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502P10	In the Matter of: Appeal of H.R. and Debra McClamrock from the Decision of the Cabarrus County Board of Equalization and Review Regarding the Valuation of Real Property for Tax Year 2008	Petitioners' (H.R. and Debra McClamrock) *Pro Se* Motion for PDR (COA10-823)	Denied
505P10	State v. David Franklin Hurt	1. State's Motion for Temporary Stay (COA09-942) 2. State's Petition for Writ of Supersedeas 3. State's Petition in the Alternative for Discretionary Review Under N.C.G.S. § 7A-31	1. Allowed **11/30/10** 2. 3.
506P10	State v. Lonnie Gene Yonce	Def's PDR Under N.C.G.S. § 7A-31 (COA09-1504)	Denied
507P10	State v. Jim E. Graham	1. Def's *Pro Se* PWC to Review Order of COA (COAP10-760) 2. Defendant's *Pro Se* Motion to Appoint Counsel	1. Dismissed 2. Dismissed as Moot
508P09-4	State v. Alfonzo Meeks	1. Def's *Pro Se* Motion for NOA (COAP09-818) 2. Def's *Pro Se* PWC to Review Order of COA	1. Dismissed Ex Mero Motu 2. Denied
508P10	State v. Kelvin Allen McNeil	1. Def's *Pro Se* PWC to Review Decision of COA (COA09-518) 2. Def's *Pro Se* Motion to Appoint Counsel 3. Def's *Pro Se* Motion to Proceed In Forma Pauperis	1. Dismissed Without Prejudice 2. Dismissed as Moot 3. Allowed
514P10	In Re: I.J. and X.J., Minor Children	Petitioner's PWC to Review Order of COA (COAP10-595)	Denied
518P10	In the Matter of: D.J.E.L.	Respondent-Mother's PDR Under N.C.G.S. § 7A-31 (COA10-685)	Denied

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520P10	State v. Larry Mackey	1. State's Motion for Temporary Stay (COA09-1382) 2. State's Petition for Writ of Supersedeas 3. State's PDR under N.C.G.S. § 7A-31 4. State's Motion for Withdrawal of Petition for Discretionary Review	1. Allowed **12/17/10**; Dissolved the Stay **01/05/11** 2. Dismissed as Moot **01/05/11** 3. Withdrawn **01/05/11** 4. Allowed **01/05/11** **Jackson, J., Recused**
520P10-2	State v. Larry Mackey	1. State's Motion for Temporary Stay (COA09-1382) 2. State's Petition for Writ of Supersedeas 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **01/25/11** 2. 3. **Jackson, J., Recused**
521P10	In the Matter of: L.B.	Respondent-Father's PDR Under N.C.G.S. § 7A-31 (COA10-574)	Denied
522P10	State v. Stevie Williams	1. Def's *Pro Se* Motion for NOA Amended (COAP10-853) 2. Def's *Pro Se* Motion for PDR Review	1. Dismissed Ex Mero Motu 2. Denied
523P10	State v. Gregory Ellis Davis	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA09-1707)	Denied **Jackson, J., Recused**
527P09-4	In the Matter of: M.X.	1. Respondent's (Mother) *Pro Se* PWC to Review Decision of COA (COA09-514) 2. Respondent's (Mother) *Pro Se* Motion to Suspend the Rules of Appellate Procedure 3. Respondent's (Mother) *Pro Se* Motion to Recuse Justice Robin E. Hudson	1. Dismissed 2. Denied 3. Denied

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533P10	State v. Jarvis Leon Williams	1. State's Motion for Temporary Stay (COA10-58)	1. Allowed **12/20/10**
		2. State's Petition for Writ of Supersedeas	2.
		3. State's Notice of Appeal Based Upon a Constitutional Question	3.
		4. State's Petition in the Alternative for Discretionary Review under N.C.G.S. § 7A-31	4.
537P10	In the Matter of Duke Energy Carolinas, LLC's Advance Notice of Purchase Agreement with the City of Orangeburg, SC and Joint Petition for Declaratory Ruling	1. Petitioner's (Duke Energy Carolinas, LLC) NOA Based Upon a Constitutional Question (COA09-1273)	1.
		2. Petitioner's (Duke Energy Carolinas, LLC) Petition in the Alternative for Discretionary Review Under N.C.G.S. § 7A-31	2.
		3. Petitioner's (City of Orangeburg) NOA Based Upon a Constitutional Question	3.
		4. Petitioner's (City of Orangeburg) PDR Under N.C.G.S. § 7A-31	4.
		5. Motion by Petitioner (City of Orangeburg) to Admit James N. Horwood, J.S. Gebhart, and Peter J. Hopkins *Pro Hac Vice*	5. Allowed **01/21/11**
		6. Respondents' (Public Staff-NC Util. Comm., Roy Cooper, Progress Energy) Motion to Dismiss Appeal of Duke Energy Carolinas, LLC	6.
		7. Respondents' (Public Staff-NC Util. Comm., Roy Cooper, Progress Energy) Motion to Dismiss Appeal of City of Orangeburg	7.
		8. Petitioner's (Duke Energy Carolinas, LLC) Motion Under Rule 2 of the NC Rules of Appellate Procedure to Suspend the Rules and for Permission to File Reply Brief	8. Denied **01/21/11**
		9. Petitioner's (City of Orangeburg) Motion for Leave to Respond, or, in the Alternative, Rule 37 Opposition, to Appellee's Motion to Dismiss Orangeburg's Notice of Appeal	9. Denied **01/21/11**

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540P10	State v. Clorey Eugene France	Def's *Pro Se* Petition for Writ of Habeas Corpus (COAP10-800)	Denied **12/29/10**
540P10-2	State v. Clorey Eugene France	Def's *Pro Se* Petition for Writ of Habeas Corpus	Denied **01/04/11**
589A01-3	State v. Ronnie Lane Stancil	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA00-581)	Dismissed
620P01-6	State v. Larry McLeod Pulley	1. Def's *Pro Se* Motion for PDR (COAP09-659) 2. Def's *Pro Se* Motion for Petition to Amend PDR	1. Dismissed 2. Dismissed as Moot

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009P11	State v. Tobias Johnson	Def's PDR Under N.C.G.S. § 7A-31 (COA10-519)	Denied
013P11	State v. Tracy Lamont Clark	Def's PDR Under N.C.G.S. § 7A-31 (COA10-235)	Denied
022P11	Arthur O. Armstrong v. Delta Airlines, et. al.	1. Plt's *Pro Se* Motion for Leave to File Supplemental Complaint (COAP10-901) 2. Plt's *Pro Se* Motion for Leave to File Motion for Summary Judgment With Supporting Affidavit and Documentation	1. Dismissed 2. Dismissed
022P11-2	Arthur O. Armstrong v. Delta Airlines, et. al.	1. Plt's *Pro Se* Motion for Leave to File PWC (COAP10-901) 2. Plt's *Pro Se* PWC to Review Order of the COA	1. Dismissed 2. Dismissed
023P11	Arthur O. Armstrong v. Roy Cooper, et. al.	1. Plt's *Pro Se* Motion for Leave to File Supplemental Complaint (COAP10-901) 2. Plt's *Pro Se* Motion for Leave to File Motion for Summary Judgment With Supporting Affidavit and Documentation	1. Dismissed 2. Dismissed
023P11-2	Arthur O. Armstrong v. Sandman, Finn & Fitzhugh, PLLC, et. al.	1. Plt's *Pro Se* Motion for Leave to File PWC (COAP10-901) 2. Plt's *Pro Se* PWC to Review Order of the COA	1. Denied 2. Denied
025P11	In Re: K.B., K.R.B., J.W.B., M.J.G.G., and J.G., Minor Children	Respondent-Mother's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA10-771)	Denied
027P11	Nationwide Property and Casualty Insurance Company v. Jaime Martinson, Administratrix of the Estate of John Gilbert Martinson	Def's PDR Under N.C.G.S. § 7A-31 (COA10-17)	Denied
031P11	State v. Julius Kevin Edwards	Def's PDR (COA09-375)	Dismissed
034P11	State v. Cory Lendell Joyner	1. State's Motion for Temporary Stay (COA10-353) 2. State's Petition for Writ of Supersedeas 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **01/25/11**; Dissolved the Stay **03/10/11** 2. Denied 3. Denied **Jackson, J., Recused**

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038P11	State v. Forest William Wooten	1. Def's *Pro Se* NOA Based Upon a Constitutional Question (COA10-215) 2. Def's *Pro Se* PDR Under N.C.G.S. § 7A-31	1. Dismissed Ex Mero Motu 2. Denied **Jackson, J., Recused**
041P11	State v. Vernon Russell Kirk	Def's PDR Under N.C.G.S. § 7A-31 (COA10-566)	Denied **Jackson, J., Recused**
045P07-3	State v. Terry Gilmore	1. Def's *Pro Se* Motion for NOA (COAP09-294) 2. Def's *Pro Se* Motion for PDR 3. Def's *Pro Se* Motion to Proceed In Forma Pauperis	1. Dismissed Ex Mero Motu 2. Dismissed 3. Allowed
046P11	In the Matter of: I.R.T.	Respondent-Father's PDR Under N.C.G.S. § 7A-31 (COA10-790)	Denied
050P11	State v. Eugene Matthews	Def's *Pro Se* Motion for PDR (COAP10-777)	Denied
051P11	Maude Rumple v. Lynda J. DeLellis	1. Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA10-659) 2. Def's *Pro Se* Motion for Temporary Stay	1. Denied 2. Denied **02/7/11** **Jackson, J., Recused**
052A11	Latrecia Treadway v. Susanna Krammer Diez, Gene Lummus, Gene Lummus Harley Davidson, Inc., Mike Calloway, individually and officially, County of Buncombe, Buncombe County Sheriff's Department	1. Def's (Buncombe County Sheriff's Department) NOA Under N.C.G.S. § 7A-30 (COA10-99) 2. Def's (Buncombe County Sheriff's Department) PDR as to Additional Issues	1. —— 2. Allowed **Jackson, J., Recused**

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053A11	Hulin K. Treadway v. Susanna Krammer Diez, Gene Lummus, Gene Lummus Harley Davidson, Inc., Mike Calloway, individually and officially, John Doe, individually and officially, County of Buncombe, Buncombe County Sheriff's Department	1. Def's (Buncombe County Sheriff's Department) NOA (Dissent) (COA10-100) 2. Def's (Buncombe County Sheriff's Department) PDR as to Additional Issues	1. —— 2. Allowed **Jackson, J., Recused**
060P11	State v. Kenneth Lee Cornelison	Def's PDR Under N.C.G.S. § 7A-31 (COA10-387)	Denied **Jackson, J., Recused**
063P11	State v. Taurence Lee Jones	Def's PDR Under N.C.G.S. § 7A-31 (COA10-420)	Denied **Jackson, J., Recused**
065P11	Debra Reale v. Ronald R. Reale	1. Def's *Pro Se* Motion for PDR (COAP11-61) 2. Def's *Pro Se* Motion in the Alternative For Application For Original Writ of Mandamus	1. Dismissed 2. Denied
067P11	State v. Carlos Rozeles Hernandez, aka Adam Gusman, aka Carlos R. Hermendez, aka Carlos Rozalas Hernandez	Def's Motion to Deem PDR Timely Filed (COA10-178)	Denied Without Prejudice to Treat Attached PDR as Petition For Writ of Certiorari **02/16/11**
068P11	State v. Ronald Lee Smith	Def's *Pro Se* Motion for Review of Habitual Felon Guilty Plea (COA02-945)	Denied
072P11	State v. Lakane Murphy	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COAP08-673)	Dismissed
080P11	State v. Melvin Elpidio Medina Funez	1. Def's *Pro Se* Motion For NOA (COAP11-60) 2. Def's *Pro Se* PWC to Review Order of COA	1. Dismissed Ex Mero Motu 2. Dismissed

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112P10	Hazel Hawkins, as Personal Repres. of the Estate of Neal Hawkins, Jr., Deceased and as Personal Representative of Statutory Beneficiaries v. SSC Hendersonville Operating Company, LLC d/b/a The Brian Center Health & Rehab.-Hendersonville	1. Plt-Appellant's Motion for Temporary Stay 2. Plt-Appellant's Petition for Writ of Supersedeas 3. Plt-Appellant's PDR	1. Allowed **03/17/10**; Dissolved the Stay **03/10/11** 2. Denied 3. Denied
133P05-2	State v. Brandon Buford Davis	1. Def's *Pro Se* PWC to Review Order of COA (COAP10-25) 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
138P00-2	State v. Malcolm E. Pfeiffer-El	Def's *Pro Se* PWC to Review Order of COA (COAP10-962)	Dismissed
166P10-2	In the Matter of: David T. Duncan	1. Def's *Pro Se* Motion for PDR (COAP10-210) 2. Def's *Pro Se* Motion to Appoint Counsel	1. Dismissed 2. Dismissed as Moot
205P10	Hope-A Women's Cancer Center P.A. v. NCDHHS, et. al.	Petitioner's PDR Under N.C.G.S. § 7A-31 (COA08-1548)	Denied
27P10	State of North Carolina ex rel. Commissioner of Insurance and N.C. Rate Bureau v. Dare County, et. al.	1. Plt's (Rate Bureau) PDR Under N.C.G.S. § 7A-31 (COA09-701) 2. Plt's (Rate Bureau) PWC to Review Decision of COA 3. Defs' Petition for PDR Under N.C.G.S. § 7A-31	1. Denied 2. Denied 3. Denied **Jackson, J., Recused**
311P10-2	State v. Gregory Scott Grosholz	1. Def's *Pro Se* Motion for Petition of Motion for Discretionary Review (COAP11-56) 2. Def's *Pro Se* Petition For Writ of Mandamus 3. Def's *Pro Se* Petition for Reconsideration of Denial of Petition for Writ of Mandamus	1. Dismissed 2. Dismissed **02/17/11** 3. Dismissed

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313P10	Cheyenne Saleena Stark, a Minor, Cody Brandon Stark, a Minor, by Their Guardian ad Litem Nicole Jacobsen v. Ford Motor Company, a Delaware Corporation	1. Def's PDR Under N.C.G.S. § 7A-31 (COA09-286)	1. Allowed
		2. Motion for Cary Silverman to be Admitted Pro Hac Vice	2. Dismissed
		3. Motion for Mark A. Behrens to be Admitted Pro Hac Vice	3. Dismissed
		4. Motion by the National Association of Manufacturers, et al., for Leave to File Amici Curiae Brief	4. Dismissed Without Prejudice to Refile Pursuant to 28(i) N.C. R. App. P.
		5. Motion by NC Association of Defense Attorneys, et al., for Leave to File Amici Curiae Brief	5. Dismissed Without Prejudice to Refile Pursuant to 28(i) N.C. R. App. P.
		6. Motion by Product Liability Advisory Council for Leave to File Amicus Brief	6. Dismissed Without Prejudice to Refile Pursuant to 28(i) N.C. R. App. P.
333P08-2	State v. Lamar Demond Smith	Def's PDR Under N.C.G.S. § 7A-31 (COA09-1397)	Denied
364P10	R.T. Hudgins v. G.W. Wagoner, Jr. and W.K.S. Corporation	1. Defs' PDR Under N.C.G.S. § 7A-31 (COA08-1004)	1. Denied
		2. Plt's Conditional PDR Under N.C.G.S. § 7A-31	2. Dismissed as Moot **Jackson, J., Recused**
382P10	State v. John Lewis Wray, Jr.	1. State's Motion for Temporary Stay (COA09-304)	1. Allowed **09/07/10**; Dissolved the Stay **03/10/11**
		2. State's Petition for Writ of Supersedeas	2. Denied
		3. State's PDR Under N.C.G.S. § 7A-31	3. Denied
		4. Def's Conditional PDR Under N.C.G.S. § 7A-31	4. Dismissed as Moot
401P10	State v. Tyrone Raynard Gladden	1. Def's PWC to Review Decision of COA (COA09-626)	1. Denied
		2. Def's *Pro Se* Motion for Reply to State's Response to PWC	2. Dismissed Ex Mero Motu

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405P10	State v. Joseph Lee Armstrong	Def's PDR Under N.C.G.S. § 7A-31 (COA09-1649)	Denied
419P10	Crosland Ardrey Woods, LLC v. Beazer Homes Corporation	1. Def's PDR Under N.C.G.S. § 7A-31 (COA09-880) 2. Plt's Conditional PDR Under N.C.G.S. § 7A-31	1. Allowed 2. Allowed
426P10	State v. Sandra Skeen Joyce	State's PWC to Review the Order of the COA (COAP10-707)	Denied
444P09-3	State v. Charles Gene Rogers	Def's *Pro Se* Petition For Writ of Habeas Corpus	Denied **02/18/11**
444P10	The N.C. State Bar v. Creighton W. Sossoman, Attorney	1. Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA09-1269) 2. Def's *Pro Se* Petition for Writ of Supersedeas 3. Def's *Pro Se* Motion for Temporary Stay	1. Denied 2. Denied 3. Allowed **01/05/11**; Dissolved the Stay **03/10/11** **Martin, J., Recused, Jackson, J., Recused**
457P10	Carolina Marina and Yacht Club, LLC v. New Hanover County Board of Commissioners and New Hanover County and Violet Ward, Intervenor	Intervenor-Respondent's PDR Under N.C.G.S. § 7A-31 (COA10-77)	Denied
459P00-2	State v. William M. Huggins	Def's *Pro Se* Petition for Writ of Mandamus	Denied
465P10	Fred E. Bear, III v. Exotic Imports, Inc. and Michael B. Day	Plt's PDR Under N.C.G.S. § 7A-31 (COA10-95)	Denied **Jackson, J., Recused**
471P10	State v. Corey Termaine Mills	1. Def's Petition for Writ of Mandamus (COA09-1144) 2. Def's Motion in the Alternative for PWC to Review the Decision of the COA	1. Denied 2. Denied

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477P10	In the Matter of: K.D.L.	1. State's Motion for Temporary Stay (COA09-1653) 2. State's Petition for Writ of Supersedeas 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **11/04/10;** Dissolved the Stay **03/10/11** 2. Denied 3. Denied
481P10	State v. Michael Ford	Def's *Pro Se* Motion for Writ of Certiorari to Review Order of COA (COAP10-297)	Dismissed
482A09	James W. Powell, Jr. v. City of Newton, a Municipal Corporation v. Shaver Wood Products, Inc., a North Carolina Corporation and Dickson Engineering, Inc., a North Carolina Corporation	Plt's Petition for Rehearing	Denied **02/23/11** **Jackson, J., Recused**
488P10	State v. Juan Carlos Olivo Ramirez	Def's *Pro Se* Motion for PDR Under N.C.G.S. § 7A-31 (COA09-168)	Denied
493P10	State v. Elijah Shane Clary	Def's PDR Under N.C.G.S. § 7A-31; (Alternatively, PWC) (COA09-1628)	Denied
496P10	State v. Jeremy Edwards	Def's PDR Under N.C.G.S. § 7A-31 (COA10-137)	Allowed
503P10	State v. Barron Eugene Wallace	Def's PDR Under N.C.G.S. § 7A-31 (COA10-4)	Denied
511P04-3	Anthony Dove v. Debra H. Speller (Formerly Dove)	Plt's *Pro Se* PWC to Review Order of COA (COAP10-733)	Denied
516P10	State v. Fred Goins Miller, III	Def's PDR Under N.C.G.S. § 7A-31 (COA09-1702)	Denied

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517P10	Dare County, et. al. v. The North Carolina Department of Insurance, Commissioner of Insurance Wayne Goodwin and North Carolina Rate Bureau and Dare County, et. al. v. The North Carolina Department of Insurance, Commissioner of Insurance Wayne Goodwin and North Carolina Rate Bureau	1. Petitioner's PDR Under N.C.G.S. § 7A-31 (COA09-1171 and COA09-1172) 2. Respondent's (N.C. Rate Bureau) Conditional PDR Under N.C.G.S. § 7A-31 (COA09-1171 and COA09-1172)	1. Denied 2. Dismissed as Moot **Jackson, J., Recused**
522P10-2	State v. Stevie Williams	1. Def's *Pro Se* Motion for Petition for Leave to Amend PDR (COAP10-853) 2. Def's *Pro Se* Petition for Writ of Habeas Corpus	1. Dismissed as Moot 2. Denied **02/11/11**
524P10	Arthur O. Armstrong v. City of Rocky Mount, et. al.	1. Plt's *Pro Se* Motion for Leave to File PWC (COAP09-97) 2. Plt's *Pro Se* PWC to Review Order of the COA 3. Plt's *Pro Se* Motion for Leave to File Supplemental PWC 4. Plt's *Pro Se* Motion for Supplement PWC	1. Denied 2. Denied 3. Dismissed as Moot 4. Dismissed as Moot
525P10	Arthur O. Armstrong v. United Companies Lending, et. al.	1. Plt's *Pro Se* Motion for Leave to File PWC (COAP10-869) 2. Plt's *Pro Se* PWC to Review Order of the COA 3. Plt's *Pro Se* Motion for Leave to Reopen Case 4. Plt's *Pro Se* Motion to File Supplement Complaint 5. Plt's *Pro Se* Motion for Leave to File Motion for Relief, With Supporting Affidavit and Documentation	1. Denied 2. Denied 3. Denied 4. Denied 5. Denied
526P10	Arthur O. Armstrong v. Armstrong's Estate	1. Plt's *Pro Se* Motion for Leave to File PWC (COAP10-872) 2. Plt's *Pro Se* PWC to Review the Order of the COA	1. Denied 2. Denied

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527P10	Arthur O. Armstrong v. Nash County	1. Plt's *Pro Se* Motion for Leave to File PWC (COAP10-888) 2. Plt's *Pro Se* PWC to Review the Order of the COA	1. Denied 2. Denied
528P10	Arthur O. Armstrong v. Nash County	1. Plt's *Pro Se* Motion for Leave to File PWC (COAP10-889) 2. Plt's *Pro Se* PWC to Review the Order of the COA 3. Plt's *Pro Se* Motion for Leave to File Supplemental PWC 4. Plt's *Pro Se* Motion for Supplemental PWC	1. Denied 2. Denied 3. Dismissed as Moot 4. Dismissed as Moot
529P10	Arthur O. Armstrong v. Embracing Change Services, Ins., et. al.	1. Plt's *Pro Se* Motion for Leave to File PWC (COAP10-899) 2. Plt's *Pro Se* PWC to Review the Order of the COA	1. Denied 2. Denied
530P10	Arthur O. Armstrong v. Medlin Motors, Inc., et. al.	1. Plt's *Pro Se* Motion for Leave to File PWC (COAP10-900) 2. Plt's *Pro Se* PWC to Review the Order of the COA	1. Denied 2. Denied
531P10	Arthur O. Armstrong v. Wilson County	1. Plt's *Pro Se* Motion for Leave to File PWC (COAP10-901) 2. Plt's *Pro Se* PWC to Review Order of the COA 3. Plt's *Pro Se* Motion for Leave to File PWC 4. Plt's *Pro Se* Motion to Review Order of the COA 5. Plt's *Pro Se* Motion for Leave to File Motion to Reopen Action 6. Plt's *Pro Se* Motion for Leave to File Supplemental Complaint 7. Plt's *Pro Se* Motion for Leave to File Rule 60 (6) (6) Motion for Relief, with Supporting Affidavit and Documentation	1. Denied 2. Denied 3. Denied 4. Denied 5. Denied 6. Dismissed as Moot 7. Dismissed

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

11 MARCH 2011

532P10	Arthur O. Armstrong v. Wake County	1. Plt's *Pro Se* Motion for Leave to File PWC (COAP10-901) 2. Plt's *Pro Se* PWC to Review Order of the COA 3. Plt's *Pro Se* Motion for Leave to File PWC 4. Plt's *Pro Se* PWC to Review Order of the COA 5. Plt's *Pro Se* Motion for Leave to File PWC 6. Plt's *Pro Se* PWC to Review the Order of the COA	1. Denied 2. Denied 3. Denied 4. Denied 5. Denied 6. Denied
536P10	State v. Christopher Lamont Williams	1. Def's *Pro Se* PWC to Review Decision of COA (COA09-1052) 2. Def's *Pro Se* Motion for Any Other Relief Pursuant to the All Writs Act 3. Def's *Pro Se* Motion for Appropriate Relief 4. Def's *Pro Se* Motion to Appoint Counsel 5. Def's *Pro Se* Motion to Proceed In Forma Pauperis.	1. Denied 2. Dismissed 3. Dismissed 4. Dismissed as Moot 5. Allowed
539P10	State v. Daniel Thomas Farrell, II	1. Def's *Pro Se* Motion for NOA Based On a Constitutional Question (COAP10-791) 2. Def's *Pro Se* Petition for Writ of Certiorari to Review Order of COA	1. Dismissed Ex Mero Motu 2. Dismissed
574A97-5	State v. Errol Duke Moses	Def's PWC to Review the Order of Forsyth County Superior Court	Denied

LANGDON B. RAYMOND v. NORTH CAROLINA POLICE BENEVOLENT ASSOCIATION, INC., A NORTH CAROLINA CORPORATION; SOUTHERN STATES POLICE BENEVOLENT ASSOCIATION, INC., A FLORIDA CORPORATION;[1] AND JOHN MIDGETTE

No. 230PA10

(Filed 8 April 2011)

Attorneys— client relationship—tripartite

A tripartite attorney-client relationship existed between the Southern States Police Benevolent Association (SSPBA), an officer who was an existing member of the association, and the attorney to whom the officer was referred by the SSPBA, which paid at least some of the attorney's fees and litigation expenses and expected to be informed of developments in the litigation. The communications between the SSPBA, the officer, and the attorney satisfied the five-factor *Murvin* test.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous, unpublished decision of the Court of Appeals, —— N.C. App. ——, 692 S.E.2d 487 (2010), affirming an order compelling discovery entered 5 March 2009 by Judge Mark Powell in Superior Court, Buncombe County. Heard in the Supreme Court 10 January 2011.

Contrivo & Contrivo, P.A., by Frank J. Contrivo, Jr., for plaintiff-appellee.

Roberts & Stevens, P.A, by Kenneth R. Hunt, for defendant-appellants.

Katherine Lewis Parker for ACLU of North Carolina Legal Foundation; Patterson Harkavy LLP, by Burton Craige, for North Carolina Advocates for Justice; Thomas M. Stern, and Ferguson, Chambers, Stein, Gresham & Sumter, P.A., by John W. Gresham, for North Carolina Association of Educators; Smith Moore Leatherwood, LLP, by Jon Berkelhammer, and McAngus Goudelock & Courie, PLLC, by John T. Jeffries, for North Carolina Association of Defense Attorneys, amici curiae.

1. Defendants' pleadings and other documents show that Southern States Police Benevolent Association is actually a Georgia non-profit organization. However, plaintiff's complaint, as well as the lower court's caption, identify the organization as a Florida corporation. For consistency, we have retained the plaintiff's original identification of the SSPBA as a Florida corporation.

McGuinness Law Firm, by J. Michael McGuinness, for National Association of Police Organizations, amicus curiae.

NEWBY, Justice.

In this case we must decide whether a professional membership association, one of its members, and an attorney hired by the association to represent that member established between them an attorney-client relationship. Recognizing its tripartite nature, we conclude this relationship is that of attorney and client such that certain communications within it are privileged. An *in camera* review by the trial court is the appropriate mechanism to be used for determining the applicability of the privilege. Accordingly, we reverse and remand the decision of the Court of Appeals.

The facts are alleged to be as follows: In October 2006 Timothy Foxx, a police officer for the Town of Fletcher, North Carolina, was demoted after notifying his superiors of a fellow officer's misconduct. In addition to being demoted, Foxx alleges that he was assaulted by the Chief of Police, Langdon Raymond. After the incident, Foxx contacted the Legal Department of the Southern States Police Benevolent Association ("SSPBA"), of which he had been a dues-paying member since 2005, to request assistance in handling his employment situation.

The SSPBA "represent[s] officers and other public employees in legal, labor, legislative, and political matters which affect the law enforcement profession." The SSPBA advertises that its legal services include emergency representation for shooting incidents, defense representation in civil or criminal actions stemming from work-related conduct, and representation in grievance and disciplinary matters. For grievance and disciplinary matters, the SSPBA policy states that its members are entitled to assistance from the SSPBA staff, aid in securing necessary counsel, and payment of attorney fees and court costs. To fund such legal services the SSPBA relies on membership dues and a requirement that successful claimants reimburse the SSPBA for attorney fees and court costs.

When Foxx contacted the SSPBA, he initially spoke with Grady Dukes, a licensed attorney. After the initial consultation, Foxx was contacted by Joni Fletcher, another licensed attorney for the SSPBA, and John Midgette, the Executive Director of the North Carolina Police Benevolent Association ("NCPBA"), a division of the SSPBA. Fletcher and Midgette assisted Foxx in filing an initial grievance. The

SSPBA ultimately referred Foxx to Shannon Lovins, an Asheville attorney who agreed to represent Foxx. The SSPBA arranged to pay Lovins up to $100 an hour and cover any associated litigation expenses; if Lovins charged more than $100 an hour, Foxx was responsible for the additional attorney fees. In accordance with its policy, the SSPBA expected to be kept informed of developments in the litigation.

In March 2007, Foxx was terminated by the Town of Fletcher. Lovins assisted Foxx in pursuing administrative appeals and by filing a federal lawsuit against the Town of Fletcher and various municipal officials, including Chief Raymond. According to plaintiff, the federal lawsuit was dismissed on 3 December 2008.

In response to the federal lawsuit, Chief Raymond filed this state lawsuit against the NCPBA, the SSPBA, and John Midgette. Among other allegations, plaintiff maintains defendants committed the torts of maintenance and champerty by financially supporting the federal lawsuit. To help establish these claims, plaintiff served interrogatories[2] and requested the production of documents[3] regarding any

2. Plaintiff served the following interrogatories:

   1. State with specificity and particularity any arrangement or agreement that either one or both of the Defendants have with Attorney Shannon Lovins or Timothy Foxx with regard to Mrs. Lovins' representation of Timothy Kirk Foxx as Plaintiff in the case of Foxx v. Fletcher and Raymond et. [sic] al. filed in the United States District Court for the Western District of North Carolina, Asheville, Division File # 1:07cv00336 including but not limited to payment of attorney's fees, expert witness fees, and court costs.

   2. State whether or not either Defendant or both Defendants have paid attorney's fees and court costs to Shannon Lovins for her representation of Mr. Foxx in the above referenced lawsuit against Langdon Raymond.

   3. State the amount of such fees and costs which have been paid to Mrs. Lovins to date for her representation of Mr. Foxx in the lawsuit against Langdon Raymond.

   4. State the amount of expert witness fees that have been paid by either or both Defendants to expert witness Melvin Tucker in the above referenced lawsuit brought by Mr. Foxx against Mr. Raymond.

   5. State the amount of court costs to include filing fees which have been paid by either or both Defendants to Mr. Foxx or Mrs. Lovins in the above referenced federal lawsuit brought by Mr. Foxx against Mr. Raymond and others.

3. Plaintiff's requests for production of documents are as follows:

   1. Any documents in the possession of either Defendant reflecting a fee arrangement with attorney Shannon Lovins or Timothy Foxx for her representation of Timothy Foxx in pending litigation against Langdon Raymond.

   2. Any documents in the possession of either Defendant reflecting payment of expert witness fees to Melvin Tucker for his services as expert witness in

agreements between defendants, Foxx, and Lovins dealing with representation and payment of costs.

Defendants objected and asserted the attorney-client privilege regarding any confidential communications; however, defendants stated that they were willing to submit such communications to *in camera* review in order "to disprove Plaintiff's unfounded allegation that Defendants are seeking to recover any damages award beyond its actual expenses." Concluding the "asserted attorney client privilege is overruled and has been waived by" statements[4] in defendants' Answer, the trial court ordered defendants to comply with plaintiff's requests. However, the trial court also certified its order for immediate appeal.

The Court of Appeals affirmed the trial court's discovery order on different grounds. The Court of Appeals did not address the trial court's conclusion of waiver, but rather, appeared to hold that fee arrangement information categorically "is not protected information subject to the attorney-client privilege" and that the remaining information sought in this case did not implicate the privilege. *Raymond v. N.C. Police Benevolent Ass'n*, —— N.C. App. ——, 692 S.E.2d 487, 2010 WL 1316208, at *4 (Apr. 6, 2010) (No. COA09-797) (unpublished). We allowed defendants' petition for discretionary review.

As presented to this Court, the principal legal question is whether the relationship and communications between Foxx and the SSPBA, and eventually between those two and Lovins, established an attorney-client relationship. If so, then the attorney-client

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the federal lawsuit brought by Timothy Foxx against Langdon Raymond and others.

3. Any documents in the possession of either Defendant reflecting payment of court costs by either Defendant on behalf of Timothy Foxx in the federal lawsuit against Langdon Raymond and others.

4. Copies of all correspondence between Defendants and Shannon Lovins concerning Langdon Raymond and/or Timothy Foxx in the federal lawsuit referenced above including but not limited to any discussion of fees and costs of Timothy Foxx in the federal lawsuit against Langdon Raymond and others.

4. Paragraph 29 of defendants' Answer states:

It is admitted that Defendant SSPBA agreed to pay Officer Foxx's chosen counsel an hourly fee and costs associated with the litigation, however, Defendants do not know what other arrangements exist between Officer Foxx and his counsel. Defendants SSPBA and NCPBA agreed to pay Officer Foxx's attorney $100 an hour. Officer Foxx is responsible for all charges per hour above $100 an hour.

privilege applies to certain communications between them. *In re Investigation of Death of Miller* (*In re Miller*), 357 N.C. 316, 335, 584 S.E.2d 772, 786 (2003) (stating that the first step in determining whether the attorney-client privilege applies to a particular communication is whether "the relation of attorney and client existed at the time the communication was made" (quoting *State v. McIntosh*, 336 N.C. 517, 523-24, 444 S.E.2d 438, 442 (1994))). For these purposes, an attorney-client relationship is formed when a client communicates with an attorney in confidence seeking legal advice regarding a specific claim and with an intent to form an attorney-client relationship. *See N.C. State Bar v. Sheffield*, 73 N.C. App. 349, 358, 326 S.E.2d 320, 325, *cert. denied*, 314 N.C. 117, 332 S.E.2d 482, *and cert. denied*, 474 U.S. 981, 106 S. Ct. 385, 88 L. Ed. 2d 338 (1985).

Traditionally, the attorney-client relationship is found between an attorney and a single client the attorney represents. *See In re Miller*, 357 N.C. at 335, 584 S.E.2d at 786. This Court, however, has also recognized a multiparty attorney-client relationship in which an attorney represents two or more clients. *Dobias v. White*, 240 N.C. 680, 684-85, 83 S.E.2d 785, 788 (1954) (indicating that an attorney-client relationship can exist between more than two individuals when "two or more persons employ the same attorney to act for them in some business transaction").

The most common scenario involving a tripartite attorney-client relationship occurs when an insurance company employs counsel to defend its insured against a claim. *Nationwide Mut. Fire Ins. Co. v. Bourlon*, 172 N.C. App. 595, 602-03, 617 S.E.2d 40, 45-46 (2005), *aff'd per curiam*, 360 N.C. 356, 625 S.E.2d 779 (2006); N.C. St. B. Ethics Op. RPC 91, 92 (Jan. 17, 1991), *reprinted in North Carolina State Bar Lawyer's Handbook 2009*, at 200-01 (2009). In the insurance context, courts find that the attorney defending the insured and receiving payment from the insurance company represents both the insured and the insurer, providing joint representation to both clients. *Bourlon*, 172 N.C. App. at 603, 617 S.E.2d at 46 (concluding that a tripartite attorney-client relationship existed whereby an attorney provided joint representation to both the insurer and the insured). Under these circumstances, notwithstanding that usually only the insured has been sued, a tripartite attorney-client relationship exists because the interests of both the insured and the insurer in prevailing against the plaintiff's claim are closely aligned. *See id.* at 603-05, 617 S.E.2d at 46-47 (holding that a contractual duty to defend and indemnify

creates a common interest and tripartite relationship between the insurer, the insured, and the defense attorney).

The rationale for recognizing this tripartite attorney-client relationship is that individuals with a common interest in the litigation should be able to freely communicate with their attorney, and with each other, to more effectively defend or prosecute their claims. *United States v. Duke Energy Corp.*, 214 F.R.D. 383, 387 (M.D.N.C. 2003). The tripartite attorney-client relationship has been recognized by various courts. *E.g.*, *In re Grand Jury Subpoenas*, 902 F.2d 244, 249 (4th Cir. 1990) (stating that a "need to protect the free flow of information from client to attorney logically exists whenever multiple clients share a common interest about a legal matter" (quoting *United States v. Schwimmer*, 892 F.2d 237, 243-44 (2d Cir. 1989), *cert. denied*, 502 U.S. 810, 112 S. Ct. 55, 116 L. Ed. 2d 31 (1991)) (brackets and internal quotation marks omitted)); *W. Fuels Ass'n v. Burlington N.R.R. Co.*, 102 F.R.D. 201, 203 (D. Wyo. 1984) (explaining that the joint defense attorney-client privilege "enables counsel for clients facing a common litigation opponent to exchange privileged communications and attorney work product in order to adequately prepare a defense without waiving either privilege" (citations omitted)); *see also Jones v. Nantahala Marble & Talc Co.*, 137 N.C. 185, 186, 137 N.C. 237, 239, 49 S.E. 94, 95 (1904) ("All communications, whether by conversation or in writing, *between the attorneys* for a party concerning the subject-matter of the litigation are privileged." (emphasis added) (citations omitted)); *Cf. Duke Energy*, 214 F.R.D. at 391 (indicating that, although the common interest doctrine did not apply in that case, the doctrine can apply in the context of a trade association or lobbying group that represents a special interest if there is specific, ongoing litigation).

Here Foxx contacted the SSPBA seeking assistance with an employment dispute. In doing so, he communicated with an attorney at the SSPBA in confidence, seeking legal advice regarding his specific situation. To assist Foxx the SSPBA contacted Lovins regarding the dispute and ultimately put Foxx in touch with Lovins. Based on these initial interactions, Foxx intended to form an attorney-client relationship with the SSPBA. Likewise, the SSPBA and Lovins, as well as Foxx and Lovins, intended to form an attorney-client relationship. As such, an attorney-client relationship existed between Foxx and the SSPBA, and eventually between those two and Lovins, such that the attorney-client privilege applies to certain communications between them.

Subsequent communications between Foxx, the SSPBA, and Lovins also took place in the context of an attorney-client relationship. Like the common interest found in the insurance context, the common thread in the litigation here is created by the SSPBA's interest in its members' legal well-being. The SSPBA has a goal of protecting and promoting the livelihood of its members, and it was advancing its purpose by assisting with the employment dispute at Foxx's request. Additionally, like an insurer defending its insured, the SSPBA retained oversight of the litigation. Foxx paid monthly membership dues to the SSPBA and thus had a preexisting financial relationship with, as well as an expectation of assistance from, the organization. Therefore, we hold that a tripartite attorney-client relationship exists here, and as such certain communications between them are privileged.

Recognizing an attorney-client relationship in this context is essential to the role of advocacy and benevolence associations like the SSPBA. Without such a relationship confidential statements made by individuals seeking assistance from advocacy organizations would be unprotected and discoverable in litigation. The possibility of disclosure of such communications would chill the flow of information to these groups and hinder their purpose of promoting and protecting the interests of members and individuals.

The trial court is best suited to determine, through a fact-sensitive inquiry, whether the attorney-client privilege applies to a specific communication. *In re Miller*, 357 N.C. at 336, 584 S.E.2d at 787 (noting that this Court has previously held that the "responsibility of determining whether the attorney-client privilege applies belongs to the trial court" (citing *Hughes v. Boone*, 102 N.C. 121, 138, 102 N.C. 137, 160, 9 S.E. 286, 292 (1889))). In making its decision, the trial court should utilize the five-factor *Murvin* test for determining whether the attorney-client privilege applies to a particular communication:

> (1) the relation of attorney and client existed at the time the communication was made, (2) the communication was made in confidence, (3) the communication relates to a matter about which the attorney is being professionally consulted, (4) the communication was made in the course of giving or seeking legal advice for a proper purpose although litigation need not be contemplated and (5) the client has not waived the privilege.

State v. Murvin, 304 N.C. 523, 531, 284 S.E.2d 289, 294 (1981) (citation omitted). All confidential communications which satisfy the test are privileged and may not be disclosed. *In re Miller*, 357 N.C. at 328, 584 S.E.2d at 782 (quoting *McIntosh*, 336 N.C. at 523, 444 S.E.2d at 441).

To preserve the confidential nature of a person's statements while the privilege's applicability is assessed, we have previously suggested an *in camera* review as the proper mechanism. *In re Miller*, 357 N.C. at 337, 584 S.E.2d at 787 (recognizing "the need for *in camera* inspections in circumstances where application of the privilege is contested" (citations omitted)). Submitting potentially protected materials to the court for review does not waive the privilege. *Id.* ("[T]he material or communication asserted to be privileged retains its confidential nature notwithstanding an *in camera* review, at least through the review process.").

We note that, here, the trial court's order contains no findings of fact to indicate that it contemplated the type of tripartite attorney-client relationship which exists between the SSPBA, Lovins, and Foxx. Likewise, the order is unclear as to whether the trial court considered if Foxx consented to the purported waiver, as required under the "common interest" rule. *See Duke Energy*, 214 F.R.D. at 387 ("Once privilege is established under the rule, a waiver may not occur without consent of all parties who share the privilege." (quoting *In re Grand Jury Subpoenas*, 902 F.2d at 250)); *Bourlon*, 172 N.C. App. at 603-07, 617 S.E.2d at 46-48 (applying the rule in North Carolina). These matters should be addressed on remand.

In sum, we hold that a tripartite attorney-client relationship exists between the SSPBA, Lovins, and Foxx, such that communications between them which satisfy the five-factor *Murvin* test are privileged. On remand, the trial court should conduct an *in camera* review of the requested information, applying the *Murvin* test to determine whether the attorney-client privilege applies to the specific communications. Accordingly, we reverse the decision of the Court of Appeals and remand this case to that court for further remand to the Superior Court, Buncombe County, for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

IN RE REGISTRATION OF AN OHIO JUDGMENT: GARDNER V. TALLMADGE

[365 N.C. 102 (2011)]

IN THE MATTER OF REGISTRATION OF AN OHIO JUDGMENT: MICHAEL J. GARDNER v. BRUCE TALLMADGE d/b/a TALLMADGE HOLDING CO., LLC

No. 472A10

(Filed 8 April 2011)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, —— N.C. App. ——, 700 S.E.2d 755 (2010), reversing an order denying relief from foreign judgment entered on 26 October 2009 by Judge L. Todd Burke in Superior Court, Rockingham County. Heard in the Supreme Court 15 March 2011.

John F. Kostyo, pro hac vice, and Gerald S. Schafer for plaintiff-appellant.

Robertson, Medlin & Bloss, PLLC, by John F. Bloss, for defendant-appellee.

PER CURIAM.

AFFIRMED.

STATE OF NORTH CAROLINA v. MARIO LYNN PHILLIPS

No. 48A08

(Filed 16 June 2011)

1. Constitutional Law— right to counsel—no request by defendant—counsel available

Defendant's state and federal constitutional rights to counsel were not violated where investigators continued to question him after an attorney arrived at the sheriff's office and requested to see defendant, but defendant never stated that he wanted the questioning to stop or that he wanted to speak with an attorney. Indigent Defense Services rules authorizing provisional counsel to seek access to a potential capital defendant do not require law enforcement to provide that access when the suspect validly waives his or her *Miranda* rights.

2. Confessions and Incriminating Statements— voluntariness—findings—impairing substances

The trial court did not err by denying defendant's motion to suppress an inculpatory statement where defendant alleged that the court's findings as to the impairing substances he had consumed were not sufficient. Findings as to the precise amount and type of any impairing substances consumed by defendant or the time of their consumption were unnecessary for determining whether defendant's statement was given voluntarily.

3. Constitutional Law— effective assistance of counsel—failure to withdraw and testify

Defendant was not denied effective assistance of counsel in a first-degree murder prosecution by his counsel's failure to withdraw and testify about a statement by the sheriff to defense counsel that defendant was stoned. Defense counsel was in the best position to determine whether a conflict existed. Applying *Strickland v. Washington*, 466 U.S. 668, there was no reasonable possibility that the outcome of a pretrial suppression hearing, the guilt phase, or the sentencing phase would have been different but for counsel's decision.

4. Constitutional Law— due process—testimony conflicting with prior notes

There was no error in a first-degree murder prosecution where defendant contended that the prosecution knowingly

elicited or failed to correct false testimony where a witness's testimony conflicted with notes taken by prior prosecutors and an investigator. The record did not establish whether the witness's direct testimony was inaccurate, whether her pretrial interview statements were inaccurate, whether the notes of those interviews were inaccurate, or whether the witness's recollection changed. Moreover, there was no indication in the record that the State knew the testimony was false, and any inconsistency was addressed on cross-examination.

5. Evidence— detectives' statements—defendant's mental state when arrested

There was no plain error where the trial court failed to instruct *ex mero motu* that statements by detectives about defendant's physical and mental state when arrested could be considered for the truth of the matter asserted. The detectives' impressions of defendant when he was taken into custody were not especially probative of defendant's mental state at the time the crimes were committed and were not relevant to whether the State had met its burden of proof in establishing aggravating circumstances.

6. Constitutional Law— effective assistance of counsel—failure to object—no prejudice

Defendant did not establish the necessary prejudice for an ineffective assistance of counsel claim arising from the failure to object to certain statements by detectives.

7. Constitutional Law— effective assistance of counsel—failure to argue—position contrary to law

A first-degree murder defendant was not denied effective assistance of counsel where his trial counsel did not argue that out-of-court statements that were inconsistent with the witnesses' trial testimony were admissible as substantive evidence. To do so, defendant's counsel would have had to take a position contrary to the existing law of North Carolina.

8. Evidence— testimony—personal knowledge

There was no plain error in a first-degree murder prosecution in the admission of certain testimony by a victim where the statements of the witness were helpful to an understanding of her testimony and were rationally based on her perceptions at the scene.

9. Kidnapping— first-degree—lack of parental consent—evidence sufficient

The trial court did not err by denying defendant's motion to dismiss first-degree kidnapping charges on grounds that the State failed to present either direct or circumstantial evidence of lack of parental consent. Viewing the evidence in the light most favorable to the State, it was reasonable for the jury to find that the witness's parents did not consent to her being taken by defendant.

10. Criminal Law— prosecutor's argument—defense concession of guilt

The trial court did not err in the guilt-innocence phase of a first-degree murder prosecution by failing to intervene *ex mero motu* in a prosecutor's argument that allegedly mischaracterized defense counsel's statement in *voir dire* conceding guilt of second-degree murder. Although the prosecutor's comment, taken in isolation, could be understood to mean that defense counsel conceded guilt entirely, the brief misstatement did not rise to the level of gross impropriety in light of all of the arguments of the parties and the court's instructions.

11. Criminal Law— prosecutor's closing arguments—diminished capacity

The trial court did not err by not intervening *ex mero motu* in the prosecutor's argument on diminished capacity in a first-degree murder prosecution where the prosecutor merely pointed out that another witness was available, and the jury would not have interpreted another reference as setting out elements of the defense.

12. Criminal Law— prosecutor's argument—impeachment of expert witness

The trial court was not required to intervene *ex mero motu* in the prosecutor's closing argument of the prosecutor in a first-degree murder prosecution when the prosecutor referred to the "convenience" of the testimony of defendant's expert witness on diminished capacity. The prosecutor sought to impeach the expert opinion by pointing out that the doctor's opinion covered only the relatively short span that defendant was committing criminal acts.

13. Criminal Law— prosecutor's argument—diminished capacity defense—inconsistent conduct

The trial court did not err by not intervening in the guilt-innocence phase of a first-degree murder prosecution where the prosecutor argued against diminished capacity by pointing out that defendant had not made efforts to assist the victims or express remorse. The prosecutor was pointing out aspects of defendant's conduct that she contended were inconsistent with diminished capacity.

14. Criminal Law— prosecutor's argument—diminished capacity—reasonable inferences

The prosecutor did not make grossly improper comments on defendant's diminished capacity defense during her closing argument in a first-degree murder prosecution where the comments argued reasonable inferences from defendant's actions.

15. Sentencing— capital—prosecutor's argument—role of mercy

The trial court did not err by not intervening *ex mero motu* in a capital sentencing proceeding when the prosecutor discussed the role of mercy in the sentencing. The prosecutor asked the jury not to impose a sentence based on emotions divorced from the facts of the case and did not foreclose considerations of mercy or sympathy.

16. Criminal Law— prosecutor's argument—not grossly improper

Certain portions of the State's closing argument were not grossly improper and the failure to object to those arguments was not ineffective assistance of counsel. Contentions about closing arguments not raised at trial are reviewed for gross impropriety rather than plain error, and there was no ineffective assistance of counsel because there was no reasonable probability that the outcome of the trial would have been different had defense counsel objected to the arguments.

17. Sentencing— capital—mitigating circumstances—no significant history of prior criminal activity

In a capital sentencing proceeding, there was evidence to support the mitigating circumstance of no significant history of criminal activity, N.C.G.S. § 15A-2000(f)(1), and counsel did not provide ineffective assistance of counsel by moving that it be submitted.

18. Sentencing— capital—mitigating circumstances—relatively minor participant

While the trial court erred in a capital sentencing proceeding by submitting the mitigating circumstance that defendant was a relatively minor participant in the murder, the outcome would not have been different if the court had withheld the instruction.

19. Sentencing— capital—death sentence—proportionate

A sentence of death was not disproportionate where defendant personally committed three murders and participated in a fourth, killings that involved the close-range shooting of young, unarmed victims who had done defendant no wrong. One victim was killed in his own home, and the murders were part of a course of conduct.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from judgments imposing a sentence of death entered by Judge James M. Webb on 17 October 2007 in Superior Court, Moore County, upon jury verdicts finding defendant guilty of four counts of first-degree murder. On 30 April 2009, the Supreme Court allowed defendant's motion to bypass the Court of Appeals as to his appeal of additional judgments. Heard in the Supreme Court 15 February 2010.

Roy Cooper, Attorney General, by Robert C. Montgomery, Special Deputy Attorney General, and Charles E. Reece, Assistant Attorney General, for the State.

Staples S. Hughes, Appellate Defender, by Barbara S. Blackman and Anne M. Gomez, Assistant Appellate Defenders, for defendant-appellant.

EDMUNDS, Justice.

In the early morning hours of 19 December 2003, Fayetteville police notified defendant that his brother had been shot. Defendant, who had been drinking heavily in addition to using marijuana and Ecstasy the night before, apparently assumed his brother was dead and continued to consume alcohol and drugs after hearing the news. Later that morning, defendant, his girlfriend Renee McLaughlin (McLaughlin), and his friend Sean Ray (Ray) drove to Moore County to tell defendant's mother about the shooting. Afterwards, they visited Daryl Hobson (Hobson) at the Carolina Lakes Trailer Park in Carthage to buy more marijuana. Hobson had none for sale but

accompanied them to the nearby mobile home belonging to Eddie Ryals (Ryals), who he understood had drugs. There they met twenty-one-year-old Ryals, his fifteen-year-old girlfriend Amanda Cooke (Cooke),[1] eighteen-year-old Carl Justice (Justice), and nineteen-year-old Joseph Harden (Harden).

Cooke testified that after thirty to thirty-five minutes of conversation, Ryals stood up to use the bathroom, turning his back to defendant for the first time. Defendant pulled a pistol from his trousers, asked where Ryals's money and drugs were, then opened fire, shooting Ryals once in the chest and once in the abdomen. He also shot Justice once in the chest. When Ryals fell, defendant kicked him, then grabbed Ryals's shotgun from the corner of the room and beat him in the face with it, demanding money and drugs. Cooke's trial testimony described a chaotic scene, and Ryals's autopsy revealed that he was also stabbed in the neck during the melee. Ryals repeatedly said he had nothing and they could take what they wanted. He also asked them not to hurt Cooke.

Defendant turned to approach Harden, who was sitting in a chair across the room, and shot him in the chest. At some point, Harden also suffered a nonfatal stab wound to the chest. Defendant reloaded his revolver, inserting individual shells into the cylinder without apparent difficulty.

Defendant, McLaughlin, and Ray instructed Cooke and Hobson to move to the kitchen, where the doors to the outside were less accessible. Defendant and Ray dragged Ryals to the kitchen, and Ray told Cooke and Hobson to lie down on the floor. After instructing Ray and McLaughlin to make sure Cooke and Hobson did not move, defendant went through Ryals's residence searching for drugs and money.

Cooke pleaded to be released, claiming she had a baby, but defendant told her to shut up and that they could not leave any witnesses. Cooke asked McLaughlin if she could go to the bathroom, but defendant told McLaughlin to refuse the request, adding that Cooke should urinate on herself. Someone knocked on the door of Ryals's trailer, and Ray put his hand over Cooke's mouth and told her not to say a word. After the knocking stopped, defendant handed Ray a kitchen knife and told him to deal with Cooke and Hobson so that defendant would not be the only person in trouble. Defendant shot Hobson in the neck at point-blank range and Ray stabbed Hobson in

1. This witness's name at the time of trial was Amanda Cooke Varner.

the chest, inflicting a fatal wound.[2] Ray then tried to slip his hand down inside Cooke's shirt. When she threw him off and rose to her feet, defendant saw them struggling and, from a distance of approximately five feet, shot Cooke twice, once in the chest and once in the side, causing her to fall. Defendant gave Ray another knife and ordered him to "finish [Cooke] off." Ray stabbed Cooke once and began to get up from the floor, but when defendant expressed scorn, Ray stabbed her more than twenty times.

Cooke wavered in and out of consciousness but observed defendant and the others pouring gasoline in Ryals's residence and setting it afire. Defendant, McLaughlin, and Ray left the residence, although Ray paused long enough to grab Cooke by the hair and slash her throat. Once they were gone, Cooke crawled out the back door and around to the front yard. She saw an open-bed pickup truck approaching and, briefly believing help was at hand, closed her eyes. Instead, she heard defendant and Ray say they were going to kill her and, looking up, saw that defendant, Ray, and McLaughlin had emerged from the truck.

Defendant and Ray placed Cooke in the back of the truck amid several bags of garbage, and defendant then drove the truck around a corner and backed up to a trash pile. When the truck bogged down in sand and the sirens of approaching fire trucks could be heard, defendant, Ray, and McLaughlin fled, abandoning Cooke in the truck.

Cooke survived her ordeal, though she was hospitalized for thirteen days and endured numerous surgeries. Ryals, Hobson, Justice, and Harden died. Their bodies were recovered from Ryals's residence after Cameron Fire Department firefighters extinguished the blaze. Autopsies revealed that Harden died as a result of a gunshot wound to the heart, Hobson died from stab wounds to his chest, Ryals died as a result of being both shot in and stabbed in the heart, and Justice died from of a gunshot wound to the heart. Defendant was apprehended a few hours later in his mother's mobile home, across the street from Ryals's residence.

Later that day, defendant gave a detailed confession to Detective Sergeant Timothy Davis of the Moore County Sheriff's Department. In his statement, defendant said that he shot Ryals and another male with a shotgun and Hobson and another male with a pistol. He further stated that Ray stabbed the victims after defendant shot them "to

2. The evidence in the record is conflicting as to the order in which these wounds were inflicted on Hobson.

make sure that they were dead." At trial, defendant's former cellmate Frederick Brown testified that defendant told him he was incarcerated "for murder" that occurred during "an attempted robbery." According to Brown, defendant told him that he shot "Eddie" (Ryals) twice with a revolver and then shot everyone else in the residence after they lay on the floor. Defendant added that he told "Sean" (Ray) to stab everyone to make sure they were dead. Brown also testified that defendant said to him, "Brown, these crackers think that I'm crazy, so I'm just playing it off to get life and not death." Additional facts will be set out as necessary for discussion and analysis of the issues.

Defendant was indicted for four counts of first-degree murder. In addition, he was indicted for robbery of Ryals with a dangerous weapon, attempted murder of Cooke, aggravated first-degree kidnapping of Cooke (presented in two indictments), assault on Cooke with a deadly weapon with intent to kill inflicting serious injury, and first-degree arson. After the close of evidence during the guilt-innocence portion of the trial, the court dismissed one indictment for first-degree kidnapping. On 10 October 2007, the jury found defendant guilty of all four counts of first-degree murder. Each of the murder verdicts was based on malice, premeditation, and deliberation. In addition, each murder conviction was based on felony murder with the underlying felonies being robbery with a firearm and arson. The jury also found defendant guilty of first-degree kidnapping, attempted first-degree murder, assault with a deadly weapon with intent to kill inflicting serious injury, robbery with a firearm, and first-degree arson. Following a capital sentencing hearing, the jury recommended a sentence of death for each murder conviction. Defendant appealed his capital convictions to this Court, and we allowed his motion to bypass the Court of Appeals as to his other convictions.

PRETRIAL MATTERS

Defendant argues that the trial court erred in denying his motion to suppress the statement he made to Detective Davis shortly after he was apprehended. Although the trial court did not resolve this motion until the trial was under way, it was filed prior to trial, so we will consider this matter along with defendant's other pretrial issues. In his motion, defendant argued that he was denied his statutory and constitutional rights to an attorney when appointed provisional counsel, who was attempting to meet with him because he was a person over the age of seventeen charged with murder, was denied access to him

at the time he made the statement. In addition, defendant argued in the motion that he was substantially impaired from drugs and alcohol and unable to understand the consequences of his actions when he waived his *Miranda* rights.

[1] We first consider defendant's contention that he was improperly denied access to counsel. The record indicates that when defendant was arrested, he was taken to the Moore County Sheriff's Office. Upon defendant's arrival, Detective Davis gave him a printed form setting out his *Miranda* rights and read through the form with him. Defendant legibly wrote his full initials, "MLP," next to printed statements on the form informing him of his rights, acknowledging each. Most pertinent to defendant's motion to suppress, he initialed the form to acknowledge his understanding that (1) he had the right to speak to a lawyer for advice before being questioned and to have that lawyer present during questioning, and (2) if he could not afford a lawyer, he could have one appointed for him before any questioning began. After going through the form with Detective Davis and initialing each individual right, defendant signed the portion of the form waiving those rights.

Detective Davis, aided by Moore County Sheriff's Detective Sergeant Robert Langford, then questioned defendant. Although defendant at first denied any knowledge of the incident, approximately thirty minutes into the interview he responded to a question of whether he had murdered four people by saying, "F[—-] it. I did it." Detective Davis continued his questioning and, over the next two and a half hours, defendant provided an inculpatory account of the shootings. Defendant dictated the details of the crime while Detective Davis typed them into a statement. At no time did defendant request a lawyer or ask to stop the interrogation.

While defendant was with Detective Davis, attorney Bruce Cunningham (attorney Cunningham) arrived at the sheriff's office and asked to see defendant. North Carolina Capital Defender Robert Hurley had appointed attorney Cunningham to be provisional counsel for Moore County. Hurley testified at the hearing on defendant's motion to suppress that upon learning of an arrest in a potential capital case, one duty of provisional counsel is "to go immediately and try to see the defendant, explain to them their rights, and take any other action that they feel is appropriate." Consistent with these responsibilities, attorney Cunningham had gone promptly to the Moore County's Sheriff's Office. However, because defendant had not asked to speak with an attorney, attorney Cunningham was denied

access to defendant. Only after the interview was completed did investigators inform defendant that attorney Cunningham was at the sheriff's office and had requested to see him.

A criminal defendant facing imprisonment has a Sixth Amendment right to counsel under the United States Constitution. *Argersinger v. Hamlin*, 407 U.S. 25, 37, 32 L. Ed. 2d 530, 538 (1972). This right applies to the states through the Fourteenth Amendment to the United States Constitution. *State v. Morris*, 275 N.C. 50, 59, 165 S.E.2d 245, 251 (1969). In addition, Sections 19 and 23 of Article I of the North Carolina Constitution provide criminal defendants with a right to counsel. *State v. Sneed*, 284 N.C. 606, 611, 201 S.E.2d 867, 870 (1974). However, an attorney may not force himself or herself on a criminal defendant. "[T]he right to counsel belongs to the defendant, and he retains it even after counsel is appointed. . . . If defendant's waiver of his right to counsel is otherwise voluntary, knowing, and intelligent, his lawyer's wishes to the contrary are irrelevant." *State v. Reese*, 319 N.C. 110, 135, 353 S.E.2d 352, 366 (1987) (internal citations omitted), *overruled on other grounds by State v. Barnes*, 345 N.C. 184, 481 S.E.2d 44, *cert. denied*, 522 U.S. 876, 139 L. Ed. 2d 134 (1997), *and cert. denied*, 523 U.S. 1024, 140 L. Ed. 2d 473 (1998). Both this Court and the Supreme Court of the United States have held that when an attorney is seeking access to a defendant who has waived counsel, investigators are not required to make the defendant aware of the attorney's efforts. *Moran v. Burbine*, 475 U.S. 412, 425-27, 89 L. Ed. 2d 410, 423-25 (1986); *State v. Hyatt*, 355 N.C. 642, 657-58, 566 S.E.2d 61, 71-72 (2002), *cert. denied*, 537 U.S. 1133, 154 L. Ed. 2d 823 (2003). Therefore, "[u]nless the in-custody suspect 'actually requests' an attorney, lawful questioning may continue" after the suspect has waived his or her *Miranda* rights. *Hyatt*, 355 N.C. at 655, 566 S.E.2d at 70 (citation omitted).

The interrogation began before attorney Cunningham arrived at the sheriff's office. Defendant never stated that he wanted the questioning to stop or that he wanted to speak with an attorney. Accordingly, the investigators did not violate defendant's state and federal constitutional rights to counsel by continuing to question him after attorney Cunningham's arrival at the sheriff's office and request to see defendant.

Defendant also cites statutes and rules of the Office of Indigent Defense Services (IDS) to support his claim that his statement was inadmissible. By statute, indigent defendants are entitled to counsel in "[a]ny case in which imprisonment . . . is likely to be adjudged."

N.C.G.S. § 7A-451(a)(1) (2009). This "entitlement to the services of counsel begins as soon as feasible after the indigent is taken into custody or service is made upon him of the charge, petition, notice or other initiating process" and applies to, *inter alia*, "in-custody interrogation." *Id.* § 7A-451(b), (b)(1) (2009). Even so, another statute in this Article also specifically provides that "[a]n indigent person who has been informed of his right to be represented by counsel at any out-of-court proceeding, may, either orally or in writing, waive the right to out-of-court representation by counsel." *Id.* § 7A-457(c) (2009). The Indigent Defense Services Act of 2000, codified in Article 39B of N.C.G.S. Chapter 7A, established IDS in part to facilitate the provision of quality representation to indigent defendants, *id.* § 7A-498.1 (2009). In carrying out its mission, IDS promulgated Rule 2A.2(a), which provides for the appointment of provisional counsel in cases that are potentially capital:

> Upon learning that a defendant has been charged with a capital offense, the IDS Director may immediately appoint a lawyer on a provisional basis to conduct a preliminary investigation to determine whether the defendant is indigent and needs appointed counsel. Provisional counsel shall report the results of his or her investigation to the IDS Director. If the defendant has not had a first appearance in court, the IDS Director may authorize provisional counsel to attend the defendant's first appearance and advise the court whether the case is a capital case as defined by these rules and therefore subject to the appointment procedures in this subpart. Provisional counsel is authorized to take steps to protect the capital defendant's rights pending appointment of trial counsel by the IDS Director.

Indigent Def. Servs. R. 2A.2(a) ("Appointment of Trial Counsel"), 2010 Ann. R. N.C. 927, 938-39.

While this statutory and regulatory framework seeks to provide representation as expeditiously as possible to potential capital defendants who qualify for appointed counsel, it does not alter the procedure this Court previously has approved that permits defendants to waive their constitutional right to counsel. Section 7A-451(b) states only that "entitlement to the services of counsel begins as soon as feasible," while section 7A-457(c) specifically allows this right to be waived. N.C.G.S. §§ 7A-451(b), -457(c). IDS Rule 2A.2(a) states that "[p]rovisional counsel is authorized to take steps to protect the capital defendant's rights pending appointment of trial counsel." Indigent Def. Servs. R. 2A.2(a), 2010 Ann. R. N.C. at 939. While this rule autho-

rizes provisional counsel to seek access to a potential capital defendant, it does not require law enforcement to provide that access when the suspect has validly waived his or her *Miranda* rights. This assignment of error is overruled.

[2] The second issue defendant raises with respect to his motion to suppress is that, in denying the motion, the trial court erred by not making sufficient findings of fact to determine whether the statement was involuntary. Specifically, defendant contends that the court made insufficient findings of fact as to whether he had consumed impairing substances before making the statement, and if so, when he consumed these substances and how much of them he consumed.

A defendant's inculpatory statement is admissible when it "was given voluntarily and understandingly." *State v. Schneider*, 306 N.C. 351, 355, 293 S.E.2d 157, 160 (1982) (citation omitted). A confession may be involuntary when "circumstances precluding understanding or the free exercise of will were present." *State v. Allen*, 322 N.C. 176, 186, 367 S.E.2d 626, 631 (1988). "While intoxication is a circumstance critical to the issue of voluntariness, intoxication at the time of a confession does not necessarily render it involuntary. It is simply a factor to be considered in determining voluntariness." *State v. McKoy*, 323 N.C. 1, 22, 372 S.E.2d 12, 23 (1988) (citations omitted), *sentence vacated on other grounds*, 494 U.S. 433, 108 L. Ed. 2d 369 (1990). "An inculpatory statement is admissible unless the defendant is so intoxicated that he is unconscious of the meaning of his words." *State v. Oxendine*, 303 N.C. 235, 243, 278 S.E.2d 200, 205 (1981) (citations omitted).

At the evidentiary hearing conducted on defendant's motion to suppress, several witnesses testified as to the level of defendant's purported intoxication. The State called Detective Davis, who transported defendant from where he was apprehended to the sheriff's office, interrogated defendant, and took the statement at issue. Detective Davis testified that defendant readily supplied biographical information for the *Miranda* rights waiver form and wrote his initials and signature on it in a clear hand. Detective Davis added that, after being interviewed for approximately two hours, defendant had no difficulty walking with him to his office where Detective Davis typed the details of the crime as defendant described them to him. Defendant then read the typed statement and objected to the sentence, "I decided to shoot everybody else because I knew that they were witnesses." Detective Davis testified that he recalled defendant saying

those words but nevertheless redacted the sentence as requested. Once that sentence was removed, defendant signed the statement.

Detective Langford, who along with Detective Davis transported defendant to the sheriff's office and assisted with the interrogation, provided similar testimony, noting that defendant was "highly excited" when arrested, but calmed down at the sheriff's office and remained composed thereafter. Cameron Police Chief Gary McDonald, who was in brief contact with defendant at his mother's residence immediately before his arrest, testified that defendant was calm at that time and requested a cigarette from him. When asked if he had told defendant's attorney, Mr. Cunningham, that defendant "looked like he was stoned out of his mind," Chief McDonald responded that he did not remember saying it but would not deny saying it.

In addition, the State called Charles Vance, M.D., a forensic psychiatrist, as an expert witness. Dr. Vance had interviewed defendant, reviewed documents, assessed defendant's mental status both at the time of the shootings and when he was interrogated, and prepared a report. He testified that it appeared defendant "was intoxicated at some level, quite probably on a variety of different substances" during the police interviews, but concluded defendant was not so impaired as to make him incompetent to waive his *Miranda* rights.

Although defendant presented a private investigator who testified that Chief McDonald told him that defendant "appeared to be wired up" at the time of his arrest, defendant relied largely on the content of his own statement to the investigators and their testimony to support his claim of intoxication. He also presented the expert testimony of Moira Artigues, M.D., a forensic psychiatrist. She had interviewed defendant and his codefendants, reviewed pertinent documents, interviewed the arresting officers, and assessed defendant's mental status. She agreed with Dr. Vance's opinion that defendant had consumed some impairing substances the day of the offense. Her conclusion was that defendant was not able rationally to choose whether to make a confession and was not able knowingly and intelligently to waive his constitutional rights.

Based on the evidence presented during the hearing on the motion to suppress, the trial court made extensive oral findings of fact in support of its conclusions of law. The trial court found as fact that defendant initially appeared excited and nervous when arrested,

wiped spittle or white foam from his mouth when he arrived at the sheriff's office and the spittle or foam never reappeared, and vomited during his interview with Detective Davis. The trial court also found that defendant had no difficulty providing his name, address, Social Security number, and date of birth; that Detective Davis observed nothing about defendant to suggest he was impaired by alcohol; that Detective Langford did not observe the odor of any impairing substance about defendant; that defendant requested the sentence, "I decided to shoot everybody else because I knew that there were witnesses," be deleted from his statement;[3] and that defendant appeared to be very calm at the beginning of the interview. Further, the trial court found "that the defendant's level of impairment at the time of the execution of the *Miranda* rights waiver form was not sufficient—if any, was not sufficient to negate his capacity to waive his *Miranda* rights."

"When there is a *material* conflict in the evidence on *voir dire*, the judge *must* make findings of fact resolving any such material conflict." *State v. Lang*, 309 N.C. 512, 520, 308 S.E.2d 317, 321 (1983) (citation omitted). "[A] trial court's findings of fact are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting." *State v. Buchanan*, 353 N.C. 332, 336, 543 S.E.2d 823, 826 (2001) (citations and internal quotation marks omitted). The factual findings by the trial court are supported by competent evidence and resolve all material factual conflicts. Findings of fact as to the precise amount and type of any impairing substances consumed by defendant, or the time of their consumption, are unnecessary for determining whether his statement was given voluntarily.

In addition, "[w]hen reviewing a motion to suppress evidence, this Court determines whether the trial court's findings of fact . . . support the conclusions of law." *State v. Wilkerson*, 363 N.C. 382, 433-34, 683 S.E.2d 174, 205 (2009) (citation omitted), *cert. denied*, —— U.S. ——, 176 L. Ed. 2d 734 (2010). The findings of fact here adequately support the trial court's conclusion of law that defendant's statement "was made freely, voluntarily, and understandingly." This assignment of error is overruled.

[3] Defendant next contends that he did not receive effective assistance of counsel because lead defense attorney Cunningham failed to withdraw and testify as a witness for defendant, depriving him of

3. Although the trial court's recitation of the wording of this redacted sentence differed from Detective Davis's testimony, the discrepancy is immaterial.

conflict-free counsel.[4] Defendant argues that a withdrawal was necessary because attorney Cunningham remembered Chief McDonald making certain statements to Cunningham that Chief McDonald did not himself recall. Their discrepant recollections became apparent during the following portion of attorney Cunningham's direct examination of Chief McDonald at a pretrial hearing on 31 May 2007:

> [Attorney Cunningham:] Let's just get to the point and ask you whether or not you admit or deny saying to me on February 5th, 2004 in the lawyers lounge in the Moore County Courthouse that on December 19th, 2003 when you saw [defendant] his eyes were big, he was wired, and he was stoned out of his mind?
>
> . . . .
>
> [Chief McDonald:] I cannot positively say I did say that or I didn't. I don't remember saying that. That was three years ago. I really don't remember.
>
> [Attorney Cunningham:] Do you deny saying that?
>
> [Chief McDonald:] No, I'm not going to deny saying that.

During this hearing, attorney Cunningham raised no objection but instead advised the court that he felt he would need to testify and therefore would have to withdraw as defendant's counsel, pursuant to Rule 3.7 of the North Carolina State Bar's Revised Rules of Professional Conduct. That Rule generally precludes an attorney from being an "advocate at a trial in which the lawyer is likely to be a necessary witness." N.C. St. B. Rev. R. Prof. Conduct 3.7 ("Lawyer as witness"), 2010 Ann. R. N.C. 759, 842. After reflection, however, attorney Cunningham ultimately concluded that, "in light of [Chief] McDonald's testimony at the previous hearing that he didn't deny saying certain things," he would not need to withdraw and on 6 July 2007, advised the court accordingly. Attorney Cunningham thereafter represented defendant as lead counsel.

At defendant's trial, after Chief McDonald testified for the State as a prosecution witness, he was cross-examined by attorney Cunningham and the following pertinent exchange took place:

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4. We note that on 23 December 2004, defendant filed with the trial court a letter stating his dissatisfaction with attorney Cunningham and asking for new counsel. The record does not indicate that any action was taken as a result of this filing. The letter describes events that took place long before the circumstances that defendant now claims constitute ineffective assistance of counsel. Accordingly, we do not consider defendant's letter to be germane to our analysis of the issues now before us.

> [Attorney Cunningham:] [D]o you recall saying anything to me about on December 19th Mario appeared to be stoned out of his mind?
>
> . . . .
>
> [Chief McDonald:] I don't recall.
>
> [Attorney Cunningham:] Do you deny it?
>
> [Chief McDonald:] No, I don't.

Attorney Cunningham then showed Chief McDonald a handwritten set of notes, apparently taken by attorney Cunningham, and the exchange continued:

> [Attorney Cunningham:] Does that refresh your recollection as to the conversation?
>
> [Chief McDonald:] No.
>
> [Attorney Cunningham:] All right. But you don't deny saying that his eyes were wired; he was—wide open; he was wired and stoned out of his mind, do you?
>
> [Chief McDonald:] No. But I don't recall saying it.
>
> [Attorney Cunningham:] All right.

Ordinarily, to prevail on an ineffective assistance of counsel claim, a defendant must show that (1) "counsel's performance was deficient" and (2) "the deficient performance prejudiced the defense." *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693 (1984); *accord State v. Braswell*, 312 N.C. 553, 562-63, 324 S.E.2d 241, 248 (1985). However, the Supreme Court has applied a different test when the claim of ineffective assistance is based upon a conflict of interest arising out of an attorney's multiple representation of more than one defendant or party, either simultaneously or in succession, in the same or related matters. Under such circumstances, questions may arise as to the attorney's loyalty to any individual client. Defendant's argument assumes that the test applicable in the face of such a conflict also applies to the case at bar.

The United States Supreme Court has considered the appropriate response to such claims in a quartet of cases. In *Holloway v. Arkansas*, 435 U.S. 475, 55 L. Ed. 2d 426 (1978), defense counsel in a criminal case twice advised the court prior to trial of a potential conflict arising from his representation of three codefendants at the

same trial. *Id.* at 477-78, 55 L. Ed. 2d at 430. Although counsel advised the court that he could not cross-examine "one or two" of the codefendants if they testified because he had "received confidential information from them," *id.* at 478, 55 L. Ed. 2d at 430, the trial court denied counsel's pretrial motions to appoint separate counsel, *id.* at 477-78, 55 L. Ed. 2d at 430. Later, during trial, defense counsel advised the court that the potential conflict had matured into a genuine conflict because all three defendants had decided to testify. *Id.* at 478, 55 L. Ed. 2d at 431. Nevertheless, the trial court allowed each defendant to testify. *Id.* at 478-81, 55 L. Ed. 2d at 431-32. Observing that defense counsel is in the best position to determine whether a conflict exists, *id.* at 485-86, 55 L. Ed. 2d at 435, the Supreme Court acknowledged the conflict and stated that "[j]oint representation of conflicting interests . . . . effectively seal[s] [counsel's] lips on crucial matters," making it difficult to measure the precise harm to the defendants, *id.* at 489-90, 55 L. Ed. 2d at 438. Accordingly, the Court held that reversal would be automatic when the trial court improperly forced defense counsel to represent codefendants over counsel's objection. *Id.* at 488-91, 55 L. Ed. 2d at 437-38.

In *Cuyler v. Sullivan*, 446 U.S. 335, 64 L. Ed. 2d 333 (1980), the defendant was represented at his murder trial by the same two attorneys who at later trials represented codefendants whose interests arguably were inconsistent with the defendant's. *Id.* at 337-38, 64 L. Ed. 2d at 339-40. Neither Sullivan nor his attorneys objected to the serial representation. *Id.* at 337-38, 64 L. Ed. 2d at 340. The Supreme Court stated that when multiple representation gives rise to a conflict about which an objection has been raised, the trial court must give a defendant the opportunity to show that "potential conflicts impermissibly imperil [the defendant's] right to a fair trial." *Id.* at 348, 64 L. Ed. 2d at 346. However, "[u]nless the trial court knows or reasonably should know that a particular conflict exists, the court need not initiate an inquiry." *Id.* at 347, 64 L. Ed. 2d at 346. In the absence of an objection, the trial court's failure to inquire into a conflict will not result in a reversal unless the defendant demonstrates that "an actual conflict of interest adversely affected his lawyer's performance." *Id.* at 348, 350, 64 L. Ed. 2d at 346-47, 348.

In *Wood v. Georgia*, 450 U.S. 261, 67 L. Ed. 2d 220 (1981), a procedurally tangled case, the three defendants' single attorney was provided and paid by another client whose interests may have been adverse to those of the defendants. *Id.* at 266-71, 67 L. Ed. 2d at 227-30. The Supreme Court noted that the possible conflict was "suf-

ficiently apparent" at the defendants' probation revocation hearing to trigger inquiry by the trial court, *id.* at 272, 67 L. Ed. 2d at 230-31, and remanded the case for a hearing to determine whether a conflict actually existed, *id.* at 272-74, 67 L. Ed. 2d at 230-31.

Finally, in *Mickens v. Taylor*, 535 U.S. 162, 152 L. Ed. 2d 291 (2002), a murder case, the defendant's lead attorney was representing the victim on apparently unrelated criminal charges at the time the victim was killed. *Id.* at 164-65, 152 L. Ed. 2d at 299-300. When appointed later to represent the defendant, the attorney did not advise the court or anyone else of his prior representation of the victim. *Id.* at 165, 152 L. Ed. 2d at 300. The Supreme Court held that even when a trial court "fails to inquire into a potential conflict of interest about which it knew or reasonably should have known," *id.* at 164, 152 L. Ed. 2d at 299, the defendant still must establish an actual conflict that "adversely affected his counsel's performance," *id.* at 173-74, 152 L. Ed. 2d at 305. The Court added that, under *Sullivan*, no inquiry by the trial court is required if the court is aware of no more than a "vague, unspecified possibility of conflict." *Id.* at 168-69, 152 L. Ed. 2d at 302. Only when a conflict " '*actually affect[s] the adequacy of his representation*,' " will the defendant be allowed relief without having to establish prejudice. *Id.* at 171, 152 L. Ed. 2d at 304 (citation omitted). Because the circuit court had found that the petitioner in *Mickens* did not demonstrate that the conflict adversely affected counsel's performance, *id.* at 165, 152 L. Ed. 2d at 300, the Supreme Court denied habeas relief, *id.* at 173-74, 152 L. Ed. 2d at 305.

We now apply the holdings of these cases to the case at bar. Defendant argues that, pursuant to the Supreme Court's analysis in *Sullivan*, attorney Cunningham gave the trial court adequate notice of his inability to serve both as attorney and witness for defendant. As a result, defendant contends, the trial court erred not only in failing to make adequate inquiry into any actual conflict of interest but also in failing to obtain a waiver from defendant of conflict-free representation before allowing attorney Cunningham to continue representing defendant.

Accordingly, we must consider whether, under the facts presented here, the opinions in *Holloway*, *Sullivan*, *Wood*, and *Mickens* (collectively, *Sullivan*) provide an appropriate framework for analysis of defendant's claims. When issues involving successive or simultaneous representation of clients in related matters have arisen before this Court, we have applied the *Sullivan* analysis rather than

the *Strickland* framework to resolve resulting claims of ineffective assistance of counsel. *See*, *e.g.*, *State v. Murrell*, 362 N.C. 375, 405, 665 S.E.2d 61, 81 (2008) (Defense counsel previously represented in a different case a witness testifying for the State in the case at bar.), *cert. denied*, —— U.S. ——, 173 L. Ed. 2d 1099 (2009); *State v. Bruton*, 344 N.C. 381, 391, 474 S.E.2d 336, 343 (1996) (One attorney represented codefendants at same trial.). Although the United States Supreme Court and North Carolina cases cited above vary in their details, each deals with concerns arising from multiple representation. The case at bar is different. Defendant does not contend counsel inappropriately engaged in concurrent or successive representation of other parties and him. Nevertheless, he argues that attorney Cunningham's decision not to withdraw and testify as a witness for defendant created an actual conflict of interest that should be analyzed under *Sullivan* rather than *Strickland*.

We find that *Strickland* provides the correct basis for our analysis. The Supreme Court observed in *Holloway* that defense counsel is in the best position to determine whether a conflict exists. 435 U.S. at 485-86, 55 L. Ed. 2d at 435. Attorney Cunningham apparently concluded no conflict existed, and defendant does not identify any conflicting interest of attorney Cunningham created by or arising from attorney Cunningham's continuing representation of defendant. Rather, defendant argues that his lead defense attorney violated Rule 3.7(a) of the North Carolina Rules of Professional Conduct, which states that:

> (a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:
>
> (1) the testimony relates to an uncontested issue;
>
> (2) the testimony relates to the nature and value of legal services rendered in the case; or
>
> (3) disqualification of the lawyer would work substantial hardship on the client.

N.C. St. B. Rev. R. Prof. Conduct 3.7(a), 2010 Ann. R. N.C. at 842. Defendant contends that attorney Cunningham's alleged conflict arose from his responsibility to weigh the benefit of presenting evidence (his testimony) as a witness for defendant against his desire to continue representing defendant.

The applicability of the *Sullivan* line of cases has been carefully cabined by the United States Supreme Court. "The purpose of our

Holloway and *Sullivan* exceptions from the ordinary requirements of *Strickland* . . . is not to enforce the Canons of Legal Ethics, but to apply needed prophylaxis in situations where *Strickland* itself is evidently inadequate to assure vindication of the defendant's Sixth Amendment right to counsel." *Mickens*, 535 U.S. at 176, 152 L. Ed. 2d at 307. Here, unlike the circumstances posited in *Holloway* where counsel has been effectively silenced and any resulting harm difficult to measure, defendant has identified the single matter to which attorney Cunningham could have testified had he withdrawn as counsel. Because the facts do not make it impractical to determine whether defendant suffered prejudice, we conclude that *Strickland's* framework is adequate to analyze defendant's issue. Accordingly, we need not address defendant's additional arguments relating to the nature of the inquiry defendant claims the trial court should have pursued and to the knowing waiver of any conflict that defendant claims the trial court should have obtained from him, both of which are premised on the assumption that *Sullivan* applies.[5]

Under *Strickland*, "[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice," we need not determine whether counsel's performance was deficient. 466 U.S. at 697, 80 L. Ed. 2d at 699. A defendant is prejudiced under *Strickland* when, looking at the totality of the evidence, "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694, 80 L. Ed. 2d at 698; *see also Braswell*, 312 N.C. at 563, 324 S.E.2d at 248. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694, 80 L. Ed. 2d at 698. Defendant argues that attorney Cunningham's testimony regarding Chief McDonald's alleged statement would have had an effect on the outcome (1) at the hearing on defendant's suppression motion that he filed prior to trial, (2) during the guilt-innocence portion of the trial, and (3) during the sentencing proceeding. We consider each in turn.

Defendant first argues that attorney Cunningham's testimony relating to Chief McDonald's alleged comment would have affected the trial court's determination of the voluntariness of defendant's

5. Defendant cites *Wood*, 450 U.S. at 271, 67 L. Ed. 2d at 230, for the proposition that the trial court was obligated to make further inquiry after learning that attorney Cunningham did not plan to withdraw. Because we are proceeding under *Strickland*, we need not address this argument, but note that remand for such inquiry is unnecessary even under *Sullivan* when, as here, any adverse effect from an alleged attorney conflict of interest can be determined adequately from the record. *See Mickens*, 535 U.S. at 169-73, 152 L. Ed. 2d at 302-05.

waiver of his *Miranda* rights when the court considered defendant's motion to suppress his statement. In his written motion to suppress, defendant argued that "extreme impairment of defendant's faculties by drug and alcohol use, combined with mental illness, rendered involun[tary] the defendant's waiver of his right to remain silent and his agreement to speak to off[ic]ers without advice of counsel." During an evidentiary hearing on this motion, Chief McDonald testified he spent roughly forty-five seconds in defendant's immediate presence before members of the Special Response Team swept into defendant's mother's residence and took defendant into custody. As to his alleged later conversation with attorney Cunningham regarding defendant's demeanor at the time of the encounter, Chief McDonald testified he did not recall telling attorney Cunningham that defendant "looked like he was stoned out of his mind," but did not deny making the statement. In its oral order denying defendant's motion to suppress, the trial court made extensive findings of fact and concluded as a matter of law that defendant's waiver of his *Miranda* rights was voluntary.

Among the trial court's findings of fact are that defendant appeared calm to Chief McDonald when they were together in the residence for not more than forty-five seconds; that defendant was sufficiently coherent to strike a potentially damaging sentence from his statement; that defendant had no difficulty providing his name, address, Social Security number, and date of birth; and that defendant did not appear to be under the influence of any impairing substance during the interview. In light of this and other evidence recited by the trial court in its findings of fact, we conclude that even if attorney Cunningham had withdrawn as counsel and testified that Chief McDonald told him defendant appeared to be "stoned out of his mind" at the time of their brief in-person encounter, there is no reasonable probability that this evidence would have persuaded the trial court that defendant's subsequent *Miranda* waiver was involuntary.

Defendant next argues that attorney Cunningham's testimony could have affected the jury verdict. During the guilt-innocence portion of his trial, defendant presented evidence that he was not guilty of first-degree murder based upon premeditation and deliberation. Specifically, this evidence indicated that defendant suffered diminished capacity stemming from the emotional repercussions of learning that his brother had been shot in the head, compounded by defendant's drug and alcohol consumption after being so informed. We have held that:

> [A] specific intent to kill is a necessary ingredient of premeditation and deliberation. It follows, necessarily, that a defendant who does not have the mental capacity to form an intent to kill, or to premeditate and deliberate upon the killing, cannot be lawfully convicted of murder in the first degree [on the basis of premeditation and deliberation].

State v. Cooper, 286 N.C. 549, 572, 213 S.E.2d 305, 320 (1975) (internal citations omitted). Diminished mental capacity may be due to intoxication, disease, or some other cause. *Id.*

Consistent with his testimony during the pretrial suppression hearing, Chief McDonald testified during the guilt-innocence portion of defendant's trial that he did not recall, but also did not deny, stating to attorney Cunningham that defendant was "wired" and "stoned out of his mind." His recollection was not refreshed when he was confronted with attorney Cunningham's notes. Considered in light of other evidence of defendant's state of mind, Chief McDonald's impression of defendant's condition at the time of his arrest bore scant relevance to the jury's determination of defendant's mental condition hours earlier when the killings occurred. Cooke, an eyewitness to and victim of defendant's actions, testified that at the time of the murders, defendant's words were understandable and that "[h]e was fine," and "he knew what he was doing." In addition, although defendant's expert, Dr. Artigues, testified that defendant told her he attempted to kill himself by taking an overdose of the antidepressant imipramine after shooting the victims, she acknowledged that his drug ingestion following the killings had no relevance to defendant's mental capacity at the time of the killings. Accordingly, we see no reasonable probability that the jury would have reached a different verdict had attorney Cunningham withdrawn as counsel and testified to his recollection of Chief McDonald's comment.

Finally, defendant argues that attorney Cunningham's testimony could have affected the sentencing proceeding. For the reasons discussed above, we do not find that any testimony attorney Cunningham could have offered regarding Chief McDonald's limited observations of defendant long after the murders would have had an effect on the jury's findings regarding mitigating circumstances. Defendant has failed to show ineffective assistance of counsel. This assignment of error is overruled.

GUILT-INNOCENCE

[4] Defendant argues the prosecution knowingly elicited or failed to correct false testimony, thereby denying him due process, his right to a jury trial, and freedom from cruel and unusual punishment, in violation of rights guaranteed by the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and by Article I, Sections 18, 19, 23, 24, and 27 of the North Carolina Constitution. Specifically, defendant contends that the State failed to correct false testimony given by Cooke regarding statements made by defendant while inside Ryals's residence around the time of the murders.

The record indicates that, in preparing for trial, agents of the State met with Cooke. Undated notes of a meeting between Cooke and Warren McSweeney, a prior prosecutor in this case, and notes of a 7 May 2007 meeting between District Attorney Maureen Krueger, Moore County District Attorney's Office Investigator Michael Kimbrell, and Cooke, all indicate Cooke related that defendant said he had "nothing to live for" because of his brother's death. In addition, Investigator Kimbrell testified at trial that during an 11 June 2007 interview, Cooke told him that "[defendant] kept repeating they killed his brother and he didn't have anything to live for." However, during her direct examination at defendant's trial, Cooke testified as follows:

> [Krueger:] Can you tell, to the best of your recollection, what [defendant] said? Tell the jurors what he said about why he needed money.
>
> [Cooke:] Well, he was not speaking to me. He was speaking to Renee McLaughlin and Sean Ray about the fact that he had gotten in debt with a drug dealer and they were going to kill him, if he did not come up with their money.
>
> . . . .
>
> [Krueger:] What comments, if anything, did the defendant make about a situation with his brother?
>
> [Cooke:] He just kept saying that his brother had been shot and, you know, he didn't have anything and that he had to come up with the money.
>
> [Krueger:] Did he say he didn't have anything to live for?
>
> [Cooke:] Not in those terms, no.

Defendant asserts that Cooke's trial testimony was false because it contradicted the notes made of her pretrial statements and that the State benefitted in both the guilt-innocence and penalty portions of the trial because Cooke's trial testimony tended to "paint [defendant] as a cold-blooded killer" motivated by the need for money "rather than as a man distraught over the shooting of his brother."

"When the State obtains a conviction through the use of evidence that its representatives know to be false, the conviction violates the Due Process Clause of the Fourteenth Amendment." *Wilkerson*, 363 N.C. at 402-03, 683 S.E.2d at 187 (citations omitted). The violation also occurs if the State fails to correct material testimony it knows to be false. *State v. Allen*, 360 N.C. 297, 304-05, 626 S.E.2d 271, 279, *cert. denied*, 549 U.S. 867, 166 L. Ed. 2d 116 (2006). To establish materiality, a defendant must show a " 'reasonable likelihood that the false testimony could have affected the judgment of the jury.' " *Id.* at 305, 626 S.E.2d at 279 (quoting *State v. Williams*, 341 N.C. 1, 16, 459 S.E.2d 208, 217 (1995), *cert. denied*, 516 U.S. 1128, 133 L. Ed. 2d 870 (1996)). "Evidence that affects the jury's ability to assess a witness' credibility may be material." *Wilkerson*, 363 N.C. at 403, 683 S.E.2d at 187 (citation omitted). "Thus, [w]hen a defendant shows that testimony was in fact false, material, and knowingly and intentionally used by the State to obtain his conviction, he is entitled to a new trial." *Williams*, 341 N.C. at 16, 459 S.E.2d at 217 (alteration in original) (internal quotation marks omitted) (quoting *State v. Sanders*, 327 N.C. 319, 336, 395 S.E.2d 412, 423 (1990), *cert. denied*, 498 U.S. 1051, 112 L. Ed. 2d 782 (1991)). However, we have distinguished between "the knowing presentation of false testimony and knowing that testimony conflicts in some manner." *Allen*, 360 N.C. at 305, 626 S.E.2d at 279. The latter merely presents a question of fact within the province of the jury. *Id.*

Although Cooke's trial testimony is inconsistent with the notes taken by others during her pretrial interviews, the record does not establish whether Cooke's direct testimony was inaccurate, whether her pretrial interview statements were inaccurate, whether the notes of those interviews were inaccurate, or whether Cooke's recollection changed. At any rate, it is not apparent that Cooke testified falsely at trial or that her trial testimony conflicted in any material way with her pretrial statements. Moreover, any inconsistency was addressed in the presence of the jury by Cooke's subsequent cross-examination when she made the following pertinent clarification:

> [Attorney Cunningham:] You testified that you do not recall [defendant] saying anything about I have nothing left to live for?
>
> [Cooke:] Not on those terms, no.
>
> [Attorney Cunningham:] Do you remember telling [Investigator] Kimbrell in this year that [defendant's] brother had been shot and he had nothing left to live for?
>
> [Cooke:] I don't think that I put it quite that way, but I might have, but that is not the way that [defendant] actually, you know, said it.

See Wilkerson, 363 N.C. at 404, 683 S.E.2d at 188 (finding that "jurors had ample evidence with which to assess [the] credibility" of a witness when that witness's direct testimony was clarified on cross-examination to reflect accurately the witness's incentive to testify). Finally, even assuming *arguendo* that Cooke perjured herself at trial, there is no indication in the record that the State knew her testimony was false. This assignment of error is overruled.

[5] Defendant next argues the trial court committed plain error by failing to instruct the jury that prior statements by Detectives Langford and Davis could be considered for the truth of the matters asserted, on the grounds that these statements were admissions of a party opponent. In the alternative, defendant contends that his attorney's failure to object to the instruction given by the court pertaining to the jury's consideration of prior inconsistent statements, and his attorney's failure to tender a correct instruction, deprived him of effective assistance of counsel.

The statements at issue were made before trial by Detectives Langford and Davis and related to defendant's behavior and demeanor as they transported him to the Moore County Sheriff's Office after his arrest. At trial, Detective Langford testified that defendant "was leaning forward and in an excited manner" while in the car; that upon their arrival at the sheriff's office, Detective Davis told defendant to wipe some saliva off his mouth; and that defendant did not appear to be under the influence of drugs, alcohol, or any other impairing substance. When cross-examined, Detective Langford admitted that he had previously described defendant in a written statement as "talking wildly" and apparently "high on something." Detective Langford also conceded that, when asked at an earlier hearing if "it appeared to you that [defendant] was high on cocaine or some kind of drug," he had answered, "It did." Detective

Langford further stated during cross-examination that he recalled Detective Davis's describing defendant as "foaming at the mouth."

Later, when Detective Davis testified at defendant's trial, he stated in his direct examination that during the ride to the station defendant was "highly excited. He—he was looking around and he appeared to be nervous or scared." On cross-examination, Detective Davis admitted that he had previously testified that defendant was "sweating a lot and acting very paranoid, looking around a lot."

In its instructions at the conclusion of the guilt-innocence portion of defendant's trial, and later again at the conclusion of the sentencing proceeding, the trial court instructed the jury:

> When evidence has been received to show that at an earlier time a witness made a statement which may be consistent or may conflict with the witness's testimony at this trial, you must not consider such earlier statement as evidence of the truth of what was said at that earlier time because it was not made under oath at this trial.
>
> If you believe that such earlier statement was made and that it is consistent or does conflict with the testimony of the witness at this trial, then you may consider this together with all other facts and circumstances bearing upon the witness's truthfulness in deciding whether you will believe or disbelieve the witness's testimony at this trial.

Although defendant did not raise a contemporaneous objection, he now argues that this instruction was erroneous. Defendant contends that the detectives' pretrial statements and hearing testimony were admissions of a party opponent and that the jury could consider them for the truth of the matters asserted, pursuant to the hearsay exception found in N.C.G.S. § 8C-1, Rule 801(d). Defendant argues that the trial court's error prejudicially affected the jurors' deliberations both at the guilt-innocence portion of the trial and at the sentencing proceeding.

This Court has not yet considered whether statements by law enforcement officers acting as agents of the government and concerning a matter within the scope of their agency or employment constitute admissions of a party opponent under N.C.G.S. § 8C-1, Rule 801(d) for the purpose of a criminal proceeding. *Cf. State v. Villeda*, 165 N.C. App. 431, 432-34, 436-37, 599 S.E.2d 62, 63-64, 65-66 (2004) (out-of-court statements of a Highway Patrol Trooper concerning his

subjective opinions about the habits of Hispanic drivers held to be admissions within the meaning of Rule 801(d)). We need not address this issue now because, even assuming *arguendo* that the statements and testimony were admissible under the exception, defense counsel neither asked the court to instruct the jury that such statements could be considered substantively nor objected to the jury instruction that was given, which limited consideration of prior inconsistent statements to impeachment purposes only. Consequently, as defendant concedes, we apply plain error analysis. N.C. R. App. P. 10(c)(4); *State v. Gregory*, 342 N.C. 580, 584, 467 S.E.2d 28, 31 (1996).

> [T]he plain error rule . . . is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a "*fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done," or "where [the error] is grave error which amounts to a denial of a fundamental right of the accused," or the error has " 'resulted in a miscarriage of justice or in the denial to appellant of a fair trial' " or where the error is such as to "seriously affect the fairness, integrity or public reputation of judicial proceedings" or where it can be fairly said "the instructional mistake had a probable impact on the jury's finding that the defendant was guilty."

State v. Odom, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (alteration in original) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir.) (footnotes omitted), *cert. denied*, 459 U.S. 1018, 74 L. Ed. 2d 513 (1982)).

While the words and phrases used by Detectives Langford and Davis in their pretrial statements and pretrial testimony painted a somewhat more vivid picture of defendant's emotional and physical state at the time of his arrest than did their trial testimony, those terms bore no relation to defendant's condition at the time of the murders. As detailed above, Dr. Artigues, defendant's expert, differentiated between defendant's mental state when the killings took place and at the later time when he was taken into custody. Dr. Artigues attributed this difference, at least in part, to the consumption of additional drugs that defendant told her he took in those intervening hours. Detectives Langford and Davis did not observe defendant until at least four hours after the killings and after defendant's apparent additional drug ingestion. As a result, the detectives' impressions of defendant at the time he was taken into custody were

not especially probative of defendant's mental state at the time the crimes were committed and also were not relevant to a determination of whether the State had met its burden of proof in establishing aggravating circumstances. Therefore, we find that the trial court's failure to instruct *ex mero motu* that the statements of Detectives Langford and Davis could be considered for the truth of the matter asserted did not constitute plain error. Moreover, we conclude that even if the jury had been so instructed, no reasonable probability exists that the jury would have reached a different verdict or recommended a different sentence. *See, e.g.*, *State v. Bell*, 359 N.C. 1, 34, 603 S.E.2d 93, 115 (2004), *cert. denied*, 544 U.S. 1052, 161 L. Ed. 2d 1094 (2005) (no plain error when there was not a "reasonable probability" of a different outcome had the error not occurred).

[6] Defendant argues in the alternative that trial counsel failed to provide effective assistance because counsel did not object to the instruction that was given and also did not tender a proposed instruction that defendant contends correctly sets out the law. To prevail on an ineffective assistance of counsel claim, defendant must show that (1) "counsel's performance was deficient" and (2) "the deficient performance prejudiced the defense." *Strickland*, 466 U.S. at 687, 80 L. Ed. 2d at 693; *accord Braswell*, 312 N.C. at 562-63, 324 S.E.2d at 248. For the reasons stated above, defendant has failed to establish prejudice resulting from the alleged errors. This assignment of error is overruled.

[7] Defendant next makes the somewhat related argument that the trial court erred in its treatment of inconsistent statements made by witnesses. Specifically, in addition to the purportedly inconsistent testimony of Detectives Langford and Davis detailed above, defendant contends that Cooke's pretrial statements to investigators were inconsistent with her trial testimony concerning the frequency of defendant's visits to the victim's residence, the reason defendant came to the victim's residence the day of the murders, and whether defendant said that he had nothing to live for. Although the trial court instructed that the jury could consider the discrepancies between the trial testimony of each of these witnesses and their earlier statements for the purpose of determining the credibility of the witnesses, defendant contends that the trial court's failure to admit these prior inconsistent statements as substantive evidence deprived him of his rights to present a defense, trial by jury, due process, and freedom from cruel and unusual punishment. Defendant also argues that defense counsel's failure to object to the admission of these state-

ments for only limited purposes constituted ineffective assistance of counsel.

Although defendant claims that the denial of constitutional rights is reviewed de novo, the record does not indicate that these issues were raised below. This Court has previously stated that "failure to raise a constitutional issue at trial generally waives that issue for appeal." *State v. Wilson*, 363 N.C. 478, 484, 681 S.E.2d 325, 330 (2009) (citing *State v. Ashe*, 314 N.C. 28, 39, 331 S.E.2d 652, 659 (1985)); *see* N.C. R. App. P. 10(b)(1). Accordingly, we will consider only defendant's argument as it relates to whether counsel was ineffective.

Defendant contends he was denied effective assistance of counsel on the grounds that defense counsel should have argued that the witnesses' out-of-court statements, which were inconsistent with their trial testimony, were admissible as substantive evidence. To have made such an argument, defense counsel would have had to have taken a position contrary to the existing law of North Carolina. "[A] statement, other than one made by the declarant while testifying at the trial . . . offered in evidence to prove the truth of the matter asserted" is hearsay. N.C.G.S. § 8C-1, Rule 801(c) (2009). Hearsay is inadmissible unless an evidentiary rule or statute otherwise provides, *id.* Rule 802 (2009), and no rule or statute in North Carolina applies here to allow this evidence to be admitted substantively, *see State v. Williams*, 355 N.C. 501, 533, 565 S.E.2d 609, 628 (2002) ("[I]t has been established that prior inconsistent statements may not be used as substantive evidence." (citation omitted)), *cert. denied*, 537 U.S. 1125, 154 L. Ed. 2d 808 (2003). Although defendant argues that the prior inconsistent statements at issue would be admissible as substantive evidence in at least eighteen other jurisdictions, we do not believe that, to avoid being ineffective, defense counsel is required to argue a position untenable under existing North Carolina law. In other words, the failure to object to this long-standing evidentiary rule was not objectively unreasonable. *Strickland*, 466 U.S. at 687, 80 L. Ed. 2d at 693. This assignment of error is overruled.

[8] Defendant next contends that the trial court committed plain error in admitting certain testimony by Cooke. During her direct examination, Cooke, who had been at Ryals's residence, witnessed defendant's actions there, and been shot and stabbed, gave the following testimony about defendant's actions and appearance during the shootings:

> [Krueger:] Okay. And did—can you describe what [defendant's] demeanor was like? Was he angry or mad? What—what was his demeanor?
>
> [Cooke:] He was fine. I mean it was—he had—he knew what he was doing. He had it planned out. It was a—he—he knew before he ever got there what was going to happen.

Defendant did not object but now argues that the testimony that defendant "had it planned out" and "knew before he ever got there what was going to happen" was improperly admitted because Cooke had no personal knowledge of any plans defendant might have formulated before he arrived at Ryals's residence.

"A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter." N.C.G.S. § 8C-1, Rule 602 (2009). However, a lay witness may provide testimony based upon inference or opinion if the testimony is "(a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue." *Id.* Rule 701 (2009). This rule permits a witness to express "instantaneous conclusions of the mind as to the appearance, condition, or mental or physical state of persons, animals, and things, derived from observation of a variety of facts presented to the senses at one and the same time. Such statements are usually referred to as shorthand statements of facts." *State v. Boyd*, 343 N.C. 699, 711, 473 S.E.2d 327, 333 (1996) (internal quotation marks omitted) (quoting *State v. Williams*, 319 N.C. 73, 78, 352 S.E.2d 428, 432 (1987)), *cert. denied*, 519 U.S. 1096, 136 L. Ed. 2d 722 (1997).

In *Boyd*, a murder case, a witness testified that "if [the defendant] gets me I know that he is going to kill everybody." 343 N.C. at 711, 473 S.E.2d at 332. The defendant argued that the statement, "I know that he is going to kill everybody," was speculative and should not have been admitted because the witness "did not know [the] defendant would kill anyone, much less everyone." *Id.* at 711, 473 S.E.2d at 333. The disputed testimony in *Boyd* was based on the witness's "opportunity to observe [the] defendant shoot his own father, holler at his own children, reload his weapon, and threaten to shoot [the witness]." *Id.* at 712, 473 S.E.2d at 333. We concluded that the witness's testimony that the defendant was "going to kill everybody" was an instantaneous conclusion as to the defendant's condition and state of mind and therefore "clearly" admissible lay testimony under Rule 701. *Id.* at 711-12, 473 S.E.2d at 333.

Immediately before her testimony at issue here, Cooke testified that defendant had said that "[h]e was in debt with somebody who he needed money for and that's why they came to Eddie's house," that the debt was "with a drug dealer and they were going to kill him, if he did not come up with their money," and that "his brother had been shot and he was dying and he had to get their money." In this context, Cooke's statements that defendant "had it planned out" and "knew before he ever got there what was going to happen" were helpful to an understanding of her testimony and were rationally based on her perceptions upon seeing defendant enter the residence; wait for Ryals to turn his back; shoot Ryals, Justice, and Harden; reload his pistol; order Hobson and her to lie on the floor; then shoot Hobson. Accordingly, this testimony was properly admitted.

Alternatively, defendant argues that defense counsel's failure to object to this testimony constituted ineffective assistance of counsel. Because the evidence was not erroneously admitted, defendant's argument fails. *See State v. Lee*, 348 N.C. 474, 492, 501 S.E.2d 334, 345 (1998). This assignment of error is overruled.

[9] Defendant contends that the trial court erred in denying his motion to dismiss all first-degree kidnapping charges on grounds that the State failed to present either direct or circumstantial evidence of lack of parental consent. When the victim is less than sixteen years old, the crime of first-degree kidnapping requires the State prove that the defendant did "unlawfully confine, restrain, or remove [the victim] from one place to another . . . without the consent of a parent or legal custodian." N.C.G.S. § 14-39(a) (2009); *see also State v. Hunter*, 299 N.C. 29, 40, 261 S.E.2d 189, 196 (1980) (discussing the element). After the State rested its case-in-chief, defendant moved to dismiss all kidnapping charges on the grounds that the State had failed to present evidence that Cooke's parents had not consented to her being taken. The State responded that defendant's actions and the circumstances of the case provided sufficient evidence to satisfy the element. The trial court denied defendant's motion and submitted first-degree kidnapping to the jury.

A defendant's motion to dismiss should be denied if, *inter alia*, "there is substantial evidence . . . of each essential element of the offense charged, or of a lesser offense included therein." *E.g.*, *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980) (citations omitted). Whether the State pre-

sented substantial evidence of each essential element is a question of law. *State v. Olson*, 330 N.C. 557, 564, 411 S.E.2d 592, 595 (1992) (citation omitted). " 'In reviewing challenges to the sufficiency of evidence, we must view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences.' " *State v. Scott*, 356 N.C. 591, 596, 573 S.E.2d 866, 869 (2002) (quoting *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993)).

Cooke's parents did not testify, so there is no direct evidence of lack of parental consent. In addition, her parents were not at Ryals's residence when the events occurred, so defendant argues that they did not do or say anything from which a lack of consent can be inferred. However, the State presented evidence that, having shot and repeatedly stabbed Cooke while she was in Ryals's residence, defendant, McLaughlin, and Ray found her after she crawled outside and removed her from the yard for the stated purpose of killing her while she was incapable of escaping. They loaded Cooke into the bed of defendant's truck and drove to a trash pile, only to abandon her there when they heard sirens. The State argues that this circumstantial evidence of actions taken against Cooke was sufficient to establish lack of parental consent.

" 'Circumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence. If the evidence presented is circumstantial, the court must consider whether a reasonable inference of defendant's guilt may be drawn from the circumstances.' " *State v. Fritsch*, 351 N.C. 373, 379, 526 S.E.2d 451, 455 (quoting *Barnes*, 334 N.C. at 75, 430 S.E.2d at 919 (internal citations and quotation marks omitted)), *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000). When a minor is taken for the purpose of killing her, as opposed to, for example, an alleged parental kidnapping, it is reasonable to infer that the minor's parents did not consent to the removal. Although defendant also argues that Cooke's parents were deficient in a number of respects, we fail to see the relevance of such evidence to the question of consent. Viewing the evidence in the light most favorable to the State, it was reasonable for the jury to find that Cooke's parents did not consent to her being taken by defendant. This assignment of error is overruled.

Defendant next argues that the trial court erred by failing to intervene *ex mero motu* at five separate points during the State's closing argument at the conclusion of the guilt-innocence portion of the trial.

Defendant contends that, considered either individually or cumulatively, the arguments constituted gross impropriety and required intervention by the trial court. Defendant seeks a new trial on the grounds that the court's errors violated his rights under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution; Article I, Sections 18, 19, 23, 24, and 26 of the North Carolina Constitution; and N.C.G.S. § 15A-1230. We will address each of defendant's contentions in turn.

Because defendant did not object to any of these arguments below, no constitutional argument could have been presented to the trial court. As noted above, failure to raise a constitutional issue at trial generally waives that issue for appeal. *Wilson*, 363 N.C. at 484, 681 S.E.2d at 330; *Ashe*, 314 N.C. at 39, 331 S.E.2d at 659. Accordingly, we will review these purported errors for a violation of N.C.G.S. § 15A-1230 ("Limitations on argument to the jury"). In conducting this review, we are mindful that "[g]enerally, 'prosecutors are given wide latitude in the scope of their argument' and may 'argue to the jury the law, the facts in evidence, and all reasonable inferences drawn therefrom.' " *State v. Goss*, 361 N.C. 610, 626, 651 S.E.2d 867, 877 (2007) (quoting *State v. Alston*, 341 N.C. 198, 239, 461 S.E.2d 687, 709-10 (1995), *cert. denied*, 516 U.S. 1148, 134 L. Ed. 2d 100 (1996)), *cert. denied*, —— U.S. ——, 172 L. Ed. 2d 58 (2008). "Statements or remarks in closing argument 'must be viewed in context and in light of the overall factual circumstances to which they refer.' " *Id.* (quoting *Alston*, 341 N.C. at 239, 461 S.E.2d at 709).

Specifically,

> "[i]n capital cases . . . an appellate court may review the prosecution's argument, even though defendant raised no objection at trial, but the impropriety of the argument must be gross indeed in order for this Court to hold that a trial judge abused his discretion in not recognizing and correcting *ex mero motu* an argument which defense counsel apparently did not believe was prejudicial when he heard it."

State v. Rogers, 355 N.C. 420, 462, 562 S.E.2d 859, 885 (2002) (quoting *State v. Johnson*, 298 N.C. 355, 369, 259 S.E.2d 752, 761 (1979)).

> In other words, the reviewing court must determine whether the argument in question strayed far enough from 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 inter-

> vened 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.

State v. Jones, 355 N.C. 117, 133, 558 S.E.2d 97, 107 (2002). To merit a new trial, "the prosecutor's remarks must have perverted or contaminated the trial such that they rendered the proceedings fundamentally unfair." *State v. Mann*, 355 N.C. 294, 307-08, 560 S.E.2d 776, 785 (citation omitted), *cert. denied*, 537 U.S. 1005, 154 L. Ed. 2d 403 (2002).

[10] Defendant first contends that the prosecutor mischaracterized statements by defendant's trial counsel. As part of defendant's trial strategy, he did not deny being guilty of second-degree murder. Instead, he contested the first-degree murder charges, claiming he suffered from diminished capacity at the time of the offenses. Consistent with that strategy, defendant's trial counsel said to prospective jurors during voir dire:

> This case is not going to be a whodunit. This is not—there is no issue about whether Mario Phillips did what he is accused of, did—did—I didn't say that right. I didn't say that right.
>
> There's no question that four people died as a result of Mario Phillips shooting them with a gun. It's that simple. Okay?

Shortly afterwards, defense counsel added that defendant "doesn't deny he is guilty of second-degree murder."

Later, during the State's closing argument at the conclusion of the guilt-innocence portion of the trial, the prosecutor said, "Now it was said during jury selection that the defendant admits that he's guilty of what he's charged with. I believe [defendant's counsel] said that." Defendant contends that the prosecutor's argument was a "blatant distortion" of defense counsel's words, suggesting that defendant's own counsel believed him to be guilty of first-degree murder, thereby misleading or prejudicing the jury.

The prosecutor's comment obviously overstated the extent of defense counsel's concession. However, while "[c]ounsel shall not knowingly misinterpret . . . the language or argument of opposite counsel," Gen. R. Pract. Super. & Dist. Cts. 12, para. 8, 2010 Ann. R. N.C. 10, we note that the prosecutor's comment was made days after defense counsel's misstatement during jury selection and could as easily have been the result of a memory lapse as a knowing misrepresentation. While the prosecutor's statement was legally incorrect

because defendant did not admit guilt to murder in the first degree, defendant nevertheless had conceded through counsel that he had killed. In addition, the prosecutor's very next words to the jury were: "Though there are admissions in this, the State must still prove the elements of these crimes. And the State has the burden of proof of beyond a reasonable doubt."

Thus, while the prosecutor's statement mischaracterized defendant's legal position, it was apparently a *lapsus linguae* that was neither calculated to mislead nor prejudicial in effect. The statement did not personally disparage defendant or defense counsel. *See Jones*, 355 N.C. at 133-34, 558 S.E.2d at 107-08 (finding gross impropriety where prosecutor called the defendant "mean," a "loser," and "worthless," among other epithets), *cert. denied*, 543 U.S. 1023, 160 L. Ed. 2d 500 (2004); *cf. State v. Sanderson*, 336 N.C. 1, 9-11, 442 S.E.2d 33, 38-40 (1994) (finding prejudice when prosecutor made abusive comments about defense counsel both in and outside the presence of the jury). While the State's comment, taken in isolation, could be understood to mean that defense counsel conceded defendant's guilt entirely, in light of all the arguments of the parties and the trial court's correct jury instructions regarding the elements of the different degrees of murder, we conclude that this brief misstatement did not rise to the level of gross impropriety necessitating the trial court's intervention *ex mero motu*.

[11] The second statement with which defendant takes issue is the prosecutor's remark about defendant's failure to introduce certain evidence related to his diminished capacity defense. During the State's case-in-chief, Chief McDonald testified that, shortly after the murders, defendant's mother spoke with defendant on the telephone at Chief McDonald's request, then told Chief McDonald that defendant would surrender to him. Although defendant's mother attended the trial, she was not called to testify. In her closing argument, the prosecutor stated:

> Now we know that the defendant intentionally talked to his mother [after the murders]. She's been here this whole time. Did she get up and tell you the defendant was incoherent when she talked to him, that the defendant went into a sudden fit of rage? Did his own mother who talked him into surrendering tell you how he was paranoid and was upset over [his brother] Julian? No.
>
> His own mother. If she had those things to tell you when her son is on trial, don't you think she would?

Defendant argues the prosecutor improperly speculated as to what defendant's mother knew about defendant's mental capacity on the day of the murders. In addition, defendant argues that the prosecutor improperly suggested that incoherence, continuing rage, or paranoia were symptoms of diminished capacity.

Addressing first the prosecutor's observation that defendant's mother failed to testify, we note that defendant presented evidence in his own behalf. We have held that "[t]he State is free to point out the failure of the defendant[] to produce available witnesses," *State v. Tilley*, 292 N.C. 132, 144, 232 S.E.2d 433, 441 (1977), and that "[t]he prosecution may argue that a defendant failed to produce a witness or other evidence to refute the State's case," *State v. Barden*, 356 N.C. 316, 359, 572 S.E.2d 108, 136 (2002) (citations omitted), *cert. denied*, 538 U.S. 1040, 155 L. Ed. 2d 1074 (2003). *See also State v. Ward*, 338 N.C. 64, 100-01, 103, 449 S.E.2d 709, 729, 730-31 (1994) (finding no error when trial court did not intervene *ex mero motu* when the prosecutor in a capital case called attention to the defendant's failure to produce exculpatory evidence as forecast), *cert. denied*, 514 U.S. 1134, 131 L. Ed. 2d 1013 (1995). Chief McDonald's testimony about the telephone call between defendant and his mother indicated the existence of a witness who spoke with defendant shortly after the murders. The prosecutor's argument merely pointed out that a witness was available who could have corroborated defendant's defense, if that defense were valid.

As to defendant's contention that the prosecutor misstated the law on diminished capacity, we do not believe the jury would have interpreted the prosecutor's references to incoherence, rage, and paranoia as setting out elements of the defense. The trial court instructed the jury on diminished capacity and to the extent the prosecutor's argument could be construed as a misstatement of law, it was remedied by the trial court's correct jury instructions. *See State v. Price*, 344 N.C. 583, 594, 476 S.E.2d 317, 323-24 (1996) (citations omitted). Because the prosecutor's argument was not improper, the trial court had no basis for intervention *ex mero motu*.

[12] The third statement by the prosecutor of which defendant complains pertained to the credibility of Dr. Artigues, defendant's expert witness, who testified to defendant's diminished capacity. Referring to Dr. Artigues, the prosecutor stated that "[h]er description of diminished capacity over the course of two hours is wholly unbelievable." Shortly thereafter, the prosecutor added:

> It is a little convenient on the behalf of Doctor Artigues that the defendant's diminished capacity only exists during the time of criminal liability, only from the time he pulled out the gun to the time he left Amanda [Cooke]. That's the only time. Before that he's not diminished; after that he's not diminished. I would say she's not very credible in that.

Defendant contends that in these statements the prosecutor impermissibly gave her personal opinion as to the credibility of this witness.

During closing argument an attorney "may not . . . express his personal belief as to the truth or falsity of the evidence." N.C.G.S. § 15A-1230(a) (2009). The prosecutor's flat statement that Dr. Artigues's testimony was "wholly unbelievable" was therefore improper. The subsequent remark that "I would say she's not very credible" when she testified that defendant suffered diminished capacity only during a short period is more ambiguous. The comment can be read either as a statement of the prosecutor's personal belief or as a contention to the jury. At any rate, the infelicitous phrasing skirts the strictures of the statute. However, defendant did not object to either comment. In light of the overwhelming evidence against defendant, we conclude that the prosecutor's remarks did not pervert or contaminate the trial to such an extent as to render the proceedings fundamentally unfair. *Mann*, 355 N.C. at 307-08, 560 S.E.2d at 785.

As to the prosecutor's criticism of the substance of Dr. Artigues's testimony, "[a]n attorney may, however, on the basis of his analysis of the evidence, argue any position or conclusion with respect to a matter in issue." N.C.G.S. § 15A-1230(a). Generally, "it is not improper for the prosecutor to impeach the credibility of an expert during his closing argument." *State v. Campbell*, 359 N.C. 644, 677, 617 S.E.2d 1, 22 (2005) (citation and quotation marks omitted), *cert. denied*, 547 U.S. 1073, 164 L. Ed. 2d 523 (2006); *see also State v. Sexton*, 336 N.C. 321, 363, 444 S.E.2d 879, 903 (noting that the prosecutor "can argue to the jury that they should not believe a witness" (citations and quotation marks omitted)), *cert. denied*, 513 U.S. 1006, 130 L. Ed. 2d 429 (1994). The prosecutor sought to impeach Dr. Artigues's expert opinion that defendant suffered from diminished capacity by pointing out that the doctor's opinion covered only the relatively short span while defendant was committing criminal acts. The prosecutor contended both that Dr. Artigues's diagnostic sharpshooting in establishing the precise time of defendant's purported disability was

not credible and that defendant's actions during and after the killings were not consistent with her diagnosis. Accordingly, the prosecutor's reference to the "convenience" of Dr. Artigues's testimony was not grossly improper and the court was not required to intervene *ex mero motu*.

[13] The fourth statement at issue from the guilt-innocence closing argument also involved the prosecutor's discussion of defendant's diminished capacity defense. Specifically, the prosecutor argued:

> If we had one shred of evidence that [defendant] did anything to help these victims—anything—one small thing—you might have diminished capacity.
>
> If you had one shred of evidence to show he reflected and was sorry and said I—I hate that I've done this, I can't believe that I've done this—You never heard anyone say that he said I can't believe I've done this. What he did was he hit [Ryals] and he beat [Ryals] and he demanded drugs and money and then he set the house on fire.
>
> These things are totally inconsistent with diminished capacity.

Defendant contends that this statement misled the jury into believing that diminished capacity was not established because the defense failed to prove remorse or efforts to assist the victims.

The diminished capacity defense to first-degree murder on the basis of premeditation and deliberation requires proof of an inability to form the specific intent to kill. *Cooper*, 286 N.C. at 572, 213 S.E.2d at 320. We do not interpret the prosecutor's argument as requiring defendant to provide any additional proof. Instead, the prosecutor was pointing out aspects of defendant's conduct that she contended were inconsistent with diminished capacity. "An attorney may . . . on the basis of his analysis of the evidence, argue any position or conclusion with respect to a matter in issue." N.C.G.S. § 15A-1230(a). Any impropriety in the argument was cured by the court's correct jury instructions on diminished capacity. *See Price*, 344 N.C. at 594, 476 S.E.2d at 323-24.

[14] Fifth, defendant contends that the prosecutor misstated the law as to the intent required to prove first-degree murder on the basis of premeditation and deliberation when the prosecutor argued:

> So we come to the question of intent and premeditation and deliberation versus diminished capacity. Our actions speak louder than words. We do the things we intend to do.
>
> . . . .
>
> It doesn't make sense, if you're talking about diminished capacity, that you then would proceed to rob somebody. Our actions mean something. If I rob you, I've intended to rob you. I don't commit a diminished capacity murder and then suddenly decide I'm going to rob you.

Defendant contends that this argument impermissibly relieved the State of the burden of proving the element of intent.

To prove the specific intent element of first-degree murder based upon premeditation and deliberation, the State must show not only an intentional act by the defendant that caused death, but also that "the defendant intended for his action to result in the victim's death." *State v. Keel*, 333 N.C. 52, 58, 423 S.E.2d 458, 462 (1992). When, as here, the defendant claims diminished capacity, the jury must decide whether the defendant was able to form the required specific intent. As the trial judge correctly stated in his subsequent instructions to the jury, "[i]ntent is a mental attitude seldom provable by direct evidence. It must ordinarily be proved by circumstances from which it may be inferred." It follows that the State may rebut a claim of diminished capacity by pointing to actions by a defendant before, during, and after a crime that indicate the existence of, or are consistent with, specific intent. *See State v. Jones*, 358 N.C. 330, 351, 595 S.E.2d 124, 137 (prosecutor's response to a defense of diminished capacity held proper when based upon reasonable inferences drawn from the evidence), *cert. denied*, 543 U.S. 1023, 160 L. Ed. 2d 500 (2004).

The two comments highlighted by defendant were part of a lengthy rebuttal of the diminished capacity defense. During this argument, the prosecutor stated, "You look at someone's actions before an event, during an event, and after an event to determine what is it that they mean," then described numerous actions defendant took around the time of the murders and contended that each was intentional. The two comments at issue served to rebut defendant's diminished capacity defense by arguing reasonable inferences from defendant's actions. The prosecutor never argued that the jury was relieved of its burden to find defendant had specific intent to commit the offenses. Given the wide latitude afforded to counsel during closing arguments, we do not find the statements to be improper, much

less grossly so. Cases cited by defendant relating to a judge's jury instructions that were found to relieve the prosecution of its burden of proving intent are inapposite to our analysis of this closing argument. *Cf. Sandstrom v. Montana*, 442 U.S. 510, 512, 521, 61 L. Ed. 2d 39, 43, 49 (1979) (concluding that jury instruction stating that "the law presumes that a person intends the ordinary consequences of his voluntary acts" violates the Fourteenth Amendment by relieving the State of its burden of proof as to a defendant's state of mind (internal quotation marks omitted)); *Morissette v. United States*, 342 U.S. 246, 249, 273-76, 96 L. Ed. 288, 293, 306-07 (1952) (reversing conviction when trial court instructed that felonious intent was presumed by the defendant's mere act of taking certain property). Even assuming *arguendo* that the prosecutor's statements were improper, any error was cured by the trial court's correct jury instructions. *E.g.*, *State v. Trull*, 349 N.C. 428, 452, 509 S.E.2d 178, 194 (1998) (citation omitted), *cert. denied*, 528 U.S. 835, 145 L. Ed. 2d 80 (1999).

Based on the record, we conclude that these statements made during the prosecutor's closing argument in the guilt-innocence portion of defendant's trial, considered both individually and cumulatively, were not so grossly improper as to have required the trial court to intervene *ex mero motu*. These assignments of error are overruled.

SENTENCING PROCEEDING

[15] Defendant contends the trial court erred by failing to intervene *ex mero motu* when the prosecutor discussed the role of mercy during the State's closing argument at the conclusion of the sentencing proceeding:

> We look at the law and at the facts, the facts as you decided them to be, and not our feelings and not our hearts to decide whether or not death is the just verdict.
>
> . . . .
>
> The facts of this case—the facts of this case demand one verdict and that is death.
>
> Your hearts may tell you to be merciful even though the defendant was not. But we are not bound by mercy in this courtroom. We're not bound by our hearts. We're bound by duty.

Defendant contends that the prosecutor erroneously called upon the jury to disregard mercy altogether, thereby contaminating the jury's weighing of aggravating and mitigating circumstances.

"The standard of review for assessing alleged improper closing arguments that fail to provoke timely objection from opposing counsel is whether the remarks were so grossly improper that the trial court committed reversible error by failing to intervene *ex mero motu*." *Jones*, 355 N.C. at 133, 558 S.E.2d at 107 (citation omitted). Prosecutors generally are afforded wide latitude in closing argument. *E.g.*, *Goss*, 361 N.C. at 626, 651 S.E.2d at 877. Remarks that do not draw a contemporaneous objection are viewed in context and constitute reversible error only when they have made the proceedings fundamentally unfair. *Mann*, 355 N.C. at 307-08, 560 S.E.2d at 785.

This Court has held that in sentencing proceeding closing arguments prosecutors may " 'argue to the sentencing jury that its decision should be based not on sympathy, mercy, or whether it wants to kill the defendant, but on the law.' " *State v. Cummings*, 361 N.C. 438, 469, 648 S.E.2d 788, 806 (2007) (quoting *State v. Frye*, 341 N.C. 470, 506, 461 S.E.2d 664, 683 (1995), *cert. denied*, 517 U.S. 1123, 134 L. Ed. 2d 526 (1996)), *cert. denied*, 552 U.S. 1319, 170 L. Ed. 2d 760 (2008). We also have upheld a prosecutor's sentencing proceeding closing argument "admonishing the jurors that feelings of sympathy and forgiveness rooted in their hearts and not also in the evidence may not be permitted to affect their verdict." *State v. Price*, 326 N.C. 56, 88, 388 S.E.2d 84, 102, *sentence vacated on other grounds*, 498 U.S. 802, 112 L. Ed. 2d 7 (1990); *see also State v. Rouse*, 339 N.C. 59, 93, 451 S.E.2d 543, 561 (1994) (noting that "the prosecutor may discourage the jury from having mere sympathy not related to the evidence in the case affect its decision" (citation omitted)), *cert. denied*, 516 U.S. 832, 133 L. Ed. 2d 60 (1995), *and overruled in part on other grounds by State v. Hurst*, 360 N.C. 181, 198-99, 624 S.E.2d 309, 322-23, *cert. denied*, 549 U.S. 875, 166 L. Ed. 2d 131 (2006).

The arguments in question, cautioning jurors against reaching a decision on the basis of their "feelings" or "hearts," did not foreclose considerations of mercy or sympathy. Instead, the prosecutor asked the jury not to impose a sentence based on emotions divorced from the facts presented in the case. In addition, during the argument the prosecutor also urged the jury to base its decision on "the evidence in this case" and to consider that it had already "decided what the true facts are," while reminding the jury that the trial court would instruct on the applicable law. Because this argument was not improper, the trial court did not err by failing to intervene *ex mero motu*. This assignment of error is overruled.

[16] In a related argument, defendant contends that his trial counsel's failure to object to several portions of the State's closing arguments both at the guilt-innocence portion of the trial and at the sentencing proceeding constituted ineffective assistance of counsel because, in the absence of an objection, defendant has had to argue that admission of the allegedly improper statements was plain error. However, as noted above, when trial counsel fails to raise a timely objection to opposing counsel's closing argument, we do not review for plain error, but instead determine whether the comments were so grossly improper that the trial court failed to intervene *ex* mero *motu*. *Jones*, 355 N.C. at 133, 558 S.E.2d at 107. Such remarks constitute reversible error only when they render the proceeding fundamentally unfair. *Mann*, 355 N.C. at 307-08, 560 S.E.2d at 785. In addition to his counsel's failure to object to the arguments discussed above, defendant also asserts that defense counsel was ineffective for failing to object to the prosecutor's arguments that: (1) the jury should answer Issue Three "Yes" if it found that aggravating and mitigating circumstances have equal weight; (2) the jury had already found the aggravating factors by virtue of its guilty verdicts; and (3) the jury is the voice and conscience of the community. We consider below in the "Preservation" portion of this opinion whether these additional arguments constituted reversible error and find that they do not. Defendant now contends that he is entitled to relief on grounds of ineffective assistance of counsel based upon counsel's failure to object to each of these arguments. Defendant adds that if the record contains insufficient information on which to resolve his claims, we should dismiss the assignment of error without prejudice to raise these matters in the trial division by means of a motion for appropriate relief.

Ineffective assistance of counsel "claims brought on direct review will be decided on the merits 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, 557 S.E.2d 500, 524 (2001) (citations omitted), *cert. denied*, 535 U.S. 1114, 153 L. Ed. 2d 162 (2002). The incidents that defendant here argues constitute ineffective assistance of counsel may be determined from the record on appeal, so we can address them on the merits without the necessity to remand for an evidentiary hearing.

To demonstrate prejudice when raising an ineffective assistance of counsel claim, defendant must show that based on the totality of

the evidence there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694, 80 L. Ed. 2d at 698; *see also Braswell*, 312 N.C. at 563, 324 S.E.2d at 248. After having reviewed each of these arguments for substantive error, we found that none was so grossly improper as to render defendant's trial fundamentally unfair. We now further conclude that a reasonable probability does not exist that the outcome of the trial would have been different had defense counsel objected to these arguments. Accordingly, trial counsel's failure to object to these arguments is not ineffective assistance of counsel. This assignment of error is overruled.

Defendant's next issues relate to two mitigating circumstances that the trial court submitted to the sentencing jury. The trial court submitted the N.C.G.S. § 15A-2000(f)(1) circumstance, that "defendant has no significant history of prior criminal activity," and, with respect to the murder of Hobson, the N.C.G.S. § 15A-2000(f)(4) circumstance, that "defendant was an accomplice in or accessory to the capital felony committed by another person and his participation was relatively minor." Defendant asserts that the State's closing argument in the sentencing proceeding used the submission of these mitigating circumstances to ridicule defendant and undermine all of defendant's mitigating evidence. Defendant argues that the trial court erred in submitting these mitigating circumstances because they were not supported by the evidence but, conceding that each was requested by defendant's trial counsel, adds that the record suggests that in making the requests, counsel failed to provide effective assistance.

[17] We consider first the (f)(1) mitigating circumstance. We have held that if this circumstance is erroneously submitted to the jury upon the defendant's request, we review for invited error. *State v. Polke*, 361 N.C. 65, 70-71, 638 S.E.2d 189, 192-93 (2006), *cert. denied*, 552 U.S. 836, 169 L. Ed. 2d 55 (2007). However, we first must make the threshold inquiry whether the circumstance was supported by evidence in the record. N.C.G.S. § 15A-2000(b) (2009). If so, its submission was not error.

During a recess in the sentencing proceeding, the State informed the court that it possessed documentation of defendant's prior criminal convictions. These were felony breaking and entering in 1999, felony larceny in 1998, driving under the influence in 1996, larceny in 1993, sale of marijuana in 1991, and sale of a narcotic or controlled substance in 1990. Although defense counsel responded that he did not intend to ask the trial court to submit the (f)(1) mitigating cir-

cumstance, the prosecutor reminded the judge that the law might require submission of the circumstance even in the absence of a request if the record supported its submission. After overnight consideration, defense counsel moved to renumber the documents as defense exhibits and introduce them in its own case during the sentencing proceeding in support of the (f)(1) mitigating circumstance. These documents were received in evidence by the trial court, and at the charge conference defendant specifically asked for the (f)(1) instruction. During its sentencing proceeding closing argument, the State contended to the jury that defendant's prior convictions were in fact significant and that the jury should not find the (f)(1) mitigating circumstance. No juror found that the (f)(1) circumstance applied.

In discussing a capital defendant's criminal history, we have held that "[i]f the trial court determines that a rational jury could find that defendant had no significant history of prior criminal activity," the trial court must submit the (f)(1) mitigating circumstance to the jury. *Barden*, 356 N.C. at 372, 572 S.E.2d at 143 (citation omitted). "Significant" in this context means "likely to have influence or effect upon the determination by the jury of its recommended sentence." *State v. Walls*, 342 N.C. 1, 56, 463 S.E.2d 738, 767 (1995) (citation omitted), *cert. denied*, 517 U.S. 1197, 134 L. Ed. 2d 794 (1996). "[A]ny reasonable doubt regarding the submission of a statutory or requested mitigating factor [must] be resolved in favor of the defendant." *State v. Brown*, 315 N.C. 40, 62, 337 S.E.2d 808, 825 (1985) (citation omitted), *cert. denied*, 476 U.S. 1165, 90 L. Ed. 2d 733 (1986), *and overruled in part on other grounds by State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373 (1988).

Defendant's prior convictions were somewhat remote in time and do not appear to involve violence against a person. *See State v. Fletcher*, 348 N.C. 292, 325-26, 500 S.E.2d 668, 687-88 (1998) (citing cases in which the trial court properly concluded that submission of the (f)(1) mitigating circumstance was proper while listing the age and nature of each defendant's prior offenses), *cert. denied*, 525 U.S. 1180, 143 L. Ed. 2d 113 (1999). We conclude that evidence in the record supported the trial court's decision to give the instruction. Because the instruction was proper, defense counsel did not invite error and did not provide ineffective assistance by moving that it be given.

[18] Turning to defendant's argument regarding the applicability of the (f)(4) mitigating circumstance in relation to the murder of Hobson, we have held that, to warrant submission of this mitigating

circumstance, "it is necessary that there be evidence tending to show (1) that defendant was an accomplice in or an accessory to the capital felony committed by another, and (2) that his participation in the capital felony was relatively minor." *State v. Stokes*, 308 N.C. 634, 656, 304 S.E.2d 184, 197 (1983). The evidence at trial indicated that defendant shot Hobson in the neck, although Hobson's death resulted from stab wounds to the chest inflicted by Ray at defendant's instruction. The doctor who performed the autopsy testified that the bullet wound was not fatal, but would have caused temporary paralysis and, if not treated, may have resulted in permanent paralysis. The State later argued to the jury that it should not find the (f)(4) mitigating circumstance because defendant was a major participant in Hobson's murder. No juror found the (f)(4) mitigating circumstance.

A judge in a capital case shall instruct "the jury that it must consider any . . . mitigating circumstance or circumstances . . . which may be supported by the evidence." N.C.G.S. § 15A-2000(b). "[A] trial court has no discretion in determining whether to submit a mitigating circumstance when 'substantial evidence' in support of the circumstance has been presented." *State v. Watts*, 357 N.C. 366, 377, 584 S.E.2d 740, 748 (2003) (quoting *State v. Fletcher*, 354 N.C. 455, 477, 555 S.E.2d 534, 547 (2001), *cert. denied*, 537 U.S. 846, 154 L. Ed. 2d 73 (2002)), *cert. denied*, 541 U.S. 944, 158 L. Ed. 2d 370 (2004). Although the violence defendant inflicted on this victim was, whether by design or by chance, less than the violence inflicted by defendant on the others, we are unable to conclude that defendant's actions in shooting Hobson in the neck and instructing Ray to inflict the stab wounds that proved fatal, constituted relatively minor participation. The (f)(4) mitigating circumstance was not supported by substantial evidence.

Consequently, the trial court erred in providing the (f)(4) instruction to the jury. However, we have held that, "[a]bsent extraordinary facts . . . , the erroneous submission of a mitigating circumstance is harmless." *State v. Bone*, 354 N.C. 1, 16, 550 S.E.2d 482, 492 (2001) (alterations in original) (citations and quotation marks omitted), *cert. denied*, 535 U.S. 940, 152 L. Ed. 2d 231 (2002). Although defendant argues that he was prejudiced by the State's ridicule of this mitigating circumstance, in light of the facts of this case, where defendant not only killed three victims himself but shot and directed the fatal stabbing of the fourth, we are convinced that the outcome would not have been different if the trial court had withheld the instruction. In the absence of "extraordinary facts," we conclude that the trial court's

error, whether invited or not, was harmless. Accordingly, defense counsel's request for an instruction that did no harm and did not prejudice defendant, *see Strickland*, 466 U.S. at 694, 80 L. Ed. 2d at 698; *see also State v. Braswell*, 312 N.C. at 563, 324 S.E.2d at 248, did not constitute ineffective assistance.

PRESERVATION ISSUES

Defendant raises three additional issues that he concedes have previously been decided by this Court contrary to his position. First, defendant contends that the trial court erred by not intervening *ex mero motu* during the State's closing argument in the sentencing proceeding when the prosecutor incorrectly indicated to the jurors that if they found the mitigating and aggravating circumstances listed on Issue Three of the Issues and Recommendation Form to be in equipoise, they must answer Issue Three "Yes" and proceed to Issue Four. However, the trial court properly instructed the jury on its responsibilities when considering Issue Three, curing the misstatement. Defendant acknowledges that this issue has been decided against him. *State v. Taylor*, 362 N.C. 514, 554, 669 S.E.2d 239, 270 (2008), *cert. denied*, —— U.S. ——, 175 L. Ed. 2d 84 (2009).

Second, defendant argues the trial court erred by failing to intervene *ex mero motu* when the prosecutor argued during its sentencing proceeding closing statement that by virtue of its verdicts in the guilt-innocence portion of the trial, the jury had already found the aggravating circumstances pertaining to "course of conduct" and "pecuniary gain." As defendant acknowledges, this Court has previously held such statements, especially when followed by proper jury instructions, do not rise to the level of gross impropriety. *Id.* at 552, 669 S.E.2d at 269; *accord Barden*, 356 N.C. at 366, 572 S.E.2d at 140 (no prejudicial error found in similar statement by prosecutor regarding the pecuniary gain aggravator).

Third, defendant contends the State's allusion to the jury as the "voice of the community" improperly focused attention on community expectations. This Court has repeatedly upheld such characterizations. *State v. Nicholson*, 355 N.C. 1, 43-44, 558 S.E.2d 109, 138, *cert. denied*, 537 U.S. 845, 154 L. Ed. 2d 71 (2002); *State v. Scott*, 314 N.C. 309, 311-12, 333 S.E.2d 296, 298 (1985). We have considered defendant's arguments on these issues and decline to depart from our prior holdings. These assignments of error are overruled.

PROPORTIONALITY REVIEW

[19] As required by N.C.G.S. § 15A-2000(d)(2), we now consider whether the record supports the aggravating circumstances found by the jury, whether the death sentence "was imposed under the influence of passion, prejudice, or any other arbitrary factor," and whether the death sentence "is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." N.C.G.S. § 15A-2000(d)(2) (2009).

We begin with the aggravating circumstances. Defendant was convicted of four counts of first-degree murder both on the basis of malice, premeditation, and deliberation and under the felony murder rule. He also was convicted of first-degree kidnapping, assault with a deadly weapon with intent to kill inflicting serious injury, attempted first-degree murder, robbery with a firearm, and first-degree arson. The trial court submitted two aggravating circumstances for the jury's consideration: (1) the murder was committed for pecuniary gain, pursuant to section 15A-2000(e)(6); and (2) the murder was part of a course of conduct in which defendant engaged and which included the commission by defendant of other crimes of violence against another person or persons, pursuant to section 15A-2000(e)(11). The jury found both of these aggravating circumstances to exist beyond a reasonable doubt. Our review of the record indicates that both circumstances were fully supported by the evidence presented at trial.

Although defendant contends that the death sentence was imposed under the influence of passion and prejudice and that other alleged errors at trial discussed above left the jury no choice but to base its decision on emotion rather than reason, we detect no indication anywhere in the record that the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor.

In conducting our proportionality review, we determine whether the death sentence "is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." *Id.* § 15A-2000(d)(2). We compare this case with those in which we have determined the death penalty was disproportionate. This Court has held the death penalty to be disproportionate in eight cases: *State v. Kemmerlin*, 356 N.C. 446, 573 S.E.2d 870 (2002); *State v. Benson*, 323 N.C. 318, 372 S.E.2d 517 (1988); *State v. Stokes*, 319 N.C. 1, 352 S.E.2d 653 (1987); *State v. Rogers*, 316 N.C. 203, 341 S.E.2d

713 (1986), *overruled on other grounds by State v. Gaines*, 345 N.C. 647, 483 S.E.2d 396, *cert. denied*, 522 U.S. 900, 139 L. Ed. 2d 177 (1997), *and by State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373 (1988); *State v. Young*, 312 N.C. 669, 325 S.E.2d 181 (1985); *State v. Hill*, 311 N.C. 465, 319 S.E.2d 163 (1984); *State v. Bondurant*, 309 N.C. 674, 309 S.E.2d 170 (1983); and *State v. Jackson*, 309 N.C. 26, 305 S.E.2d 703 (1983). We conclude that defendant's case is not substantially similar to any of these.

Defendant personally committed three murders and participated in a fourth. "This Court has never found a sentence of death disproportionate in a case where a defendant was convicted of murdering more than one victim." *State v. Meyer*, 353 N.C. 92, 120, 540 S.E.2d 1, 17 (2000) (citation omitted), *cert. denied*, 534 U.S. 839, 151 L. Ed. 2d 54 (2001). We also consider the brutality of the murders. *State v. Duke*, 360 N.C. 110, 144, 623 S.E.2d 11, 33 (2005) (citations omitted), *cert. denied*, 549 U.S. 855, 166 L. Ed. 2d 96 (2006). These killings involved the close-range shooting of young, unarmed victims who had done defendant no wrong. Victim Ryals was killed in his own home, a place where a person has a right to feel secure. *State v. Holmes*, 355 N.C. 719, 745, 565 S.E.2d 154, 172 (citation omitted), *cert. denied*, 537 U.S. 1010, 154 L. Ed 2d 412 (2002).

Defendant was convicted of first-degree murder under the felony murder rule and on the basis of malice, premeditation, and deliberation. "Although a death sentence may properly be imposed for convictions based solely on felony murder, a finding of premeditation and deliberation indicates a more calculated and cold-blooded crime for which the death penalty is more often appropriate." *Taylor*, 362 N.C. at 563, 669 S.E.2d at 276 (citations and internal quotation marks omitted). This Court has previously found the section 15A-2000(e)(6) aggravating circumstance (stating that the murder "was committed for pecuniary gain"), standing alone, sufficient to uphold a death sentence. *See State v. Chandler*, 342 N.C. 742, 760, 764, 467 S.E.2d 636, 646, 649, *cert. denied*, 519 U.S. 875, 136 L. Ed. 2d 133 (1996); *Ward*, 338 N.C. at 124, 129, 449 S.E.2d at 743, 746. Similarly, this Court has previously found that the section 15A-2000(e)(11) aggravating circumstance (The murder was committed as "part of a course of conduct in which the defendant engaged and which included the commission by the defendant of other crimes of violence against another person or persons.") is by itself sufficient to support a death sentence. *Polke*, 361 N.C. at 77, 638 S.E.2d at 196 (citing *State v. Bacon*, 337 N.C. 66, 110 n.8, 446 S.E.2d 542, 566 n.8 (1994), *cert. denied*, 513

U.S. 1159, 130 L. Ed. 2d 1083 (1995)). These murders were part of a course of conduct involving arson, assault, and kidnapping, among other criminal acts.

This Court also compares the present case with cases in which we have found the death penalty to be proportionate. *State v. al-Bayyinah*, 359 N.C. 741, 762, 616 S.E.2d 500, 515 (2005), *cert. denied*, 547 U.S. 1076, 164 L. Ed. 2d 528 (2006). After carefully reviewing the record, we conclude that this case is more analogous to cases in which we have found the sentence of death to be proportionate than to those cases where we have found it disproportionate or to those cases in which juries have consistently recommended sentences of life imprisonment. Although defense counsel presented evidence of several mitigating circumstances, including defendant's mental or emotional disturbance at the time of the crime and his borderline level of intellectual functioning, and although at least one or more jurors found several of these mitigating circumstances to exist, we are nonetheless convinced that the sentence of death here is not disproportionate.

Accordingly, we conclude that defendant received a fair trial and capital sentencing proceeding, free from prejudicial error, and the death sentence recommended by the jury and imposed by the trial court is not disproportionate. Accordingly, the judgments of the trial court are left undisturbed.

NO ERROR.

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

MORRIS COMMUNICATIONS CORPORATION D/B/A FAIRWAY OUTDOOR ADVERTISING, PETITIONER v. CITY OF BESSEMER CITY ZONING BOARD OF ADJUSTMENT, RESPONDENT

No. 150A10

(Filed 16 June 2011)

1. Appeal and Error— standard of review—administrative decision—de novo

A *de novo* standard of review applied to plaintiff's argument on appeal that defendant Board of Adjustment's (BOA) interpretation of the term "work" as used in a sign permit issued to plaintiff constituted an error of law. The BOA's interpretation was not entitled to deference.

2. Zoning— sign permit—interpretation of ordinance—unduly restrictive

The Board of Adjustment (BOA) erred in prohibiting plaintiff from relocating a sign as necessary to accommodate a state highway project based on the BOA's determination that a sign permit issued to plaintiff had expired. The BOA's interpretation of the term "work" as used in the sign permit to mean only visible activities related to construction was too narrow and unduly restrictive. Zoning ordinances are strictly construed in favor of the free use of real property and plaintiff's actions were sufficient to constitute "work."

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, —– N.C. App. ——, 689 S.E.2d 880 (2010), affirming a judgment and order entered on 31 October 2008 by Judge Thomas W. Seay, Jr. in Superior Court, Gaston County. On 26 August 2010, the Supreme Court allowed petitioner's petition for discretionary review as to an additional issue. Heard in the Supreme Court 15 November 2010.

Van Winkle, Buck, Wall, Starnes & Davis, P.A., by Craig D. Justus, for petitioner-appellant.

Gray, Layton, Kersh, Solomon, Furr & Smith, P.A., by David W. Smith, III and Michael L. Carpenter, for respondent-appellee.

MARTIN, Justice.

In this appeal we consider whether a local board of adjustment erred in prohibiting a company from relocating a sign as necessary to accommodate a state highway project.

In 2000 Morris Communications Corporation d/b/a Fairway Outdoor Advertising (Fairway) lawfully constructed a sign on land situated along the Gastonia Highway in Bessemer City, North Carolina. The sign stood in close proximity to the highway and a NAPA auto parts store located on the same parcel. In July 2005 the North Carolina Department of Transportation (DOT) notified Fairway that it was condemning a portion of the parcel to widen the highway. As a result, the sign had to be relocated and the NAPA building had to be renovated. To accommodate the DOT project, Fairway applied for a Bessemer City sign permit. On 31 August 2005, the Bessemer City zoning administrator met with a Fairway representative and issued a sign permit to Fairway. During their meeting the administrator and the Fairway representative discussed the sign relocation project. According to the Bessemer City sign ordinance, Fairway's permit would expire on 27 February 2006 unless Fairway began "the work described in . . . [the] sign permit . . . within six months from the date of issuance." City of Bessemer City, N.C., Ordinance § 155.207. Fairway's sign permit stated that "[t]he applicant is responsible for obtaining a building permit (if required) prior to commencing work on the proposed improvement."

In November 2005 Fairway applied for a building permit at the Gaston County building inspection department, which administers building permits for Bessemer City. The county issued Fairway a building permit on 13 December 2005. The county building permit contained language similar to the Bessemer City sign ordinance, stating that "[t]his permit becomes null and void if work or construction authorized is not commenced within 6 months, or if construction or work is suspended, or abandoned for a period of 1 year at any time after work is started."

Soon after the sign permit was issued, Fairway began negotiating with DOT and the property owner, Ralph Dixon (Dixon). This process included communicating with DOT about the location of the highway's expanded right-of-way and discussions with Dixon about his plans for the NAPA building. As part of these negotiations, DOT indicated in a letter dated 2 December 2005 that it would pay Fairway $14,850.00 for the sign relocation. Fairway received another letter from DOT dated 21 February 2006 stating that Fairway had to remove the sign from the road widening project right-of-way "on or before" 15 March 2006. Fairway also began renegotiating the lease governing the sign with Dixon. On 27 February 2006, the day the sign permit was scheduled to expire if "work" had not commenced, Fairway issued an

internal work order to remove the sign. On 9 March 2006, Fairway sent DOT a letter about its "tentative relocation plans for th[e] sign" and expressing its desire to remove the sign on or before 13 June 2006, several days before the widening project contract would be awarded. DOT orally agreed to push the removal date back to 19 June 2006. On 8 June 2006, Fairway applied for and received a renewed building permit from Gaston County. The renewed permit was scheduled to expire on 8 December 2006. On 12 June 2006, Bessemer City amended its zoning ordinance to ban most outdoor advertising.

On 13 June 2006, Fairway took down the sign in compliance with DOT's instructions. The sign, its poles, and other component parts were placed in storage off the property. The sign and related equipment remained in storage for more than five months while Fairway waited for DOT to finalize the exact location of the right-of-way and for Dixon to reconstruct the NAPA building. The right-of-way location was not finalized until the middle of November 2006. Fairway then made arrangements to install concrete footings and place the sign in its new location. On 4 and 5 December 2006, county officials inspected the footings. The next day Fairway reinstalled the sign. With the exception of the new footings, the sign was exactly the same as the one that had been previously removed.

On 16 January 2007, Bessemer City sent Fairway a Notice of Violation informing the company that the relocated sign violated the city's outdoor advertising ban and that it must be removed within thirty days. The notice asserted that Fairway's sign permit had expired because work on the relocation project had not "commenced prior" to the permit's expiration date, 27 February 2006. According to the notice, the renewed county building permit was invalid because it was issued after the city's sign permit had expired. On 14 February 2007, Fairway appealed the Notice of Violation to the Bessemer City Board of Adjustment (the BOA) pursuant to N.C.G.S. § 160A-388(b).

On 7 May 2007, the BOA conducted a public hearing and voted five to one to affirm the determination that the sign violated the city's outdoor advertising ban. The BOA Chair dissented. Following the hearing the BOA issued a written order demanding removal of the sign. Fairway filed a petition for writ of certiorari under N.C.G.S. § 160A-388(e2) requesting that the Superior Court, Gaston County, review the BOA's decision. With the consent of the parties, the trial court issued the writ on 10 August 2007. After hearing arguments on 29 October 2008, the trial court entered an order two days later affirming the BOA decision.

Fairway appealed to the Court of Appeals. On 2 March 2010, the Court of Appeals affirmed the trial court's order in a divided opinion holding that: (1) The BOA's interpretation of its ordinance was entitled to some deference under a de novo standard of review; (2) The trial court correctly concluded that the sign's re-erection violated the city's sign ordinance because Fairway had not commenced "work" within six months of the issuance of the sign permit; (3) Fairway did not have vested rights to re-erect the sign under N.C.G.S. § 160A-385(b)(i) because the sign permit expired before the building permit was renewed; (4) The BOA was not estopped from ordering the sign's removal; and (5) The trial court properly concluded that the BOA's decision was "supported by competent, material, and substantial evidence and was otherwise not arbitrary or capricious." *Morris Commc'ns Corp. v. City of Bessemer Zoning Bd. of Adjust.*, —— N.C. App. ——, 689 S.E.2d 880 (2010).

Judge Robert C. Hunter issued a dissenting opinion and argued that the BOA's interpretation of the term "work" was too narrow. *Id.* at ——, 689 S.E.2d at 886 (Hunter, J., dissenting). Specifically, Judge Hunter contended that the term " 'work' does not necessarily mean that a physical alteration must occur at the site." *Id.* at ——, 689 S.E.2d at 887.

[1] We review the trial court's order for errors of law. *See Mann Media, Inc. v. Randolph Cnty. Planning Bd.*, 356 N.C. 1, 14, 565 S.E.2d 9, 18 (2002) (citations omitted); *Capricorn Equity Corp. v. Town of Chapel Hill Bd. of Adjust.*, 334 N.C. 132, 137, 431 S.E.2d 183, 186-87 (1993). Our review asks two questions: Did the trial court identify the appropriate standard of review, and, if so, did it properly apply that standard? *Mann Media*, 356 N.C. at 14, 565 S.E.2d at 18; *ACT-UP Triangle v. Comm'n for Health Servs.*, 345 N.C. 699, 706, 483 S.E.2d 388, 392 (1997) (citation omitted). As with any administrative decision, determining the appropriate standard of review to be applied when reviewing a board of adjustment decision depends on "the substantive nature of each assignment of error." *N.C. Dep't of Env't & Natural Res. v. Carroll*, 358 N.C. 649, 658, 599 S.E.2d 888, 894 (2004) (citations omitted); *see also Mann Media*, 356 N.C. at 13, 565 S.E.2d at 17; *ACT-UP*, 345 N.C. at 706, 483 S.E.2d at 392. Reviewing courts apply de novo review to alleged errors of law, including challenges to a board of adjustment's interpretation of a term in a municipal ordinance. *See Capricorn Equity Corp.*, 334 N.C. at 137, 431 S.E.2d at 187; *see also Mann Media*, 356 N.C. at 13, 565 S.E.2d at 17 (citations omitted); *In re Tadlock*, 261 N.C. 120, 124-25, 134 S.E.2d

177, 180-81 (1964) (interpreting a city zoning ordinance as a question of law). De novo review applies here because Fairway alleges the BOA's interpretation of the term "work" constituted an error of law. *See Mann Media*, 356 N.C. at 13, 565 S.E.2d at 17.

Fairway contends the Court of Appeals erred in determining the BOA's interpretation was entitled to deference under de novo review. We agree. Under de novo review a reviewing court considers the case anew and may freely substitute its own interpretation of an ordinance for a board of adjustment's conclusions of law. *Id.* (citation omitted). In *Capricorn Equity Corporation*, we noted that "the superior court, sitting as an appellate court, *could* freely substitute its judgment for that of [the Chapel Hill Board of Adjustment] and apply *de novo* review as *could* the Court of Appeals with respect to the judgment of the superior court." 334 N.C. at 137, 431 S.E.2d at 187 (emphases added) (citing *N.C. Sav. & Loan League v. Credit Union Comm'n.*, 302 N.C. 458, 464-65, 276 S.E.2d 404, 409-10 (1981)). In other words, reviewing courts may "make independent assessments of the underlying merits" of board of adjustment ordinance interpretations. 4 Patricia E. Salkin, *American Law of Zoning* § 42:41, at 42-180 & n.1 (5th ed. 2010) (citing, among other authority, *Capricorn Equity Corp.*, 334 N.C. at 137, 431 S.E.2d at 187). This proposition emphasizes the obvious corollary that courts consider, but are not bound by, the interpretations of administrative agencies and boards. *See, e.g.*, *Wells v. Consol. Jud'l Ret. Sys. of N.C.*, 354 N.C. 313, 319-20, 553 S.E.2d 877, 881 (2001) (upholding long-standing agency interpretation); *N.C. Sav. & Loan League*, 302 N.C. at 465-66, 276 S.E.2d at 410 (finding agency interpretation "unpersuasive").

[2] Turning to the disputed ordinance, we find the BOA's interpretation of the term "work" unpersuasive. The ordinance provides that:

> If the work described in any compliance or sign permit has not begun within six months from the date of issuance thereof, the permit shall expire. Upon beginning a project, work must be diligently continued until completion with some progress being apparent every three months. If such continuance or work is not shown, the permit will expire.

City of Bessemer City, N.C., Ordinance § 155.207.

Bessemer City's zoning administrator testified at the BOA hearing that he interpreted the term "work" to mean "actually something moving on the ground . . . . [c]onstruction." In his view, Fairway failed to commence "work" within the time period prescribed in the sign

permit because he did not observe construction-like activities occurring on the property. He therefore concluded the sign was relocated without a valid sign permit.

In contrast, Fairway argues the term "work" encompasses the broader range of activities necessary to complete the sign relocation. Fairway contends its negotiations with DOT and Dixon, as well as its acquisition of a county building permit, constitute "work" under the ordinance. We agree with Fairway that the term "work" has a broader meaning than mere visible evidence of construction.

This Court has long held that governmental restrictions on the use of land are construed strictly in favor of the free use of real property. *See*, *e.g.*, *Westminster Homes*, *Inc. v. Town of Cary Zoning Bd. of Adjust.*, 354 N.C. 298, 304, 308, 554 S.E.2d 634, 638, 640-41 (2001); *Yancey v. Heafner*, 268 N.C. 263, 266, 150 S.E.2d 440, 443 (1966) ("Zoning regulations are in derogation of common law rights and they cannot be construed to include or exclude by implication that which is not clearly their express terms." (citation and internal quotation marks omitted)); *In re W.P. Rose Builders Supply Co.*, 202 N.C. 496, 500, 163 S.E. 462, 464 (1932) ("Zoning ordinances are in derogation of the right of private property, and where exemptions appear in favor of the property owner, they should be liberally construed in favor of such owner."), *quoted in Penny v. City of Durham*, 249 N.C. 596, 601, 107 S.E.2d 72, 76 (1959); *Price v. Edwards*, 178 N.C. 493, 500, 101 S.E. 33, 37 (1919) (providing examples of statutes that derogate from common law, including those "which impose restrictions upon the control, management, use, or alienation of private property" (citation and internal quotation marks omitted)).

When interpreting a municipal ordinance we apply the same principles of construction used to interpret statutes. *See Westminster Homes*, 354 N.C. at 303, 554 S.E.2d at 638 (citations omitted); *Coastal Ready-Mix Concrete Co. v. Bd. of Comm'rs of Nags Head*, 299 N.C. 620, 629, 265 S.E.2d 379, 385 (1980) (citation omitted). Undefined and ambiguous terms in an ordinance are given their ordinary meaning and significance. *See Perkins v. Ark. Trucking Servs., Inc.*, 351 N.C. 634, 638, 528 S.E.2d 902, 904 (2000) (citations omitted); *Penny*, 249 N.C. at 600, 107 S.E.2d at 76; *In re Builders Supply*, 202 N.C. at 499, 163 S.E. at 463-64; *see also Reg'l Acceptance Corp. v. Powers*, 327 N.C. 274, 278, 394 S.E.2d 147, 149 (1990) ("Where words of a statute are not defined, the courts presume that the legislature intended to give them their ordinary meaning determined according to the context in which those words are ordinarily used." (citation omitted)).

The term "work" is not defined in the Bessemer City ordinance. Perhaps even more telling, the first sentence of the ordinance indicates that "work" is "described in . . . [the] sign permit." City of Bessemer City, N.C., Ordinance § 155.207. But Fairway's sign permit fails to describe "work" in any detail whatsoever. Instead, the permit simply contains administrative information, including the parcel number and address, the name of the permit holder, the permit fee, and the permit's issuance and expiration dates. Most notably, the "details" line on the permit form merely states the sign is for "business identification." Consequently, neither the ordinance nor the sign permit provides even minimally adequate contours to the definition of "work."

Despite this lack of definitional clarity, the BOA nonetheless contends the term "work" means only visible activities related to construction. Specifically, the BOA asserts that the words "apparent" and "shown" in the second and third sentences of the ordinance determine the meaning of "work." We reject the BOA's narrow and unduly restrictive interpretation. "Apparent" and "shown" do not illustrate the types of activities that constitute "work," but simply describe the requirements for sustaining a sign permit after "work" initially commences.

To ascertain the ordinary meaning of undefined and ambiguous terms, courts may appropriately consult dictionaries. *Perkins*, 351 N.C. at 638, 528 S.E.2d at 904 (citations omitted); *see also Penny*, 249 N.C. at 600, 107 S.E.2d at 75-76 (applying dictionary definition to ambiguous term in zoning ordinance). *Webster's Dictionary* defines "work" to include "sustained physical *or mental* effort to overcome obstacles and achieve an objective or result." *Merriam-Webster's Collegiate Dictionary* 1363 (10th ed. 1999) (emphasis added). Applying this definition to the Bessemer City ordinance, the term "work" has a broader meaning than mere visible evidence of construction. *Cf. Town of Hillsborough v. Smith*, 276 N.C. 48, 55, 170 S.E.2d 904, 909 (1969) (holding that landowners who incurred contractual obligations to construct a building and to purchase dry cleaning equipment acquired vested rights to carry on a nonconforming use, even though the contracts did "not result in any visible change in the condition of the land").

Remand is not automatic when "an appellate court's obligation to review for errors of law can be accomplished by addressing the dispositive issue(s)." *Carroll*, 358 N.C. at 664, 599 S.E.2d at 898 (citations and internal quotation marks omitted). Under such circum-

stances the appellate court can "determin[e] how the trial court *should have* decided the case upon application of the appropriate standards of review." *Id.* at 665, 599 S.E.2d at 898. Here we "can reasonably determine from the record" whether Fairway's challenge to the BOA's interpretation "warrant[s] reversal or modification" of the BOA's ultimate decision. *Id.*

One of the fundamental purposes of zoning boards of adjustment is to provide flexibility and "prevent . . . practical difficulties and unnecessary hardships" resulting from strict interpretations of zoning ordinances. *See* 2 James A. Webster, Jr., Patrick K. Hetrick & James B. McLaughlin, Jr., *Webster's Real Estate Law in North Carolina* § 18-19, at 874 (5th ed. 1999) [hereinafter *Webster's*]; *see also* N.C.G.S. § 160A-388(d) (2009). Thus, "[f]or the purpose of effecting a just result," boards of adjustment are empowered "to correct errors or abuse" arising from "the zoning enforcement officer['s]" administration of an ordinance. *Webster's* § 18-19, at 874. By affirming the Bessemer City zoning administrator's narrow and restrictive interpretation of the term "work," the BOA failed to effectuate "a just result."

The record raises an inference that the Bessemer City zoning administrator took advantage of the ambiguity in the sign ordinance and the uncertainty and complexity of the road widening project to hasten the city's prospective ban on outdoor advertising. The administrator admitted during the BOA hearing that his interpretation of the term "work" was entirely subjective. As he put it, "[T]his is my interpretation." He also revealed that both the Bessemer City planning department and he had a "general disagreement with billboards." On several occasions during the hearing, the administrator referred to the sign in question as "new," even though he could not support this characterization with specific evidence.

The zoning administrator was generally aware of the sign relocation project and the behind-the-scenes steps necessary to complete it. During his testimony before the BOA, the administrator acknowledged that the sign had to be relocated *because of* the DOT's road widening project. The administrator discussed the relocation with a Fairway representative when she picked up the sign permit. Beginning in September 2005, the administrator participated in several meetings between DOT and Dixon about the road widening project.

The zoning administrator also knew that the sign relocation and NAPA building renovation were linked. When questioned by

Fairway's attorney, the administrator stated that the sign could not be relocated until reconstruction of the NAPA building was complete:

> Q. [I]t's fair to say that the sign could not be relocated until the building was taken down?
>
> A. Well, yes.
>
> Q. All right.
>
> A. That's evident.
>
> Q. And until really the road-widening project took place and the building was taken down, that sign couldn't have been moved; is that fair to say?
>
> A. Pretty fair to say.

And yet when he was asked about this connection later during the hearing, the administrator baldly denied its existence:

> Q. Were you aware of the sign being relocated, that act being connected to the remodeling?
>
> A. It was two different cases. They were never—we know that they were all the same property owner. . . . But no, they're two separate issues; I wouldn't tie them together.
>
> Q. So you didn't tie the actual removal of a portion of the building to the sign being moved back?
>
> A. It had nothing to do with this permit.

According to Fairway, three steps were required to complete the sign relocation: (1) finalizing the exact location of the sign with DOT; (2) renegotiating the lease with Dixon; and (3) securing a county building permit. The zoning administrator admitted that accomplishing each of these tasks was sufficient to constitute "work" under the ordinance:

> Q. All right. Now, do you have any, I guess, understanding that in order to do the work, that as part of that, that Fairway has to work out an arrangement with the Department of Transportation as it relates to the roadway?
>
> A. Okay.
>
> Q. Does that seem fair?
>
> A. Yes.

Q. And that as part of the work, in order to relocate the sign, that Fairway has to renegotiate a lease with the property owner because the building's coming down, the sign is being moved?

A. (Nodded head up and down.)

Q. Does that seem fair, that that's part of the work?

A. I'm sure that there's a lot of things to do, yes.

Q. Now, isn't it fair also that, in order to relocate the sign, they actually had to go and get a building permit; that would be part of the work?

A. Yes.

As noted above, during the six month period following the issuance of the sign permit, Fairway communicated with DOT about removing the sign, started renegotiating the lease with Dixon, and secured a Gaston County building permit.

In support of its position, the BOA argues that Fairway did not keep the zoning administrator informed of its efforts to relocate the sign. Fairway representatives admitted at the hearing that they did not give the zoning administrator periodic updates. Even though this lack of communication was less than ideal, it is understandable given the ambiguity of the ordinance and the special context of an involuntary sign relocation project. Fairway representatives testified that they believed Fairway was in compliance with the sign ordinance, and that they were never informed that the sign permit was about to expire, nor did they think it would expire under their understanding of the ordinance. They also stated that they would have promptly renewed Fairway's sign permit or taken other action to comply with the ordinance had they known the permit was in jeopardy under the city's interpretation of the ordinance. A Fairway representative with over twenty years of experience in the outdoor advertising industry testified that permit renewals are ordinarily unnecessary because most sign construction projects are completed quickly.

We acknowledge that requiring municipalities to investigate the validity of the numerous permits they have issued would be unduly burdensome. But our decision does not impose such a requirement because our holding is limited to the unusual facts of this case, involving the overly restrictive application of a vague ordinance to a sign relocation that was mandated by a DOT project. Fairway was not

moving the sign to increase its visibility; the relocation was necessary to accommodate a DOT project.

In sum, the rule of construction that zoning ordinances are strictly construed in favor of the free use of real property is appropriately applied here. To relocate its sign Fairway was required to work with three levels of government—one of which had a stated policy opposing outdoor advertising. Nevertheless, Fairway took multiple steps to lawfully relocate its sign within the six month period prescribed in the sign permit. Because respondent's interpretation of its sign ordinance constituted an error of law, we reverse.

REVERSED.

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

STATE OF NORTH CAROLINA v. BENZION BIBER

No. 423A10

(Filed 16 June 2011)

Search and Seizure— motion to suppress drugs—search of motel room—probable cause

The trial court did not err in a felonious possession of cocaine case by denying defendant's motion to suppress evidence found while searching a motel room. Under the circumstances of this case, the officers could have reasonably believed that the suspected drugs hidden in the bathroom belonged to the person who had claimed the room as his own and that he intended to exercise control, alone or with others, over the bag of white powder believed to be a controlled substance. The police officers had probable cause to arrest defendant based on the matters witnessed by the officers that reasonably corroborated the information they had received upon being dispatched that people in the motel room were using drugs.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, —– N.C. App. —–, 698 S.E.2d 476 (2010), reversing a judgment entered on 3 October 2008 by Judge

Zoro J. Guice, Jr. in Superior Court, Buncombe County, and ordering a new trial. On 4 November 2010, the Supreme Court allowed the State's petition for discretionary review as to additional issues. Heard in the Supreme Court on 3 May 2011.

Roy Cooper, *Attorney General*, *by Derrick C. Mertz*, *Assistant Attorney General*, *for the State-appellant.*

Staples S. Hughes, *Appellate Defender*, *by Barbara S. Blackman*, *Assistant Appellate Defender*, *for defendant-appellee.*

PARKER, Chief Justice.

Defendant was indicted for felonious possession of cocaine, a Schedule II controlled substance under the North Carolina Controlled Substances Act. Prior to trial defendant filed a motion to suppress evidence, alleging that (i) Asheville Police officers violated his constitutional rights by searching the motel room in which he and others were present without consent and without a search warrant and (ii) the officers lacked probable cause to arrest him for possession of an alleged controlled substance. After receiving evidence and arguments of counsel at the hearing on defendant's motion to suppress, the trial court denied the motion, making findings of fact and conclusions of law from the bench, which were reduced to writing in an order entered on 14 November 2008. Before court adjourned, defendant entered a guilty plea to possession of a Schedule II controlled substance, while reserving his right to appeal the trial court's denial of the motion to suppress. Defendant was sentenced to six to eight months' imprisonment, suspended for twenty-four months with supervised probation for the first twelve months and unsupervised probation for the remainder of the suspension, provided all conditions of probation were satisfied. Defendant gave timely notice of appeal to the Court of Appeals.

Based on the uncontroverted evidence presented by the State at the suppression hearing, the trial court made the following findings of fact. On or about 8 September 2007, Sharon Hensley rented Room 312 at a Motel 6 in Asheville, North Carolina. When Hensley checked in, she disclosed that she and one other person would be occupying the room. The motel clerk did not obtain any information regarding the identity of the other person. Cheryl Harvin was a general manager of the motel and lived on the premises.

On the morning of 9 September 2007, Hensley came to Harvin and reported that people were doing drugs in her room and that people

were in her room whom she did not want to be there. Hensley asked Harvin to check the room. In response to Hensley's complaint, Harvin contacted the Asheville Police Department and relayed that Hensley had complained about people being in her room who were involved in drug activity. Officers Alan Presnell and Michelle Spinda responded to the dispatcher's call to go to the motel.

After meeting with Harvin at the motel office, the officers followed Harvin to Room 312. Harvin knocked on the door. The door was then opened, and Harvin saw defendant Benzion Biber standing near the doorway or close to the door. Harvin also saw two other people in the room. These two individuals were females who were later identified as Tammy Meadows and Candice Moose. Hensley was not in the room, and Harvin did not recognize any of these people. Harvin had a conversation with defendant. After Harvin's conversation with defendant, the officers appeared behind her at the motel room door. There was then additional activity in the room with the individuals moving around. Neither Officer Presnell nor Officer Spinda heard the conversation between Harvin and defendant. After the door was opened, no one told Harvin or the police that they could not come into the room. Through the open doorway, both officers could see two females inside the room. Officer Spinda noticed that one of the women was seated on a bed, holding a glass pipe in her hand by her side. Both officers observed this female rise quickly from the bed, run into the bathroom, and close the door. Officer Spinda went to the bathroom door and asked the female to come out. Before the female complied, Officer Spinda heard the toilet flush. When the female emerged, Officer Spinda had her sit on the bed. Officer Spinda then went into the bathroom, where she saw a single edge razor blade in the toilet. Upon doing a more thorough search of the bathroom, Officer Spinda found a clear plastic bag in the light fixture. The plastic bag contained a white powder which Officer Spinda believed, based on her years of experience as a police officer and her prior experience with other defendants involved in drug activity, to be cocaine or methamphetamine. Officer Spinda also found a brown box in the bathroom. Other items of drug paraphernalia were found in the room and on the persons of the two females. A bag containing male clothing was also found in the room, and defendant stated the bag was his.

After the female ran into the bathroom, Officer Presnell saw a push rod used for crack cocaine and burn screens on the bed where the female had been seated. These items were lying in plain view

when Officer Presnell stepped to the open door. Based on his experience as a police officer and prior involvement with drug activity, Officer Presnell recognized these items as being consistent with the use of controlled substances. At the time Officer Presnell observed these items, he had not entered the motel room but saw them through the door that had been opened in response to Harvin's knock.

While Officer Spinda tried to make contact with the female in the bathroom, Officer Presnell monitored defendant and the remaining female. Defendant insisted on continuing to walk around the room, and Officer Presnell told defendant to have a seat on the bed. At one point defendant stood up quickly and the officers drew their weapons. Once the three individuals were seated, Officer Presnell began a preliminary investigation to determine why the female ran, what they were doing there, who rented the room, and other facts. During this investigation defendant stated that the room was his. Officer Presnell observed that the package Officer Spinda retrieved from the bathroom was a clear plastic bag containing a white powder or substance that Officer Presnell believed was consistent with cocaine or methamphetamine. All three of the individuals were arrested for possession of a controlled substance and then taken to the Buncombe County jail. Officer Presnell transported defendant, and Officer Spinda transported the two females.

Upon reaching the jail's sally port, Officer Presnell informed defendant that if he had any controlled substances on his person, he needed to tell Officer Presnell, advising that charges more serious than mere possession would result if defendant were found to have brought contraband into the detention center. As he exited the patrol vehicle, defendant indicated he had something to give Officer Presnell and then handed what appeared to be two rocks of crack cocaine to the officer. When Officer Presnell asked defendant what this substance was, defendant identified it as "crack rocks."

Authorities tested the white powder found in the Motel 6 bathroom and determined that it did not contain any controlled substances. Analysis revealed that the two suspected crack rocks were cocaine.

Based on these findings, the trial court concluded that the two Asheville police officers had probable cause to enter the motel room and conduct a further investigation and search of the room, that defendant lacked standing to complain of the search at issue, and that none of defendant's constitutional rights were violated. The trial court then denied defendant's motion to suppress.

In his appeal to the Court of Appeals, defendant's sole argument was that the trial court's ruling on his suppression motion was erroneous in that the officers lacked probable cause to arrest him for constructive possession of the powdery substance found in the motel room. Thus, defendant argued, evidence of the "crack rocks," which defendant surrendered to Officer Presnell and for which defendant was convicted, should be excluded as the fruit of an unlawful seizure pursuant to *Mapp v. Ohio*, 367 U.S. 643, 6 L. Ed. 2d 1081 (1961). In support of this assertion, defendant cited six cases in which this Court found the evidence to be sufficient to convict those defendants for constructive possession of controlled substances. The Court of Appeals agreed.

In a divided opinion, the Court of Appeals reversed, holding that the trial court erred in denying defendant's motion to suppress. *State v. Biber*, —— N.C. App. ——, ——, ——, 698 S.E.2d 476, 480, 484 (2010). Judge Steelman dissented, concluding that because the trial court made no findings of fact or conclusions of law on the issue of probable cause to arrest, raised in defendant's motion to suppress, the Court of Appeals should remand the case to the trial court for entry of an order containing findings of fact and conclusions of law on that issue. *Id.* at ——, 698 S.E.2d at 485 (Steelman, J., dissenting).

The State appealed to this Court as of right based on Judge Steelman's dissent and also petitioned this Court for discretionary review on the issues of (i) whether the trial court's findings of fact supported probable cause to arrest defendant for possession of a controlled substance and (ii) whether the majority utilized an incorrect evidentiary standard to determine probable cause. We granted review on 4 November 2010, and now reverse.

On discretionary review before this Court, the State argues that the Court of Appeals applied the wrong legal analysis in addressing the trial court's ruling. We agree.

After reciting the substantive evidentiary requirements for a constructive possession conviction, the Court of Appeals majority stated:

> In the present case, the trial court failed to make any findings of fact or conclusions of law concerning Defendant's "intent and capability to maintain control and dominion over" the white powder found in the bathroom light fixture. As intent and capability to maintain control and dominion are elements of constructive possession, the trial court's findings of fact and conclusions of

law fail to support its order denying Defendant's motion to suppress. We reverse the trial court's order for this reason.

Biber, —— N.C. App. at ——, 698 S.E.2d at 480 (majority opinion) (citation omitted). Rather than remanding the case to the trial court for additional factual findings and conclusions of law, as the dissenting judge would have done, the Court of Appeals majority granted defendant a new trial, *id.* at ——, 698 S.E.2d at 484, concluding that the evidence presented at the suppression hearing did not support the elements of a constructive possession conviction:

> We hold that there was not competent evidence presented in this case to support the trial court's findings of fact []or its conclusion that Defendant had the requisite intent and capability to maintain control and dominion over the suspected controlled substance. There was no competent evidence of any circumstances indicating that Defendant knew of the presence of the suspected controlled substance located in the bathroom light fixture.

Id. at ——, 698 S.E.2d at 484 (citation omitted).

Even though defendant contested only the lack of probable cause for his arrest, the Court of Appeals focused its attention on the elements of constructive possession, treating this case as if defendant had challenged a conviction on grounds of insufficient evidence. The court stated:

> We decline . . . to allow someone *to be convicted of constructive possession* when competent evidence supports neither dominion and control over the location in which the contraband was located, nor that the suspect was ever in close proximity to the recovered contraband (or suspected contraband).

Id. at ——, 698 S.E.2d at 484 (emphasis added) (citations omitted). The cases relied on by the Court of Appeals address whether the evidence in those cases was sufficient to withstand a motion to dismiss a charge of constructive possession. *See id.* at ——, 698 S.E.2d at 479–84 (discussing, *inter alia*, *State v. Miller*, 363 N.C. 96, 678 S.E.2d 592 (2009); *State v. Moore*, 162 N.C. App. 268, 592 S.E.2d 562 (2004); and *State v. Weems*, 31 N.C. App. 569, 230 S.E.2d 193 (1976)).

The standard of review in evaluating the denial of a motion to suppress is whether competent evidence supports the trial court's findings of fact and whether the findings of fact support the conclu-

sions of law. *State v. Brooks*, 337 N.C. 132, 140–41, 446 S.E.2d 579, 585 (1994). However, when, as here, the trial court's findings of fact are not challenged on appeal, they are deemed to be supported by competent evidence and are binding on appeal. *State v. Baker*, 312 N.C. 34, 37, 320 S.E.2d 670, 673 (1984) (citation omitted). Conclusions of law are reviewed de novo and are subject to full review. *State v. McCollum*, 334 N.C. 208, 237, 433 S.E.2d 144, 160 (1993) (citation omitted), *cert. denied*, 512 U.S. 1254, 129 L. Ed. 2d 895 (1994); *see also State v. Buchanan*, 353 N.C. 332, 336, 543 S.E.2d 823, 826 (2001) (citation omitted). "'Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment' for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632–33, 669 S.E.2d 290, 294 (2008) (quoting *In re Greens of Pine Glen, Ltd. P'ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003)).

Although the trial court's order denying defendant's motion to suppress contains no explicit findings of fact and conclusions of law as to whether the officers had probable cause to arrest defendant at the motel for possession of a controlled substance, the trial court did conclude that

> none of [defendant's] constitutional rights were violated and that none of the activities and conduct of the members of the Asheville Police Department, of which the defendant complains, violates the defendant's rights under the laws of the State of North Carolina or of the United States or under the constitution of North Carolina or the Constitution of the United States.

In concluding that none of defendant's constitutional rights were violated, the trial court implicitly concluded that the officers had probable cause to arrest defendant. *See, e.g.*, *State ex rel. Utils. Comm'n v. Two Way Radio Serv., Inc.*, 272 N.C. 591, 600, 158 S.E.2d 855, 863 (1968) (inferring an "implied conclusion" from an express conclusion of law made by the fact finder).

Thus, the determinative question before this Court is whether the trial court was correct in implicitly concluding that Officers Presnell and Spinda had probable cause to arrest defendant for possession of a controlled substance.

The law of probable cause is well established. An officer may make a warrantless arrest of any person the officer has probable cause to believe has committed a criminal offense. *See* N.C.G.S. § 15A-401(b) (2009). "Probable cause" is defined as "those facts and

circumstances within an officer's knowledge and of which he had reasonably trustworthy information which are sufficient to warrant a prudent man in believing that the suspect had committed or was committing an offense." *State v. Williams*, 314 N.C. 337, 343, 333 S.E.2d 708, 713 (1985) (citations omitted); *see also Carroll v. United States*, 267 U.S. 132, 162, 69 L. Ed. 543, 555 (1925). The Supreme Court has explained that probable cause "does not demand any showing that such a belief be correct or more likely true than false. A practical, nontechnical probability that incriminating evidence is involved is all that is required." *Texas v. Brown*, 460 U.S. 730, 742, 75 L. Ed. 2d 502, 514 (1983) (citation and internal quotation marks omitted); *accord State v. Bone*, 354 N.C. 1, 10, 550 S.E.2d 482, 488 (2001), *cert. denied*, 535 U.S. 940, 152 L. Ed. 2d 231 (2002). A probability of illegal activity, rather than a prima facie showing of illegal activity or proof of guilt, is sufficient. *Illinois v. Gates*, 462 U.S. 213, 235, 76 L. Ed. 2d 527, 546 (1983) (citation and internal quotation marks omitted); *see also State v. Harris*, 279 N.C. 307, 311, 182 S.E.2d 364, 367 (1971) ("Probable cause and 'reasonable ground to believe' are substantially equivalent terms."). Importantly, an officer making an arrest "'may rely upon information received through an informant, rather than upon his direct observations, so long as the informant's statement is reasonably corroborated by other matters within the officer's knowledge.' " *Bone*, 354 N.C. at 10, 550 S.E.2d at 488 (quoting *Jones v. United States*, 362 U.S. 257, 269, 4 L. Ed. 2d 697, 707 (1960), *overruled on other grounds by United States v. Salvucci*, 448 U.S. 83, 65 L. Ed. 2d 619 (1980)).

In his brief to this Court, defendant argues that "probable cause is 'correlative to what must be proved'" and that "[t]he 'particular offense involved' dictates the quantum of proof necessary," quoting language from *Brinegar v. United States*, 338 U.S. 160, 175, 93 L. Ed. 1879, 1890 (1949), and *Harris*, 279 N.C. at 311, 182 S.E.2d at 367, respectively. Neither of these concepts, however, requires evidence sufficient to support a conviction to satisfy probable cause. To the contrary, the Supreme Court in *Brinegar* was recognizing "the difference in standards and latitude allowed in passing upon the distinct issues of probable cause and guilt." 338 U.S. at 174, 93 L. Ed. at 1889. As we stated in *Harris*: "To establish probable cause *the evidence need not amount to proof of guilt, or even to prima facie evidence of guilt*, but it must be such as would actuate a reasonable man acting in good faith." 279 N.C. at 311, 182 S.E.2d at 367 (emphasis added) (citation and quotation marks omitted).

Under this standard the unchallenged facts found by the trial court at defendant's suppression hearing provide ample support for the conclusion as a matter of law that the police had probable cause to arrest defendant for drug possession. At the outset of their involvement in this case, Officers Presnell and Spinda knew they were being dispatched to the Motel 6 in order to assist its manager, Harvin, in determining whether illegal activities—including drug use—were afoot in Room 312. The officers' initial on-the-scene conversation with Harvin confirmed the possibility of suspicious activities. Everything the officers encountered thereafter, considered cumulatively and in light of defendant's claims, corroborated the information relayed by Harvin.

Among the first things the officers saw when the door to Room 312 opened in response to Harvin's knock was a woman sitting on a bed. A crack pipe and drug paraphernalia were next to her on the bed. This same woman, upon spotting police, fled into the bathroom, ignoring instructions to open the door while she flushed the toilet. A search of the bathroom revealed a bag of what looked like narcotics stashed in the light fixture. During the officers' discovery of this and other potential contraband and drug paraphernalia found in the room and on the two women, defendant ignored instructions to remain still and instead moved about the room. When asked, defendant claimed the room was his and that a bag containing clothing was his. Thus, the officers found themselves confronted with a man who appeared to have brought two women and his own personal belongings into Room 312, where the drug use that was the basis of the complaint to Harvin appeared to be taking place. We conclude that under these circumstances the officers could reasonably believe that the suspected drugs hidden in the bathroom belonged to the person who had claimed the room as his own and that he intended to exercise control, alone or with others, over the bag of white powder believed to be a controlled substance.

In sum, the matters witnessed by Officers Presnell and Spinda "reasonably corroborated" the information they had received upon being dispatched: namely, that people in Room 312 of the Motel 6 were using drugs. *Bone*, 354 N.C. at 10, 550 S.Ed. 2d at 488 (internal quotation marks omitted). Because their observations were such as would "warrant a prudent man in believing that [defendant] had committed or was committing an offense," *Williams*, 314 N.C. at 343, 333 S.E.2d at 713, the police in this case had probable cause to arrest defendant for possession of a controlled substance.

Conclusions of law are reviewed de novo and are subject to full review. *McCollum*, 334 N.C. at 237, 433 S.E.2d at 160. In this case the Court of Appeals effectively held that the trial court could not conclude that probable cause to arrest defendant for drug possession existed unless the findings of fact in its denial of defendant's motion to suppress were sufficient to support a *conviction* for constructive possession. *See Biber*, —— N.C. App. at ——, ——, 698 S.E.2d at 480, 484. That holding would demand more than the law requires. "The substance of all the definitions of probable cause is a reasonable ground for belief of guilt. And this means *less* than evidence which would justify condemnation or conviction . . . ." *Brinegar*, 338 U.S. at 175, 93 L. Ed. at 1890 (emphasis added) (citations and internal quotation marks omitted). We hold that the trial court's findings of fact supported what was implied by the trial court's explicit conclusion that none of defendant's constitutional rights were violated: namely, that the officers had reasonable grounds to believe defendant was guilty of drug possession and thus had probable cause to arrest him for that crime. For the reasons stated herein, the decision of the Court of Appeals is reversed.

REVERSED.

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

IN THE MATTER OF J.H.K. AND J.D.K.

No. 369PA10

(Filed 16 June 2011)

Termination of Parental Rights—nonlawyer guardian ad litem—not required to be present in courtroom during hearing

The Court of Appeals erred by holding that N.C.G.S. §§ 7B-601 and 7B-1108 mandate the physical presence of a nonlawyer guardian *ad litem* (GAL) volunteer during a termination of parental rights (TPR) hearing. Although the GAL's presence at the TPR hearing may be preferable, the language of the statute does not mandate the volunteer's appearance. The case was reversed

and remanded to the Court of Appeals for consideration of issues not addressed in the original opinion.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, —— N.C. App. ——, 695 S.E.2d 162 (2010), reversing an order terminating parental rights entered on 18 September 2009 by Judge Polly D. Sizemore in District Court, Guilford County, and remanding for a new termination of parental rights hearing. Heard in the Supreme Court on 14 March 2011.

Deana K. Fleming, Guardian ad Litem Associate Counsel, and Smith, James, Rowlett & Cohen, LLP, by Margaret F. Rowlett, for appellant Guardian ad Litem; and Mercedes O. Chut for petitioner-appellant Guilford County Department of Social Services.

Leslie C. Rawls for respondent-appellee father.

Cathy L. Moore, Assistant County Attorney, Durham County Department of Social Services, for North Carolina Association of Social Services Attorneys, amicus curiae.

PARKER, Chief Justice.

The sole issue before this Court is whether the Guardian ad Litem (GAL) volunteer is required to be present in the courtroom at a termination of parental rights (TPR) hearing. For the reasons stated herein, we reverse the decision of the Court of Appeals holding that N.C.G.S. §§ 7B-601 and 7B-1108 mandate the physical presence of the GAL volunteer during a TPR hearing. *In re J.H.K.*, —— N.C. App. ——, 695 S.E.2d 162, 167–68 (2010).

On 25 January 2007, the Guilford County Department of Social Services (DSS) filed a juvenile petition alleging that the minor children J.H.K. and J.D.K. were neglected and dependent. A nonsecure custody order was entered that same day, placing custody of the children with DSS. Six days later, pursuant to N.C.G.S. § 7B-601, the trial court appointed Terry Helms the GAL and Donna Michelle Wright the attorney advocate. At a 16 March 2007 dispositional hearing, the court determined that the juveniles were neglected and dependent. Thereafter, on 8 June 2007 and 7 September 2007, permanency planning review hearings were held. At the 7 September 2007 hearing, the court ordered that "[t]he appropriate plan shall be a concurrent plan of adoption with reunification." A TPR petition was filed on 15 November 2007. Thereafter, throughout the remainder of 2007, during

2008, and into 2009, regular periodic permanency planning review hearings were held. Meanwhile, on 31 July 2008, DSS filed a second TPR petition on each child. By order entered 16 December 2008, Karen Moorefield was substituted as GAL to replace Terry Helms. Donna Wright continued as attorney advocate.

Following a TPR hearing on 14 and 15 July 2009, the trial court entered an order on 18 September 2009 terminating both parents' parental rights as to J.H.K. and J.D.K. In particular, the court found that during the thirty months that the children had been in foster care, the father had been in compliance with his DSS case plan for only five months, despite making some efforts. The court found that the father had been incarcerated two separate times for extended periods during which he did not see or provide care for the children and that even after he was released, he had abandoned wellness counseling, ceased communicating with DSS for drug screening and case compliance purposes, committed criminal acts in violation of his probation, and altogether failed to correct his substance abuse problems. The trial court further found that "[t]here is a probability of a repetition of neglect if the minor children are returned to [the father]" and found and concluded that grounds existed to terminate the father's rights for the reasons set forth in N.C.G.S. § 7B-1111(a)(1) and (a)(6). In light of its findings, the trial court determined that termination of the father's parental rights was in the best interests of the children.

Respondent father gave timely notice of appeal to the Court of Appeals, arguing, *inter alia*, that the trial court erred in conducting the TPR hearing when the minor children's nonattorney GAL volunteer was not physically present in court. *In re J.H.K.*, —— N.C. App. at ——, 695 S.E.2d at 166. The Court of Appeals agreed, concluding that the children were not "represented" by a GAL at a critical stage of the termination proceedings and "'presum[ing] prejudice'" from the GAL's absence. *Id.* at ——, 695 S.E.2d at 168 (citing *In re R.A.H.*, 171 N.C. App. 427, 431, 614 S.E.2d 382, 385 (2005)). On these grounds the Court of Appeals unanimously reversed the trial court's order and remanded the case for a new TPR hearing. *Id.* at ——, 695 S.E.2d at 168.

The determination of the issue before this Court implicates three statutes that address GAL appointment, duties, and administration, namely, N.C.G.S. §§ 7B-601, 7B-1108, and 7B-1200. The section of the Juvenile Code establishing GAL Services specifies that "[e]ach local

program shall consist of volunteer guardians ad litem, at least one program attorney, a program coordinator who is a paid State employee, and any clerical staff as the Administrative Office of the Courts in consultation with the local program deems necessary." N.C.G.S. § 7B-1200 (2009). The Office of GAL Services was established "to provide services in accordance with [section] 7B-601 to abused, neglected, or dependent juveniles involved in judicial proceedings." *Id.* Section 7B-601, in turn, states that when a petition alleges a juvenile is abused or neglected,

> the court shall appoint a guardian ad litem to represent the juvenile. . . . In every case where a nonattorney is appointed as a guardian ad litem, an attorney shall be appointed in the case in order to assure protection of the juvenile's legal rights throughout the proceeding. The duties of the guardian ad litem program shall be to make an investigation to determine the facts, the needs of the juvenile, and the available resources within the family and community to meet those needs; to facilitate, when appropriate, the settlement of disputed issues; to offer evidence and examine witnesses at adjudication; to explore options with the court at the dispositional hearing; to conduct follow-up investigations to insure that the orders of the court are being properly executed; to report to the court when the needs of the juvenile are not being met; and to protect and promote the best interests of the juvenile until formally relieved of the responsibility by the court.

N.C.G.S. § 7B-601(a) (2009).

The Juvenile Code also requires appointment of a GAL if a parent denies a material allegation of a TPR petition. *See id.* § 7B-1108 (2009). Unless a GAL has already been appointed as required by section 7B-601,

> [i]f an answer or response denies any material allegation of the petition or motion, the court shall appoint a guardian ad litem for the juvenile to represent the best interests of the juvenile . . . . A licensed attorney shall be appointed to assist those guardians ad litem who are not attorneys licensed to practice in North Carolina. The appointment, duties, and payment of the guardian ad litem shall be the same as in [section] 7B-601 and [section] 7B-603 . . . .

Id. § 7B-1108(b).

To provide continuity in protecting the minor's interests and to avoid unnecessary duplicative GAL appointments in the same case, section 7B-1108(d) mandates that a GAL "previously . . . appointed under [section] 7B-601, and any attorney appointed to assist that guardian, shall also represent the juvenile in all proceedings under this Article." *Id.* § 7B-1108(d).

When read *in pari materia*, these statutes manifest the legislative intent that representation of a minor child in proceedings under sections 7B-601 and 7B-1108 is to be, as DSS argues, by the GAL program established in Article 12 of the Juvenile Code. Under Article 12 volunteer GALs, the program attorney, the program coordinator, and clerical staff constitute the GAL program. *Id.* § 7B-1200. Of note, a GAL who is trained and supervised by the program cannot, without the consent of the program, be appointed for a TPR proceeding unless the minor "has been the subject of a petition for abuse, neglect, or dependency" pursuant to section 7B-601. *See id.* § 7B-1108(b). Section 7B-601(a) mandates the appointment of a GAL and of an attorney advocate if the GAL is not an attorney. The appointment must "be made pursuant to the program established by Article 12." *Id.* § 7B-601(a); *see id.* §§ 7B-1200 to -1204 (2009). Moreover, the duties of the GAL and attorney advocate in proceedings under both section 7B-601 and section 7B-1108 are the duties of the GAL program set forth in section 7B-601. *Id.* § 7B-1108(b). The statutes require appointment of an attorney advocate only if the appointed GAL is not an attorney licensed to practice in North Carolina. *Id.* §§ 7B-601(a), -1108(b). Thus, if the GAL is an attorney, that person can perform the duties of both the GAL and the attorney advocate.

This statutory scheme is consistent with the traditional view of the role of a GAL, who stands in the place of the minor who is not *sui juris*. This Court, applying the predecessor statute to N.C.G.S. § 7B-1108, observed that

> under the statutory law and traditional practice of this State, the minor parties to a civil action or a special proceeding must be represented by a guardian ad litem who may defend *pro se* or employ counsel. A traditional practice has been to appoint licensed attorneys as guardians ad litem, and, even then, in the more complicated matters, for the guardian to employ separate counsel.

In re Clark, 303 N.C 592, 598, 281 S.E.2d 47, 52 (1981). Counsel appointed under section 7B-601(a) is appointed "to assure protection of the juvenile's legal rights throughout the proceeding." N.C.G.S.

§ 7B-601(a). Section 7B-1108(b) states that the attorney is "appointed to assist those guardians ad litem who are not attorneys licensed to practice in North Carolina." *Id.* § 7B-1108(b). This language, read in conjunction with the language in section 7B-601 setting forth the duties of the GAL program, recognizes that in TPR proceedings the attorney advocate is to perform the traditional role of a lawyer "to facilitate, when appropriate, the settlement of disputed issues; to offer evidence and examine witnesses at adjudication; [and] to explore options with the court at the dispositional hearing." *Id.* § 7B-601(a). In keeping with the polar star of protecting the minor child's best interests, the mandatory appointment of an attorney advocate precludes a nonlawyer GAL from representing a minor *pro se*. A person represented by counsel cannot represent himself at the same time. *E.g.*, *Hamlin v. Hamlin*, 302 N.C. 478, 482, 276 S.E.2d 381, 384–85 (1981); *New Hanover Cnty. v. Sidbury*, 225 N.C. 679, 680, 36 S.E.2d 242, 243 (1945); *see also* N.C.G.S. § 1-11 (2009) ("A party may appear either in person or by attorney . . . ."). Although the statute does not specify which duties of the GAL program are to be performed by the individual GAL and which are the responsibility of the attorney advocate, the statute makes clear that the attorney advocate is to assist the nonlawyer GAL and thereby protect the legal rights of the minor in court proceedings. While the GAL could potentially facilitate settlement of disputed issues arising at a TPR hearing, the investigation and observation of the needs of the children and identification of the resources available to meet those needs take place both before and after a dispositional hearing, meaning that those actions necessarily occur outside the courtroom. This recognition of separate in-court and out-of-court responsibilities for the nonlawyer GAL and the attorney advocate in no way diminishes the GAL volunteer's obligation to protect the best interests of the minor at all critical stages. Although the GAL's presence at the TPR hearing may be preferable, the language of the statute does not mandate the nonlawyer volunteer's attendance.

Relying on *In re R.A.H.*, 171 N.C. App. 427, 614 S.E.2d 382 (2005), a case factually distinguishable from the present case, the Court of Appeals emphasized the significance of the word "represent" and concluded that J.H.K. and J.D.K. were not "represented" as required by the statute. *In re J.H.K.*, —— N.C. App. at ——, 695 S.E.2d at 166–68. The Court of Appeals stated:

> [W]e do not believe that the General Assembly intended the term "represent" to merely require a GAL to prepare a report for the

> trial court to be submitted at the termination of parental rights hearing in lieu of actually appearing in the courtroom.
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> . . . .
>
> . . . The GAL is obligated to be an active "agent" inside the courtroom and to vigorously promote a minor child's best interests. . . . We can imagine no set of circumstances in which a GAL can be an agent satisfactorily performing these duties without being present in the courtroom when a minor child's fate is being determined in the trial court.

Id. at ——, 695 S.E.2d at 167–68.

This interpretation, however, disregards the concept of the GAL program in which the participants work as a team. Given the role of the attorney advocate to assist the GAL, we cannot agree that the General Assembly intended by the use of the word "represent" to obligate the volunteer GAL to appear in court during the TPR hearing unless the attorney advocate or the trial court deems the GAL's presence necessary to protect the minor's best interests. Section 7B-1108 does not impose upon the GAL volunteer a special duty to "represent" a juvenile beyond what section 7B-601 requires of a GAL to meet his or her responsibilities as an appointed member of the GAL program.

Our review of the record in this case discloses that the GAL program performed the duties listed in N.C.G.S. § 7B-601(a). Upon DSS's filing of a petition alleging J.H.K. and J.D.K. were neglected and dependent, the trial court appointed a GAL volunteer and an attorney advocate. Throughout the subsequent two and one-half years of related proceedings, Ms. Helms as GAL volunteer (or Ms. Moorefield, her appointed successor) regularly filed reports describing the children's needs; the nature and availability of educational, supervisory, health care and other resources; and other important matters, such as respondent father's incarceration. These reports also contained the GAL volunteer's assessment of the parents' compliance with court orders and her recommendations concerning the best interests of the children in light of her ongoing investigation of their case. The GAL volunteer thus satisfied the GAL program's duty "to make an investigation" and "to conduct follow-up investigations." N.C.G.S. § 7B-601(a). Meanwhile, Ms. Wright as attorney advocate appeared at every hearing documented in the record. During the pivotal TPR hearing, she examined witnesses and introduced into evidence the GAL volunteer's best-interest report. Nothing in the record—or in respon-

dent father's brief—suggests the GAL program failed to "facilitate . . . settlement of disputed issues," "explore options with the court," or "protect and promote the best interests of the juvenile[s]." *Id.* Through the work of its team members appointed to this case, the GAL program satisfied its out-of-court investigatory duties as well as its in-court representational duties—not only in connection with the TPR hearing at issue in this appeal, but throughout the entire case up to that point. The program thus provided J.H.K. and J.D.K. the services contemplated by the statute. *See* N.C.G.S. § 7B-1200.

We, therefore, hold that a local GAL program "represents" a juvenile within the meaning of N.C.G.S. §§ 7B-601 and 7B-1108 by performing the duties listed in section 7B-601 and that the nonlawyer GAL volunteer is not required to be physically present at the TPR hearing. As explained above, the record in this case satisfies us that the GAL program met its obligations under section 7B-601 and, *a fortiori*, those prescribed by section 7B-1108.

For the foregoing reasons, the decision of the Court of Appeals is reversed, and the case is remanded to that court for consideration of issues not addressed by its original opinion.

REVERSED AND REMANDED.

NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY, INC. v. GERVIS E. SADLER, INDIVIDUALLY AND BY AND THROUGH STEVE ANTHONY SADLER, HIS ATTORNEY-IN-FACT

No. 267PA10

(Filed 16 June 2011)

Insurance— insurance policy—erroneous partial summary judgment—material issues of fact

The trial court in a declaratory judgment action involving disputed coverage under an insurance policy improperly granted partial summary judgment in favor of defendant-insured on his breach of contract counterclaim. Genuine issues of fact existed concerning the causes of defendant's damages and the extent to which the policy applied to those losses.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, —— N.C. App. ——, 693 S.E.2d 266 (2010), affirming an order granting partial summary judgment for defendant entered on 21 May 2009 by Judge William C. Griffin, Jr. in Superior Court, Hyde County. Heard in the Supreme Court on 2 May 2011.

Young Moore and Henderson P.A., by Walter E. Brock, Jr. and Matthew J. Gray, for plaintiff-appellant.

Armstrong & Armstrong, P.A., by L. Lamar Armstrong, Jr., and Ledolaw, by Michele A. Ledo, for defendant-appellee.

MARTIN, Justice.

This case presents the question of whether partial summary judgment was properly granted on defendant's breach of contract counterclaim after an appraisal determined the amount of loss.

Gervis Sadler (Sadler), along with his wife Evelyn, formerly lived in a house in Swan Quarter, North Carolina. The house was constructed in 1946 and has been modified over the years. Sadler insured the property through a limited-peril policy issued by North Carolina Farm Bureau Mutual Insurance Company, Inc. (Farm Bureau). On 1 September 2005, Sadler gave Farm Bureau notice of a claim for mold damage. Farm Bureau's adjuster and a professional engineer hired by Farm Bureau inspected the property, confirmed that mold was present, and sought to determine the cause of mold growth in the house. On 30 November 2005, Farm Bureau sent a letter denying Sadler's claim, explaining that Farm Bureau, "[u]pon careful review of [the] policy, . . . [could] find no coverage for mold not caused by a named peril."

Sadler telefaxed a letter to Farm Bureau disputing the denied claim on 6 March 2006. In the letter, Sadler noted that he "found that the coast guard station recorded 112 miles per hour winds on May 6, 2005" and shared his belief that the windstorm may have caused the damage. The adjuster examined the home again and estimated that repairs for "roof damage and interior damage due to roof damage" would cost $3,203.03. In May 2006 Farm Bureau tendered Sadler a check for that amount, which he did not cash.

By letter dated 5 June 2006, Sadler notified Farm Bureau that he was invoking the policy's appraisal provisions, which stated:

> **Appraisal**—If you and we fail to agree on the value or amount of any item or loss, either may demand an appraisal of such item or loss. In this event, each party will choose a competent and disinterested appraiser within 20 days after receiving a written request from the other. The two appraisers will choose a competent and impartial umpire. If they cannot agree upon an umpire within 15 days, you or we may request that a choice be made by a judge . . . in the state where the [insured property] is located. The appraisers will separately set the amount of loss. If the appraisers submit a written report of an agreement to us, the amount agreed upon will be the amount of loss. If they fail to agree, they will submit their differences to the umpire. A decision agreed to by any two will set the amount of loss.
>
> . . . .
>
> In no event will an appraisal be used for the purpose of interpreting any policy provision, determining causation or determining whether any item or loss is covered under this policy. If there is an appraisal, we still retain the right to deny the claim.

Farm Bureau did not respond to Sadler's 5 June 2006 letter. In another letter dated 22 June 2006, Sadler identified his appraiser (Lewis O'Leary) and noted that he had not heard from Farm Bureau regarding its choice of a representative. Sadler then sought court appointment of an umpire pursuant to the insurance policy. In an order dated 30 June 2006, the trial court appointed Martin Overholt to serve as the umpire. O'Leary sent a facsimile on 2 July 2006 notifying Farm Bureau of the umpire's appointment. Farm Bureau informed Sadler of the identity of its appraiser (Rick Manning) in a letter dated 31 July 2006. Manning and O'Leary inspected the house and outbuildings on 16 October 2006.

On 6 November 2007, Manning submitted his appraiser's report to O'Leary. The report stated that "the damages are . . . a result of a combination of wind and water damages, along with mold infestation in the lower section of the home, crawl space and floor system." Manning recommended that Farm Bureau pay Sadler $31,561.39 for the loss.

On 1 February 2008, O'Leary and Overholt certified an appraisal award to Sadler of "$162,500.00 as the actual cash value of the damages as the result of wind, occurring on May 6, 2005." In a check dated 18 March 2008, Farm Bureau tendered $31,561.39 to Sadler, which he

also did not cash. Instead, Sadler maintained in a letter dated 26 March 2008 that the money due for the loss was $150,500, after reducing the $162,500 to that amount to reflect policy limits.

On 20 March 2008, Farm Bureau filed a complaint for declaratory relief in the Superior Court, Wake County. Venue was later changed to Hyde County pursuant to a motion filed by Sadler. In its complaint Farm Bureau alleged that the appraisal award calculated by Sadler's appraiser and the umpire "fails to itemize the damages so that Farm Bureau can determine the covered losses and apply policy exclusions and/or limitations. The award also purports to determine the cause of loss, to wit: wind."

On 28 May 2008, Sadler filed an answer, moved to dismiss the action, and asserted affirmative defenses of waiver, estoppel, and collateral attack as to the appraisal award. In an amended answer Sadler asserted counterclaims alleging breach of contract, breach of the covenant of good faith, and unfair claim settlement practices. Discovery ensued, and the parties disagreed about its appropriate scope. On 27 April 2009, while further discovery was pending and still disputed, Sadler moved for partial summary judgment on his breach of contract counterclaim. He did not seek summary judgment on his "remaining claims for unfair and deceptive trade and claims practices."

The trial court entered an order on 21 May 2009 granting Sadler's request for partial summary judgment. The trial court concluded "that no genuine issue of material fact exists with respect to Sadler's counterclaim for breach of contract" and awarded Sadler $150,500, plus prejudgment interest. After noting that "[t]his is a final judgment on the breach of contract claim, which is less than all of Sadler's claims," the trial court certified its decision for immediate appeal pursuant to Rule 54(b) of the North Carolina Rules of Civil Procedure.

Farm Bureau appealed. On 18 May 2010, the Court of Appeals held that "the trial court did not err in granting partial summary judgment to Sadler for the amount of the appraisal award." *N.C. Farm Bureau Mut. Ins. Co. v. Sadler*, —— N.C. App. ——, ——, 693 S.E.2d 266, 271 (2010). We allowed Farm Bureau's petition for discretionary review on 3 February 2011.

At the outset, we observe that 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. R. Civ. P. 56(c). A genuine issue of material fact arises when the "facts alleged . . . are of such nature as to affect the result of the action." *Kessing v. Nat'l Mortg. Corp.*, 278 N.C. 523, 534, 180 S.E.2d 823, 830 (1971) (citation and quotation marks omitted); *see also City of Thomasville v. Lease-Afex, Inc.*, 300 N.C. 651, 654, 268 S.E.2d 190, 193 (1980) ("An issue is material if, as alleged, facts 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." (citations and internal quotation marks omitted)). "Rule 56 does not authorize the court to decide an issue of fact, but rather to determine whether a genuine issue of fact exists." *Caldwell v. Deese*, 288 N.C. 375, 378, 218 S.E.2d 379, 381 (1975).

Sadler had "the burden of clearly establishing lack of a triable issue" to the trial court. *See N.C. Nat'l Bank v. Gillespie*, 291 N.C. 303, 310, 230 S.E.2d 375, 379 (1976). Sadler also had the burden of showing that the insurance policy covered his losses. *Nationwide Mut. Ins. Co. v. McAbee*, 268 N.C. 326, 328, 150 S.E.2d 496, 497 (1966). On appeal, we view the pleadings and all other evidence in the record in the light most favorable to the nonmovant and draw all reasonable inferences in that party's favor. *See, e.g.*, *Barger v. McCoy Hillard & Parks*, 346 N.C. 650, 662, 488 S.E.2d 215, 221 (1997) (citations omitted). Cognizant of the burdens placed on Sadler and viewing the record in the light most favorable to the nonmoving party, we conclude that summary judgment was improperly granted.

"We first note the well-settled principle that an insurance policy is a contract and its provisions govern the rights and duties of the parties thereto." *Fid. Bankers Life Ins. Co. v. Dortch*, 318 N.C. 378, 380, 348 S.E.2d 794, 796 (1986) (citations omitted). Specifically, the Farm Bureau insurance policy both provides for and constrains the appraisal process, and that process cannot exceed the scope of the contractual provisions authorizing it. *See, e.g.*, *Thomasville Chair Co. v. United Furn. Workers of Am.*, 233 N.C. 46, 49, 62 S.E.2d 535, 537 (1950). The policy states: "In no event will an appraisal be used for the purpose of interpreting any policy provision, determining causation or determining whether any item or loss is covered under this policy. If there is an appraisal, we still retain the right to deny the claim."

The plain language of this policy provides that while the appraisal process assesses the value of the loss at issue, Farm Bureau retains

the right to determine in the first instance what portion of that loss is covered by the policy. Put differently, Farm Bureau is not obligated to pay the full amount—or for that matter, any amount—of an appraisal award, which may be reduced or denied by policy exclusions and limitations. *See, e.g.*, 2 Allan D. Windt, *Insurance Claims & Disputes* § 9.33, at 111 (3d ed. 1995) ("[T]he appraiser evaluates only the loss and does not consider questions of policy interpretation or scope of coverage." (citations omitted)). In sum, the policy's appraisal process is limited to a determination of the amount of loss and is not intended to interpret the amount of coverage or resolve a coverage dispute. *See* 15 Lee R. Russ & Thomas F. Segalla, *Couch on Insurance 3d* § 210:42 (Dec. 1999) ("As a general rule, the sole purpose of an appraisal is to determine the amount of damage. . . . An appraisal does not necessarily determine the total amount due under the policy.").

The Farm Bureau limited-peril policy does not cover Sadler for damages "to the inside of a structure, or to property inside, caused by dust, rain, sand, sleet, snow or water, all whether driven by wind or not, which enter through an opening not made by the direct force of wind or hail." The record indicates that the policy also specifically excludes coverage for water damage or damage caused by wet rot, dry rot, bacteria, fungi, or protists unless the loss falls within a limited fungi coverage. Farm Bureau states that the limited fungi coverage extends to mold damage that "is the direct result of a peril insured against that applies to the damaged property [when] all reasonable means were used to save and preserve the property at and after the time of loss." Additionally, fungi coverage in Sadler's policy is limited to a specific maximum amount, no matter how much mold damage was indirectly caused by a named peril like wind.

In light of these policy provisions, the trial court's grant of Sadler's motion for summary judgment was error. "It is generally held that the motion should not be granted unless it is perfectly clear that no issue of fact is involved and *inquiry into the facts is not desirable* to clarify the application of the law." *Dendy v. Watkins*, 288 N.C. 447, 452, 219 S.E.2d 214, 217 (1975) (emphasis added) (citation and quotation marks omitted). Here, further inquiry into the factual context of Sadler's losses and the appraisal award is necessary to determine: (1) which damages were directly caused by wind and covered under the policy; and (2) which parts of the wind-related damages, if any, were directly caused by mold growth and thus limited to a specific maximum amount of fungi coverage under the policy. Accord-

ingly, the trial court erred in granting partial summary judgment in favor of Sadler because genuine issues of material fact must be resolved before the loss covered by the policy can be determined. Although we express no opinion on the final determination of coverage, "when, as here, the facts and circumstances surrounding a claim—especially causation—remain in dispute," the finder of fact must "determine whether the ultimate cause of the claimed damages falls within the scope of the policy's exclusionary provisions, as defined by the trial court." *Markham v. Nationwide Mut. Fire Ins. Co.*, 125 N.C. App. 443, 453, 481 S.E.2d 349, 355, *disc. rev. denied*, 346 N.C. 281, 487 S.E.2d 551 (1997) (citations omitted); *see also Wood v. Mich. Millers Mut. Fire Ins. Co.*, 245 N.C. 383, 384-85, 96 S.E.2d 28, 29-30 (1957) ("The evidence was sufficient to permit the jury to reach the conclusion that the damage to the building was the result of any of three conditions. . . . It was the duty of the court to declare the law applicable to each factual situation which the jury might accept as correct."); 17 Lee R. Russ & Thomas F. Segalla, *Couch on Insurance 3d* § 246:10, at 246-26 (Dec. 2000) ("Generally, . . . whether the loss . . . was caused by a covered risk is a question for the jury. Similarly, whether . . . the loss falls within a policy definition is a question of fact." (footnote and citation omitted)).

We therefore reverse the decision of the Court of Appeals and remand this case to that court for further remand to the trial court for further proceedings not inconsistent with this opinion.

REVERSED and REMANDED.

IN RE ARMSTRONG

[365 N.C. 185 (2011)]

IN RE: ARTHUR D. ARMSTRONG	)	ORDER

No. 129P11

ORDER

Since 28 April 2006, petitioner has filed 249 documents with this Court. More recently, petitioner has filed 104 motions or petitions since 8 March 2011. After reviewing the substance of these most recent filings, the Court has determined that they are frivolous under Rule 34(a) of the Rules of Appellate Procedure. Accordingly, all of petitioner's filings are denied.

Further, petitioner is no longer permitted to proceed pro se before this Court. Any future filing by petitioner will not be processed by the Office of the Clerk of the Supreme Court of North Carolina unless the filing is accompanied by a certification signed by a licensed North Carolina attorney in good standing with the North Carolina State Bar verifying that the claims presented by petitioner have arguable merit and are not frivolous.

By order of the Court in Conference, this 7th day of April, 2011.

s/Jackson, J.
For the Court

IN RE M.I.W.

[365 N.C. 186 (2011)]

IN THE MATTER OF:	)	
	)	
M.I.W.	)	From Harnett County
	)	
	)	
	)	

No. 148P11

ORDER

The respondent-mother's petition for writ of certiorari is allowed on the following issue only:

Did the trial court possess subject matter jurisdiction to terminate parental rights when the motion in the cause was filed during the pendency of an appeal?

By order of the Court in Conference, this 15th day of June, 2011.

s/Jackson, J.
For the Court

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

7 APRIL 2011

003P11	In the Matter of: J.K., S.K., S.C., Minor Children	Burke County Department of Social Services' PDR Under N.C.G.S. § 7A-31 (COA10-649)	Denied
008P11	State v. Chris Alan Jones	1. State's Motion for Temporary Stay (COA10-475) 2. State's Petition for Writ of Supersedeas 3. State's PDR under N.C.G.S. § 7A-31	1. Allowed **01/10/11** 2. Allowed 3. Allowed
022A02-2	State v. Marcus Douglas Jones	1. Def's Motion for Stay of Proceeding 2. Def's Motion in the Alternative for an Extension of Time to File Petition for Writ of Certiorari	1. Denied **03/31/11** 2. Allowed **03/31/11**
035P11	State v. Javon Capers	1. Def's NOA Based Upon a Constitutional Question (COA09-1613) 2. Def's PDR Under N.C.G.S. § 7A-31	1. Dismissed Ex Mero Motu 2. Denied **Jackson, J., Recused**
042P11	Afrika S. Roberts, by and through her Guardian ad Litem, Frankie J. Perry v. Adventure Holdings, LLC and 3311 Capital Boulevard, LLC d/b/a Adventure Landing	Plt's PDR Under N.C.G.S. § 7A-31 (COA10-589)	Denied **Jackson, J., Recused**
043P11	State v. Mario Pier Fortune	Def's PDR Under N.C.G.S. § 7A-31 (COA10-81)	Denied
044P11	Mecklenburg County v. Simply Fashion Stores, Ltd.	1. Def's NOA Based Upon a Constitutional Question (COA09-1625) 2. Def's PDR Under N.C.G.S. § 7A-31	1. Dismissed Ex Mero Motu 2. Denied **Jackson, J., Recused**
051P11	Maude Rumple v. Lynda DeLellis	3. Def's *Pro Se* Motion to Void Superior Court October 2, 2009 Order and Judgment 4. Def's *Pro Se* Motion to Stay March 15, 2011 Contempt Order to Enforce Said Order and Judgment	3. Dismissed 0**3/22/11** 4. Denied **03/22/11** **Jackson, J., Recused**

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

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058A02-5	State v. Travis Levance Walters	Defendant-Appellant's PDR Under N.C.G.S. § 7A-31 (COA10-281)	Denied **Jackson, J., Recused**
058P11	Markus Perry and his wife, Veronica Perry v. The Presbyterian Hospital, Hawthorne Cardiovascular Surgeons, and David Scott Andrews, M.D.	Def's (The Presbyterian Hospital) PDR Under N.C.G.S. § 7A-31 (COA10-150)	Denied **Jackson, J., Recused**
066P11	State v. Sandy Delandore Graves	Def's *Pro Se* Petition for Writ of Certiorari to Review the COA (COA09-595)	Denied
070P11	State v. Reginald McKinley Williams	Def's PDR Under N.C.G.S. § 7A-31 (COA09-1656)	Denied
073P11	State v. Norman Ray Roberts, III	1. Def's NOA Based Upon a Constitutional Question (COA10-741) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. —— 2. Denied 3. Allowed
076P11	State v. Roman Wiloth Vasquez-Guardo	Def's PDR Under N.C.G.S. § 7A-31 (COA10-633)	Denied
086P11	State v. James M. Womble	Def's *Pro Se* Motion for Review of M.A.R. Denied by COA (COAP11-143)	Dismissed
087P11	Mitchell, Brewer, Richardson, Adams, Burge & Boughman, PLLC; Glenn B. Adams; Harold L. Boughman, Jr.; and Vickie L. Burge v. Coy E. Brewer, Jr.; Ronnie A. Mitchell; William O. Richardson; and Charles Brittain	1. Def's (Coy E. Brewer, Jr.) *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA09-1020) 2. Plts' Motion to Strike Response of Charles Brittain	1. Denied 2. Allowed **Martin, J., Recused; Timmons-Goodson, J., Recused**
090P11	State v. Clyde Milton Boyd	Def's PDR Under N.C.G.S. § 7A-31 (COA09-1666)	Denied
091P11	State v. Ron Dale Johnson	1. Def's *Pro Se* Petition for Writ of Certiorari to Review the Order of Superior Court of Granville County 2. Def's *Pro Se* Motion to Appoint Counsel	1. Dismissed 2. Dismissed as Moot

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

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094A11	State v. Roger Gene Moore	Motion by Carol Ann Bauer to Withdraw as Appellate Counsel and to Re-Appoint Appellate Defender's Office	Allowed **03/30/11**
097P11	State v. Glorbman Lamont Brown	Def's *Pro Se* Petition for Writ of Certiorari to Review the Decision of COA (COA09-1293)	Denied
100P11	State v. David Ordis Lawrence	1. State's Motion for Temporary Stay (COA10-348) 2. State's Petition for Writ of Supersedeas 3. State's NOA Based Upon a Constitutional Question 4. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **03/17/11** 2. 3. 4.
103P11	Roger Stevenson v. N.C. Department of Correction	Plt's *Pro Se* NOA Based Upon a Constitutional Question (COA10-1169)	Dismissed Ex Mero Motu
104P11	State v. Titus Batts	Def's *Pro Se* Petition for Writ of Habeas Corpus	Denied **03/22/11**
105P11	State v. Meco Tarnell Wiggins	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA10-450)	Denied
108A11	Leonard A. Boyles, Jr. v. North Carolina Real Estate Commission	1. Plt's *Pro Se* NOA Based Upon a Constitutional Question (COA10-367) 2. Respondent's Motion to Dismiss Appeal (COA10-367)	1. —— 2. Allowed
120P11	Robert Allen Sartori v. Andrew Patterson	Plt's *Pro Se* Petition for Writ of Mandamus (COAP11-36)	Denied
121P11	State v. Patrick Loren Towe	1. State's Motion for Temporary Stay (COA10-401) 2. State's Petition for Writ of Supersedeas 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **03/30/11** 2. 3.
123P11	State v. Artis Tamar Perkins	1. Def's *Pro Se* Petition for Certiorari to Review Order of Superior Court of Wake County (COA02-158) 2. Def's *Pro Se* Motion to Appoint Counsel 3. Def's *Pro Se* Motion to Proceed in Forma Pauperis	1. Dismissed 2. Dismissed as Moot 3. Allowed **Hudson, J., Recused**

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

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132P11	State v. Gregory Lynn Gordon	Def's *Pro Se* Petition for Writ of Habeas Corpus (COAP11-153)	Denied **04/05/11**
136P09-3	Corinda D. Greene v. Lorenzo D. Richardson	1. Def's *Pro Se* Motion for Temporary Stay (COA10-1067) 2. Def's *Pro Se* Petition for Writ of Supersedeas 3. Def's *Pro Se* Motion for NOA 4. Def's *Pro Se* Motion to Proceed In *Forma Pauperis*	1. Denied **02/21/11** 2. Denied 3. Denied 4. Allowed
148P10-3	State v. Lance Adam Goldman	1. Def's *Pro Se* Petition for Writ of Habeas Corpus 2. Def's *Pro Se* Motion to Proceed In *Forma Pauperis*	1. Denied **03/25/11** 2. Allowed **03/25/11**
171P10	David E. Combs v. City Electric Supply Co., et al.	1. Defs' PDR Under N.C.G.S. § 7A-31 (COA09-108) 2. Plt's Motion for Leave to File Response to Petition	1. Denied 2. Allowed **11/19/10**
253P10-2	State v. James Earl Lassiter	1. Def's *Pro Se* Motion for NOA (COAP10-353) 2. Def's *Pro Se* Petition for Writ of Mandamus	1. 2. Denied **03/11/11**
313PA10	Cheyenne Saleena Stark, a Minor, Cody Brandon Stark, a Minor, by Their Guardian ad Litem Nicole Jacobsen v. Ford Motor Company, a Delaware Corporation	1. Def's PDR Under N.C.G.S. § 7A-31 (COA09-286) 2. Motion for Cary Silverman to be Admitted Pro Hac Vice 3. Motion for Mark A. Behrens to be Admitted Pro Hac Vice 4. Motion by the National Association of Manufacturers, et al., for Leave to File Amici Curiae Brief 5. Motion by NC Association of Defense Attorneys, et al., for Leave to File Amici Curiae Brief	1. Allowed **02/03/11** 2. Dismissed **03/10/11** 3. Dismissed **03/10/11** 4. Dismissed Without Prejudice to Refile Pursuant to 28(i) N.C. R. App. P. **02/03/11** 5. Dismissed Without Prejudice to Refile Pursuant to 28(i) N.C. R. App. P. **02/03/11**

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

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313PA10 con'd		6. Motion by Product Liability Advisory Council for Leave to File Amicus Brief	6. Dismissed Without Prejudice to Refile Pursuant to 28(i) N.C. R. App. P. **02/03/11**
		7. Motion by Defendant to Admit Robert L. Wise and Sandra Giannone Ezell *Pro Hac Vice*	7. Allowed **03/21/11**
		8. Motion by Defendant to Amend ROA	8.
		9. Motion, in the Alternative, by Plaintiff to Amend ROA	9.
		10. Plt's Motion to Reconsider Motion for Leave to file Amici Curiae Brief of Former Legislators	10. Denied
		11. Plt's Motion to Strike Amicus Brief of Former Legislators	11.
		12. Motion by K. Edward Green for Admission of James L. Gilbert *Pro Hac Vice*	12. Allowed **4/04/11**
		13. The Covenant with North Carolina's Children and KidsandCars.org's Motion for Leave to File Amicus Brief	13. Allowed **04/05/11**
		14. Advocates for Justice's Motion for Leave to File Amicus Brief	14. Allowed **4/05/11**
331P01-3	State v. Nicholas Nathaniel Cauley	1. Def's *Pro Se* Petition for Writ of Habeas Corpus (COAP11-102)	1. Denied **03/24/11**
		2. Def's *Pro Se* Petition for Writ of Certiorari to Review Order of COA	2. Dismissed **03/24/11** **Hudson, J., Recused**
348P06-2	State v. Stuart Wayne Tompkins	1. Def's *Pro Se* Motion for NOA (COAP11-211)	1. Dismissed Ex Mero Motu
		2. Def's *Pro Se* Petition for Writ of Certiorari to Review the Order of COA	2. Dismissed
		3. Def's *Pro Se* Motion to Appoint Counsel	3. Dismissed as Moot
400A10	James W. Langston v. Julie Richardson, as Executrix of the Estate of Jeanne E. Langston	1. Plt's NOA Based Upon a Dissent (COA09-1535)	1. Dismissed Ex Mero Motu
		2. Plt's Petition for Writ of Certiorari to Review Decision of COA	2. Denied

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

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412P10	In the Matter of: K.S. & K.S., Minor Children	Respondent Mother's PDR Under N.C.G.S. § 7A-31 (COA10-371)	Denied
429P10	Todd M. Bodine and Janet L. Paczkowski v. Harris Village Property Owners Association, Inc.	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA09-1458) 2. Plt's Motion to Strike Exhibit to Response	1. Denied 2. Dismissed as Moot
441P92-5	State v. Johnnie L. Harrington	Def's *Pro Se* Petition for Writ of Certiorari to Review Order of Superior Court of Lee County	Dismissed
458P10	State v. Nakia Nickerson	1. State's Motion for Temporary Stay (COA09-1511) 2. State's Petition for Writ of Supersedeas 3. State's PDR Under N.C.G.S. § 7A-31 4. State's Motion to Withdraw PDR and Petition for Writ of Supersedeas 5. State's Motion for Temporary Stay 6. State's Petition for Writ of Supersedeas 7. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **10/25/10** Dissolved the Stay **11/30/10** 2. Dismissed as Moot **11/30/10** 3. Dismissed as Moot **11/30/10** 4. Dismissed as Moot **11/30/10** 5. Allowed **11/30/10** 6. Allowed 7. Allowed
459P10	State v. Cody James Marler	1. Def's PDR Under N.C.G.S. § 7A-31 (COA09-1573) 2. Def's Motion to Deem PDR Timely Filed	1. Allowed 2. Allowed
466P10	Profile East Investments No. 25, LLC v. Ammons East Corporation	Plt's PDR Under N.C.G.S. § 7A-31 (COA09-1471)	Denied
479P10	State v. Elijah Omar Nabors	1. State's Motion for Temporary Stay (COA10-176) 2. State's Petition for Writ of Supersedeas 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **11/05/10** 2. Allowed 3. Allowed **Jackson, J., Recused**

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480P10	Clinton W. Lunsford and Mary Ann Lunsford, et al. v. Lori Renn and Town of Franklinton, et al.	Plts' PDR Under N.C.G.S. § 7A-31 (COA09-1592)	Denied
489P10	Cary Creek Limited Partnership v. Town of Cary, North Carolina	Petitioner's PDR Under N.C.G.S. § 7A-31 (COA10-38)	Denied **Jackson, J., Recused**
500P10	WHD, L.P. v. Lawyers Mutual Liability Insurance Company of NC and Brent E. Wood	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA09-1633) 2. Def's (Lawyers Mutual Liability Ins. Co. of NC) Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 2. Dismissed as Moot
501P10	In the Matter of J.D.	1. Respondent's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA10-422) 2. Respondent's *Pro Se* Motion to Amend PDR	1. Denied 2. Allowed
520P10-2	State v. Larry Mackey	1. State's Motion for Temporary Stay (COA09-1382) 2. State's Petition for Writ of Supersedeas 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **01/25/11**; Dissolved the Stay **04/07/11** 2. Denied 3. Denied **Jackson, J., Recused**
553P07-2	State v. Luther A. McKinney	1. Def's *Pro Se* Petition for Writ of Certiorari to Review Order of COA (COAP07-135) 2. Def's *Pro Se* Motion to Appoint Counsel	1. Dismissed 2. Dismissed as Moot
702P05-2	State v. Furman Lindell Jacobs	Def's *Pro Se* Motion on "DNA" Testing (COAP11-216)	Dismissed **Jackson, J., Recused**

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005P11	James Blackburn v. Dominick J. Carbone, M.D., Wake Forest University Baptist Medical Center, The North Carolina Baptist Hospitals, Inc., North Carolina Baptist Hospital, and Wake Forest University Health Sciences	1. Plt's NOA Based Upon a Constitutional Question (COA10-602) 2. Plt's PDR Under N.C.G.S. § 7A-31	1. Dismissed *ex mero motu* 2. Denied
006P11	State v. Eric Ricardo Handy	1. Def's PDR Under N.C.G.S. § 7A-31 (COA09-1422) 2. State's Motion for Response to Def-Appellant's PDR to be Deemed Timely Filed	1. Denied 2. Allowed
007P11	State v. Citarian Tyquan Crandell	Def's PDR Under N.C.G.S. § 7A-31 (COA10-439)	Denied
010P11	State v. Aric Devon Blackwell	Def's PDR Under N.C.G.S. § 7A-31 (COA10-132)	Denied
012P11	State v. Darnell Lynch	Def's PDR Under N.C.G.S. § 7A-31 (COA10-303)	Denied **Jackson, J., Recused**

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018P11	Hilmar Leiber v. Arboretum Joint Venture, LLC; AAC-Arboretum Joint Venture Consolidated Limited Partnership; AAC-Franklin Square Limited Partnership; Franklin III Limited Partnership; AAC-Franklin Development GP Limited Partnership; AAC-Franklin Development, Inc.; Franklin Square IV, LLC; Southlake Limited Partnership; AAC Retail Property Development and Acquisition Fund, LLC; AAC Retail Fund Management, LLC; American Asset Corporation Companies, Ltd.; AAC Investments, Inc.; Gastonia Limited Partnership; Arbor Limited Partnership; Bank of America; and Wachovia Bank	Defendant-Appellants' (excluding Bank of America and Wachovia Bank) PDR (COA09-1284)	Denied
019P11	Lisa Sanderson Rabon v. Fay Elizabeth Hopkins and Keystone Freight Corp.	Defendant-Appellants' PDR (COA10-455)	Denied
020P11	State v. James Patrick Treadway	Def's PDR Under N.C.G.S. § 7A-31 (COA10-287)	Denied
021P11	Lamez Williams v. American Eagle Airlines, Inc.	1. Motion by Ross S. Sohm to Withdraw as Counsel of Record 2. Plt's PDR Under N.C.G.S. § 7A-31 (COA10-267)	1. Allowed **04/13/11** 2. Denied **Jackson, J., Recused**

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026P11	Claude Kirkman Crumpler and Wife, Carol Folsom Crumpler v. Avenir Development, L.L.P., Cadeto Construction Services d/b/a Cadeto, Inc., Cadeto Inc., Christopher G. Yerkes and Avenir Construction, Inc.	Plts' PWC to Review Decision of COA (COA10-103)	Denied
028P11	McDonald's Corporation v. Five Stars, Inc. and S. Sonny Dang	Def's (S. Sonny Dang) PDR Under N.C.G.S. § 7A-31 (COA10-346)	Denied
029P11	State v. Richard Eugene Foy	1. Def's Motion for Temporary Stay (COA10-331) 2. Def's Petition for *Writ of Supersedeas* 3. Def's NOA Based Upon a Constitutional Question 4. Def's PDR Under N.C.G.S. § 7A-31 5. State's Motion to Dismiss Appeal	1. Allowed **01/19/11;** Dissolved the Stay **06/15/11** 2. Allowed **01/19/11** 3. —— 4. Denied 5. Allowed
036P11	State v. James Donovan Ford	Def's PDR Under N.C.G.S. § 7A-31 (COA10-470)	Denied
039P11	State v. Robert Albert Tillett	1. Def's *Pro Se* Motion for NOA (COAP10-875) 2. Def's *Pro Se* Motion for PDR 3. Def's *Pro Se* PWC to Review Order of COA 4. Def's *Pro Se* Motion for Petition for Leave to Amend	1. Dismissed *ex mero motu* 2. Dismissed 3. Dismissed 4. Allowed
040P11	State v. Charles Benjamin Paterson	Def's PDR Under N.C.G.S. § 7A-31 (COA10-446)	Denied
048P11	State v. Brian Wendell Rhodes, Jr.	1. Def's NOA Based Upon a Constitutional Question (COA10-784) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. —— 2. Denied 3. Allowed **Jackson, J., Recused**

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055P02-10	State v. Henry Ford Adkins	Def's *Pro Se* PWC to Review Order of COA (COAP11-263)	Dismissed
055P11	State v. Gregory Lionel King	Def's PDR Under N.C.G.S. § 7A-31 (COA10-617)	Denied **Jackson, J., Recused**
056P11	State v. Don Tray Cole	1. Def's NOA Based Upon a Constitutional Question (COA10-139) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. —— 2. Denied 3. Allowed **Jackson, J., Recused**
057P11	David Matthew Harrell, Employee v. General Electric, Employer, Self-Insured (Electric Insurance/Sedgwick CMS, Servicing Agent	Def's PDR Under N.C.G.S. § 7A-31 (COA10-358)	Denied
059P11	State v. Robert Francis Watlington	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA10-531)	Denied **Jackson, J., Recused**
061P11	State v. Eric Alan Oakes	1. Def's NOA Based Upon a Constitutional Question (COA09-1280) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. —— 2. Denied 3. Allowed **Jackson, J., Recused**
062P11	State v. Joshua James Parlee	Def's PDR Under N.C.G.S. § 7A-31 (COA10-620)	Denied
064P11	State v. Thomas John Starr	Def's PDR Under N.C.G.S. § 7A-31 (COA10-752)	Allowed
069P11	State v. Jennings	Def's PDR Under N.C.G.S. § 7A-31 (COA10-503)	Denied
071P11	State v. Alexander Robert Brown	1. Def's PWC to Review the Order of the COA (COAP10-192) 2. Def's Motion to Amend PWC	1. Dismissed 2. Allowed

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074P11	Michael Jonathan McCrann, Jr. by Guardians, Kelly C. McCrann and Michael J. McCrann v. N.C. Department of Health and Human Services, Division of Mental Health, Developmental Disabilities, and Substance Abuse Services	1. Respondent's PDR Under N.C.G.S. § 7A-31 (COA10-80) 2. Respondent's Motion for Temporary Stay 3. Respondent's Petition for *Writ of Supersedeas*	1. Denied 2. Allowed **05/03/11**; Dissolved **06/15/11** 3. Denied
075P11	State v. James Anthony Barnette, Jr.	Def's PDR Under N.C.G.S. § 7A-31 (COA10-620)	Denied
078P11	Town of Midland v. Harry T. Morris and Maralyn R. Morris and Town of Midland v. John S. Wagner and Anne D. Wagner and Town of Midland v. Beverly F. Chapman and Town of Midland v. Brenda Seaford, Harold Gray Seaford, and Ben F. Fisher and Town of Midland v. Jimmy Ray Wilkinson and Gilda S. Wilkinson and Town of Midland v. Vaudrey Mesimer and Edith Mesimer and Town of Midland v. Dorothy Drescher Black and Town of Midland v. Marlene T. Cook and Jennings R. Cook and Town of Midland v. Albertine L. Smith and Town of Midland v. Wilmer Melton, Jr. and Harriet L. Melton and Town of Midland v. Wilmer Melton, Jr. and Harriet L. Melton and Town of Midland v. Billy James, Norris James and Amelia	1. Defs'/Plts' NOA Based Upon A Constitutional Question (COA10-322) 2. Defs'/Plts' PDR Under N.C.G.S. § 7A-31 3. Defs' (John S. Wagner and Anne D. Wagner) PDR Under N.C.G.S. § 7A-31 4. Plt's/Def's (Town of Midland) Motion to Dismiss Appeal	1. — 2. Denied 3. Denied 4. Allowed **Jackson, J., Recused**

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078P11, Cont'd	Goodnight and Town of Midland v. Concord Police Club, Inc. and Town of Midland v. Theron Keith Honeycutt and Ann Nash Honeycutt and Town of Midland v. Theron Keith Honeycutt and Ann Nash Honeycutt and Harry T. Morris and Maralyn R. Morris v. Town of Midland and Jimmy Ray Wilkinson and Gilda S. Wilkinson v. Town of Midland and Vaudrey Mesimer and Edith Mesimer v. Town of Midland and Marlene T. Cook and Jennings R. Cook v. Town of Midland and Albertine L. Smith, Trustee v. Town of Midland and Billy James, Norris James and Amelia Goodnight v. Town of Midland and Dorothy Drescher Black v. Town of Midland and Concord Police Club, Inc. v. Town of Midland		
082P11	State v. Marcus Rudolph Keys	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA10-112)	Denied
083P11	State v. Jonathan Salas Ramirez	1. Def's NOA Based Upon a Constitutional Question (COA10-293) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion Pursuant to Rule 2 to Deem Motion to Dismiss and Response Timely Filed 4. State's Motion to Dismiss Appeal	1. —— 2. Denied 3. Allowed 4. Allowed

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085P11	Integon National Insurance Company v. Jane Elizabeth Sechrist, Justin Paul Fryar, Paul S. Fryar, and North Carolina Farm Bureau Mutual Insurance Company, Inc.	1. Def's PDR Under N.C.G.S. § 7A-31 (COA10-484) 2. Plt's Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 2. Dismissed as Moot
088P11	State v. Stephen Eric Snipes	Def's PDR Under N.C.G.S. § 7A-31 (COA10-442)	Denied
089P11	State v. Dallis Davis	1. Def's PDR Under N.C.G.S. § 7A-31 (COA09-1378) 2. Def's Petition in the Alternative for *Writ of Certiorari* to Review the Order of the COA	1. Denied 2. Denied
092P11	State v. Ronnie Lee Ziglar	Def's PDR Under N.C.G.S. § 7A-31 (COA10-839)	Denied
093P11	State v. David E. Poole	1. Def's *Pro Se* PWC to Review Order of COA (COAP11-18) 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
095P11	State v. Ernest Jawern Wright	1. Def's PDR Under N.C.G.S. § 7A-31 (COA10-854) 2. State's PDR Under N.C.G.S. § 7A-31	1. Denied 2. Denied
096P11	State v. Dennis Tyrone Garnett, Sr.	Def's PDR Under N.C.G.S. § 7A-31 (COA10-111)	Denied
098P11	State v. William Charles Kohls	Def's *Pro Se* Motion for PDR (COAP11-27)	Dismissed
100P11	State v. David Ordis Lawrence	1. State's Motion for Temporary Stay (COA10-348) 2. State's Petition for *Writ of Supersedeas* 3. State's NOA Based Upon a Constitutional Question 4. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **03/17/11** 2. Allowed 3. Dismiss *ex mero motu* 4. Allowed as to Issue II

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101P11	Wachovia Mortgage, FSB f/k/a World Savings Bank, FSB v. Walter K. Davis and wife, Shelvia J. Davis; Branch Banking and Trust Company; and Jerone C. Herring, Trustee	Defs' (Walter K. and Shelvia Davis) PDR Under N.C.G.S. § 7A-31 (COA10-572)	Denied
103P11-2	Roger Stevenson v. N.C. Department of Correction	Plt's *Pro Se* Motion for Petition for Rehearing	Denied
106P11	State v. Kenneth Hammond	1. Def's *Pro Se* PWC to Review Order of COA (COAP11-68) 2. Def's *Pro Se* Motion to Appoint Counsel 3. Def's *Pro Se* Motion to Proceed *In Forma Pauperis*	1. Dismissed 2. Dismissed as Moot 3. Allowed
107P11	Robert King, Ann King, Margaret Whaley, and A. William King v. Robert Orr and Marianne Orr	Def's PDR Under N.C.G.S. § 7A-31 (COA10-23)	Denied
109P11	State v. Brandon Lamar Medlin	1. Def's NOA Based Upon a Constitutional Question (COA10-629) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. —— 2. Denied 3. Allowed
114P11	The Villages at Red Bridge, LLC v. J. Brent Weisner, in his capacity as Cabarrus County Tax Administrator	Petitioner's PDR Under N.C.G.S. § 7A-31 (COA10-723)	Denied
116P11	State v. Robert Rigdon Scruggs, Jr.	Def's PDR Under N.C.G.S. § 7A-31 (COA10-921)	Denied

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117P11	Anthony Robinson, Calizza Whitaker, Edith Robinson, individually and as guardian *ad litem* of Shondretta Whitaker and Shondretta Whitaker v. Bridgestone/ Firestone North American Tire, LLC, a foreign corporation, Littleton Service Center, and Luther Alston, individually and as a Servant, Agent, and Employee of Littleton Service Center	Plt's PDR Under N.C.G.S. § 7A-31 (COA09-1108)	Denied
118P11	Frances Christmas v. Greyhound Lines, Inc., Shields Candido Jones, Katay Logistics, LLC, and Alberto Barreto	Plt's PDR Under N.C.G.S. § 7A-31 (COA10-859)	Denied
119P00-30	State v. Wayne Thomas Johnson	Def's *Pro Se* Petition for *Writ of Habeas Corpus*	Denied **05/16/11**
119P11	State v. Erick Thomas Eaton	Def's PDR Under N.C.G.S. § 7A-31 (COA09-1586)	Denied
121P11	State v. Patrick Loren Towe	1. State's Motion for Temporary Stay (COA10-401) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **03/30/11** 2. Allowed 3. Allowed
122P11	State v. Michael A. Deese	Def's *Pro Se* Motion for Response to State's Rebuttal of *Certiorari* (COAP11-185)	Dismissed
124A93-4	State v. Carl Stephen Moseley	Def's PWC to Review Order of the Superior Court of Stokes County	Denied
124P11	State v. Gerald L. Carter	Def's PDR Under N.C.G.S. § 7A-31 (COA10-648)	Denied
131P11	State v. Donald Wayne Bright	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA10-544)	Denied

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132P11-1	State v. Gregory Lynn Gordon	1. Def's *Pro Se* Motion to Dismiss for Medical & Physical Defense of Incapacity to Proceed to Criminal Defense 2. Def's *Pro Se* Petition for *Writ of Habeas Corpus* 3. Def's *Pro Se* Motion for *Writ of Habeas Corpus Testicadum* (sic)—"Default Judgment"	1. Dismissed **05/17/11** 2. Denied **05/09/11** 3. Denied **05/17/11**
132P11-3	State v. Gregory Lynn Gordon	Def's NOA; Objection to All Criminal Proceedings	Dismissed
133P11	State v. Kunta Kinta Dillard	Def's PWC to Review the Order of the COA (COAP10-767	Dismissed
135A11	State v. Curtis Edwin Leyshon	Def's *Pro Se* NOA Based Upon a Constitutional Question (COA10-556)	Dismissed ex mero motu
136P11	State v. Brett Donald Sullivan	1. Def's *Pro Se* NOA Based Upon a Constitutional Question (COA10-925) 2. Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. — 2. Denied 3. Allowed
137P11	State v. Keith Bruce Cady	1. Def's NOA Based Upon a Constitutional Question (COA10-872) 2. Def's PDR Under N.C.G.S. § 7A-31	1. Dismissed *ex mero motu* 2. Denied
142P11	River Run Limited Partnership and River Run Property Owner's Association v. Equus Merda Inc., et al.	Plt's PDR Under N.C.G.S. § 7A-31 (COA10-469)	Denied
143P11	Herbert M. Bell, Employee v. Hype Manufacturing, LLC, Employer, and American Zurich Insurance Company, Carrier	Defendant-Employer's PDR Under N.C.G.S. § 7A-31 (COA10-952)	Denied
144P11	State v. Morris Clem Patterson	1. Def's NOA Based Upon a Constitutional Question (COA10-538) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. — 2. Denied 3. Allowed
145P11	In the Matter of: N.T.S.	Respondent-Mother's PDR Under N.C.G.S. § 7A-31 (COA10-1154)	Denied

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147P11	State v. Randolph Alexander Watterson	1. Def's *Pro Se* NOA Based Upon a Constitutional Question (COA10-1007) 2. Def's *Pro Se* PDR Under N.C.G.S. § 7A-31	1. Dismissed *ex mero motu* 2. Denied
148P11	In the Matter of: M.I.W.	1. Respondent-Mother's PDR Under N.C.G.S. § 7A-31 (COA10-1058) 2. Respondent-Mother's Petition in the Alternative for *Writ of Certiorari* to Review Decision of the COA	1. Dismissed 2. See Special Order Page 186
149P11	State v. Jon Robert Guthrie	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA09-1595)	Denied
150P11	State v. Benjamin Thomas Schaeffer	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA-620)	Denied
151P11	State v. Carsee Hunt	1. Def's *Pro Se* Motion for Freedom of Information Act Under Bill of Particular 2. Def's *Pro Se* Motion for NOA (COAP11-173) 3. Def's *Pro Se* Motion for PDR 4. Def's *Pro Se* PWC to Review Order of COA	1. Dismissed 2. Dismissed *ex mero motu* 3. Dismissed 4. Dismissed
152P11	State v. Keith Leonardo Shropshire	1. Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA10-1113) 2. Def's *Pro Se* Motion to Amend PDR	1. Dismissed 2. Allowed
154P11	Grover M. Ensley v. FMC Corporation, Self-Insured, and BroadSpire, A Crawford Company, Servicing Agent	1. Def's Motion for Temporary Stay (COA10-522) 2. Def's Petition for *Writ of Supersedeas* 3. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed **04/19/11**; Dissolved the Stay **06/15/11** 2. Denied 3. Denied
155P11	State v. William Ballard	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COAP11-239)	Denied
156P11	Yaodong Ji v. Johnny S. Gaskins	1. Plt's *Pro Se* NOA Based Upon a Constitutional Question (COA10-492) 2. Plt's *Pro Se* PDR Under N.C.G.S. § 7A-31 3. Def's Motion to Dismiss Appeal	1. —— 2. Denied 3. Allowed
159P11	State v. Corey Dwayne Smith	Def's *Pro Se* Motion for this Court to Review Case for Plain Error Pursuant to N.C.G.S. § 7-A28	Dismissed
160P11	State v. Arnold Arnaz Johnson	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA10-1061)	Denied

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161P11	State v. Ralph Edward Gray	1. State's Motion for Temporary Stay (COA10-307) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **04/25/11** 2. 3.
162P11	Lazona Gale Spears, Employee v. Betsy Johnson Memorial Hospital, Employer, N.C. Guaranty Association, Successor to Reliance Insurance Company, Carrier	Plt's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA10-580)	Denied
163P11	State v. Phillip Maurice Propst	Def's *Pro Se* PWC (COAP10-63)	Dismissed
165P11	State v. Dean Sylvester Vann	Def's *Pro Se* Motion for PDR Under N.C.G.S. § 7A-31 (COAP10-876)	Dismissed
166P11	State v. Haiber V. Montehermoso	Def's *Pro Se* Motion for NOA (COAP11-227)	Dismissed
167A10	Wilson v. Wilson	Joint Motion to Withdraw Appeal	Allowed **05/16/11**
167P11	State v. Dwayne Eric Justice	1. Def's *Pro Se* PWC to Review the Order of the COA (COAP11-224) 2. Def's *Pro Se* Motion to Appoint Counsel	1. Dismissed 2. Dismissed as Moot
168P11	State v. Kelvin Jerome Rippy	1. Def's NOA Based Upon a Constitutional Question Under N.C.G.S. § 7A-31 (COA10-482) 2. Def's PDR 3. State's Motion to Dismiss Appeal	1. —— 2. Denied 3. Allowed

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169P11	Hest Technologies, Inc., and International Internet Technologies, LLC v. State of North Carolina, ex rel. Beverly Perdue, in her official capacity; NC Dep't of CCPS; Secretary of CCPS, Reuben Young, in his official capacity; Alcohol Law Enforcement Division; Director of Alcohol Law Enforcement Division, John Ledford, in his official capacity	Def's PDR Prior to Determination by the COA	Denied
171P11	State v. Sidney Evans, III	Def's *Pro Se* Motion for Petition for Plain Error Review	Dismissed
178P11	State v. Jason Wayne Maynard	Def's PDR Under N.C.G.S. § 7A-31 (COA10-134)	Denied
179P11	Henry James Bar-Be-Que, Inc. v. Jeanette Davis Gilmore	Def's PDR Under N.C.G.S. § 7A-31 (COA10-729)	Denied
182P11	State v. Mario V. Fregoso	Def's *Pro Se* Motion for Peremptory *Writ of Mandamus*	Dismissed
185P11	State v. Ronnie Oliver	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31	Denied
186P11	State v. Todd Wayne Worsham	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA10-287)	Denied
187P11	State v. Jeffrey Lamont Phifer	1. Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA10-1256) 2. Def's *Pro Se* Motion to Appoint Counsel	1. Denied 2. Dismissed as Moot
188P11	State v. Gary Wayne Rice	1. Def's *Pro Se* Motion for NOA (COAP11-349) 2. Def's *Pro Se* Motion for PDR 3. Def's *Pro Se* PWC to Review Order of COA	1. Dismissed *ex mero motu* 2. Dismissed 3. Dismissed
189P11	State v. Derrick Lamont Crudup	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31	Denied

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190P08-2	State v. Alfred Luther Williams, Jr.	Def's *Pro Se* PWC to Review the Order of the COA (COAP10-936)	Dismissed
190P11	State v. Ben Earl Pell	1. State's Petition for *Writ of Supersedeas* (COA10-415) 2. State's PDR Under N.C.G.S. § 7A-31 3. State's Motion for Temporary Stay	1. Denied 2. Denied 3. Dismissed as Moot **05/24/11**
191P09-2	Larry W. Pigg and Gloria A. Vandiver v. Boyd B. Massagee, Jr. and Prince, Youngblood and Massagee, Partnership	1. Plt's *Pro Se* Motion for PDR Under N.C.G.S. § 7A-31 (COA10-1400) 2. Plt's *Pro Se* PWC to Review Order of COA	1. Dismissed 2. Denied **Jackson, J., Recused**
192P07-2	State v. Quincy Jevon Hunt	Def's *Pro Se* Motion for Petition for Plain Error Review	Dismissed
207P11	State v. Victor Manuel Vasquez a/k/a Juan Manuel Ortiz	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA10-1027)	Denied
208PA09-2	Stanford, et. al. v. Paris, et. al.	Plt's PDR Under N.C.G.S. § 7A-31 (COA09-19)	Denied
213P11	State v. Michael Lamont Bynem	1. Def's *Pro Se* NOA Based Upon a Constitutional Question (COA10-999) 2. Def's *Pro Se* PDR Under N.C.G.S. § 7A-31	1. Dismissed *ex mero motu* 2. Denied
215P11	Alfonzo Meeks v. NC Department of Corrections, et. al.	1. Plt's *Pro Se* Motion for NOA (COAP11-360) 2. Plt's *Pro Se* Motion for Appellate Review	1. Dismissed *ex mero motu* 2. Denied
216P11	In the Matter of District Court Administrative Order	1. State's Petition for *Writ of Supersedeas* (COAP11-444) 2. State's PWC to Review Order of COA 3. State's Petition in the Alternative for *Writ of Mandamus*	1. Allowed 2. Allowed 3. Denied **Parker, C.J., and Martin, J., Recused**

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224P97-2	State v. Taurice Marquese Crisp	Def's *Pro Se* Petition for *Writ of Habeas Corpus*	Denied **05/16/11**
244P08-3	State v. Jamel Byrd Price	Def's *Pro Se* PWC to Review Order of COA (COAP11-146)	Dismissed
253P10-2	State v. James Earl Lassiter	1. Def's *Pro Se* Motion for NOA (COAP10-353) 2. Def's *Pro Se* Petition for *Writ of Mandamus*	1. Dismissed *ex mero motu* 2. Denied **03/11/11**
260P04-2	State v. Ervin Williamson	Def's PWC to Review the Order of the Superior Court of Columbus County	Dismissed
267PA10-1	North Carolina Farm Bureau Mutual Insurance Company, Inc. v. Gervis E. Sadler, individually and by and through Steve Anthony Sadler, his Attorney-in-Fact	Motion to Substitute Evelyn Sadler, Executrix for the Estate of Gervis E. Sadler	Allowed **04/20/11**
271P99-3	State v. Michael Rankins	Def's *Pro Se* Petition for *Writ of Habeas Corpus*	Denied **06/06/11**
273P07-2	State v. Michael Rankins	Def's *Pro Se* Petition for *Writ of Mandamus*	Denied **06/14/11**
311P06-2	State v. Darrian Deloach	1. Def's *Pro Se* PWC to Review the Order of the Superior Court of Forsyth County 2. Def's *Pro Se* Motion to Appoint Counsel	1. Dismissed 2. Dismissed as Moot
329A09-2	State v. Martinez Orlando Black	1. Def's *Pro Se* PWC to Review the Order of COA (COAP10-844) 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 **Jackson, J., Recused**
349P09-2	State v. Jeffery Robinson	1. Def's *Pro Se* PWC to Review Order of COA (COAP11-14) 2. Def's *Pro Se* Motion to Appoint Counsel 3. Def's *Pro Se* Motion to Proceed *In Forma Pauperis*	1. Dismissed 2. Dismissed as Moot 3. Allowed

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368P09-4	State v. Ronnie Eugene Simpson	Def's *Pro Se* Petition for *Writ of Mandamus*	Dismissed **05/11/11**
371P99-3	State v. Robert Dondera Batts	Def's *Pro Se* Motion for Appropriate Relief	Dismissed
372P07-2	State v. Ricky Dean Johnson	Def's *Pro Se* Motion for Petition for Plain Error Review	Dismissed
381P10-4	State v. David E. Simpson	1. Def's *Pro Se* Motion for Petition for a *Writ of Habeas Corpus* (COAP11-32) 2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis*	1. Denied 2. Allowed
386P10	State v. Paul Brantley Lewis	1. State's Motion for Temporary Stay (COA08-1595) 2. State's Petition for *Writ of Supersedeas* 3. State's NOA Based Upon a Dissent 4. State's Alternative PDR 5. Def's Motion to Dismiss Appeal 6. Def's Motion for Substitution of Counsel 7. State's Motion to Substitute Counsel	1. Allowed **09/07/10** 2. Allowed 3. — 4. Allowed 5. Allowed 6. Allowed 7. Allowed **Jackson, J., Recused**
389P07-2	William Lawson Brown, III v. Mark P. Ellis	1. Plt's NOA Based Upon a Constitutional Question (COA06-710-2) 2. Plt's Alternative PDR Under N.C.G.S. § 7A-31 3. Plt's Motion to Supplement Record on Appeal 4. Def's Motion to Dismiss Appeal	1. Dismissed *ex mero motu* 2. Denied 3. Allowed 4. Dismissed as Moot

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390P10	Amward Homes, Inc., Ange Construction Company, Bluepoint Homes, Inc., Homescape Building Company, Impact Design-Build, Inc., John Leggett and Company, Poythress Construction Company, Inc., Poythress Homes, Inc., Wardson Construction, Inc., WHG, Inc., d/b/a Timberline Builders, and Zeigler & Company v. Town of Cary, a body Politic and corporate Tradition at Stonewater I, LP, Plaintiff-Intervenor v. Town of Cary, a body politic and corporate, Defendant to Claim of Plaintiff-Intervenor	Def's PDR Under N.C.G.S. § 7A-31 (COA09-923)	Allowed **Jackson, J., Recused**
396P10	Agnes L. Pinkey v. HMS Host USA, Inc. d/b/a Chili's Too Restaurant	Def's *Pro* Se PDR Under N.C.G.S. § 7A-31 (COA09-393)	Denied
436P10	Craft Development, LLC v. County of Cabarrus	Def's PDR Under N.C.G.S. § 7A-31 (COA09-1610)	Allowed
437P10	Mardan IV v. County of Cabarrus	Def's PDR Under N.C.G.S. § 7A-31 (COA09-1611)	Allowed
438P10	Lanvale Properties, LLC and Cabarrus County Building Industry Association v. County of Cabarrus and City of Locust	Def's PDR Under N.C.G.S. § 7A-31 (COA09-1621)	Allowed
448P10	Joseph E. Burroughs, Employee v. Laser Recharge of Carolinas, Inc., Employer and Norguard Insurance Company, Carrier	Def's PDR Under N.C.G.S. § 7A-31 (COA09-1624)	Denied

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475P09-2	Mary B. Webb v. George Travers Webb, III	Def's PDR Under N.C.G.S. § 7A-31 (COA09-1203) 2. Def's Motion to Amend PDR	1. Denied **04/07/11** 2. Dismissed as Moot
476P03-2	State v. Sharoid Te-Juan Wright	Def's *Pro Se* Motion for Peremptory *Mandamus* (COAP10-631)	Denied **06/07/11**
476P10	Alicia Danielle Mosteller v. Duke Energy Corporation, A North Carolina Corporation; Duke Energy Carolinas, LLC, A North Carolina Limited Liability Company; and William Ray Walker	Plt's PDR Under N.C.G.S. § 7A-31 (COA09-277)	Denied
498P10	Mary S. Johnson, Employee v. Duke University Medical Center, and its subsidiary Duke Health Community Care (Self-Insured), Employer	Plt's PDR Under N.C.G.S. § 7A-31 (COA09-1582)	Denied
499P10	State v. Damien Lanel Gabriel	1. Def's PDR Under N.C.G.S. § 7A-31 (COA09-1669) 2. State's Motion to Deem Response to PDR Timely Filed	1. Denied 2. Allowed
510P10	State v. Rhonda Jean Hicks	Def's PDR Under N.C.G.S. § 7A-31 (COA10-247)	Denied
511P10	MLC Automotive, LLC and Leith of Fayetteville, Inc. v. Town of Southern Pines; The Southern Pines Town Council; Fran Quis; David Woodruff; Fred Walden; Christopher Smithson, and Michael Haney	1. Plts' PDR Under N.C.G.S. § 7A-31 (COA09-433) 2. Plts' Motion to Amend PDR to Include Recently Decided Case 3. Plts' Motion to Supplement Motion to Amend PDR	1. Denied 2. Allowed 3. Allowed
512P10	Signature Development, L.L.C. v. Sandler Commercial at Union, L.L.C.	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA09-646) 2. Def's Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 2. Dismissed as Moot

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513P10	In the Matter of: B.G.	1. Respondent's (Father) NOA Based Upon a Constitutional Question (COA10-168) 2. Respondent's (Father) PDR Under N.C.G.S. § 7A-31 3. Guardian *ad Litem's* Motion to Dismiss Appeal 4. Petitioner's (Durham County Dept. of Social Services) Conditional PDR Under N.C.G.S. § 7A-31	1. —— 2. Denied 3. Allowed 4. Dismissed as Moot **Jackson, J., Recused**
515P10	Robert Timberlake Newcomb, III, et al. v. County of Carteret, et al.	Plt's (Robert Timberlake Newcomb, III, Gary T. and Karen Davis) PDR Under N.C.G.S. § 7A-31 (COA09-1254)	Denied
519P10	Jeannette Parrott (Kriss) v. Jay Lawrence Kriss	Def's PWC to Review Decision of COA (COA09-593)	Denied
525P08-2	State v. Mitchell Joseph Harb, Jr.	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COAP11-100)	Dismissed
534P10	State v. Wynn Robert Walker	1. Def's NOA Based Upon a Constitutional Question (COA09-1514) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. —— 2. Denied 3. Allowed
535P10	In the Matter of: A.B.S.D., D.L.E., D.L.E., D.L.E., D.L.E., and D.L.E.	Respondent-Mother's PDR Under N.C.G.S. § 7A-31 (COA10-440)	Denied **Jackson, J., Recused**
536P00-5	State v. Terrance L. James	Def's *Pro Se* Motion for Peremptory Writ of Right to COA (COAP11-273)	Dismissed

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537P10	In the Matter of Duke Energy Carolinas, LLC's Advance Notice of Purchase Agreement with the City of Orangeburg, SC and Joint Petition for Declaratory Ruling	1. Petitioner's (Duke Energy Carolinas, LLC) NOA Based Upon a Constitutional Question (COA09-1273) 2. Petitioner's (Duke Energy Carolinas, LLC) Petition in the Alternative for Discretionary Review Under N.C.G.S. § 7A-31 3. Petitioner's (City of Orangeburg) NOA Based Upon a Constitutional Question 4. Petitioner's (City of Orangeburg) PDR Under N.C.G.S. § 7A-31 5. Motion by Petitioner (City of Orangeburg) to Admit James N. Horwood, J.S. Gebhart, and Peter J. Hopkins *Pro Hac Vice* 6. Respondents' (Public Staff-NC Util. Comm., Roy Cooper, Progress Energy) Motion to Dismiss Appeal of Duke Energy Carolinas, LLC 7. Respondents' (Public Staff-NC Util. Comm., Roy Cooper, Progress Energy) Motion to Dismiss Appeal of City of Orangeburg 8. Petitioner's (Duke Energy Carolinas, LLC) Motion Under Rule 2 of the NC Rules of Appellate Procedure to Suspend the Rules and for Permission to File Reply Brief 9. Petitioner's (City of Orangeburg) Motion for Leave to Respond, or, in the Alternative, Rule 37 Opposition, to Appellee's Motion to Dismiss Orangeburg's Notice of Appeal	1. —- 2. Denied 3. —- 4. Denied 5. Allowed **01/21/11** 6. Allowed 7. Allowed 8. Denied **01/21/11** 9. Denied **01/21/11**
538P10	Lawyers Title Insurance Corporation; Commonwealth Land Title Insurance Company; Clark's Creek Associates, L.L.C.; and Branch Bank and Trust Company v. Zogreo, LLC; Forest at Swift Creek, LLC; and C.C. Mangum Company, LLC and Donnie Harrison, in his official capacity as Sheriff of Wake County	Defs' PDR Under N.C.G.S. § 7A-31 (COA09-1304)	Denied

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541P10	James R. Gaynor v. Virginia Faye Gaynor	Plt's PDR Under N.C.G.S. § 7A-31 (COA09-1675)	Denied
639P06-2	State v. Rodney Keith Watts	Def's PWC to Review Order of COA (COAP10-502)	Dismissed

STATE OF NORTH CAROLINA v. KHURAM ASHFAQ CHOUDHRY

No. 409A10

(Filed 26 August 2011)

Constitutional Law— effective assistance of counsel—inquiry regarding prior representation of State's witness—failure to show prejudice

Although under the facts of this case, the trial court's inquiry pertaining to defense counsel's possible conflict of interest arising from his prior representation of a State's witness was insuffcient to assure that defendant knowingly, intelligently, and voluntarily made his decision regarding counsel's continued representation, defendant failed to make a threshold showing that defense counsel's performance was adversely affected by the conflict or that defendant was prejudiced by the representation.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, ––– N.C. App. –––, 697 S.E.2d 504 (2010), finding no error in a judgment entered 19 September 2008 by Judge Henry W. Hight, Jr. in Superior Court, Durham County. Heard in the Supreme Court 14 March 2011.

Roy Cooper, *Attorney General*, *by Melissa L. Trippe*, *Special Deputy Attorney General*, *for the State.*

M. Gordon Widenhouse Jr. for defendant-appellant.

EDMUNDS, Justice.

In this case we consider whether the trial court conducted an adequate inquiry pertaining to defense counsel's possible conflict of interest arising from his prior representation of a State's witness. Although the trial court heard argument from the prosecutor and from defense counsel on this issue and made direct inquiry of defendant after placing him under oath, we conclude that, under the facts of this case, the inquiry was insufficient to assure that defendant knowingly, intelligently, and voluntarily made his decision regarding counsel's continued representation. However, because defendant has failed to make a threshold showing that defense counsel's performance was adversely affected by the conflict, much less that defendant was prejudiced by the representation, we modify and affirm the decision of the Court of Appeals.

Factual and Procedural Background

At trial, the State presented evidence that during the evening of 3 November 2002, defendant Khuram Choudhry drove his friends Umar Malik and Hasan Sokoni to a BP gas station on Chapel Hill Boulevard in Durham where the victim Rana Shazad Ahmed ("Shazad," or "the victim") was employed. Sokoni, who was sitting in the back seat, testified that he could tell defendant and Malik "weren't happy" with the victim and that he later heard there was "a beef between Shazad and the mother and sister of [defendant]." Sokoni testified that he "could kind of . . . tell that there was some type of altercation that was going to happen because they were mad," and he "assume[d]" defendant and Malik were looking for Shazad to "chastise" him or "rough him up." Seeing that Shazad was closing the store, defendant drove the three to Shazad's apartment complex about a mile away and waited. When Shazad pulled into the apartment parking lot, defendant and Malik jumped out of the car. Sokoni, who remained in the back seat of defendant's car, heard "two or three hits" that sounded like "balls being hit by a baseball bat." A minute or two later, defendant and Malik ran back to the car and defendant drove the three back to his residence in Durham. Sokoni testified that at the time he asked no questions of defendant or Malik, but added that two weeks after the incident, he observed defendant stop on Interstate 85 during a trip to Virginia and throw a bat from his vehicle.

Defendant's then-girlfriend Michelle Wahome testified that in November 2002, she was awakened by a late-night telephone call from defendant. She related that defendant sounded "panicky" and said, " 'Oh my God, oh my God, you won't believe what happened. . . . Shazad's gone. Shazad's dead. He's gone out of this world.' " When Wahome asked him to clarify, defendant told her the victim had called his house and cursed out his mother, so he, Malik, and Sokoni drove to the victim's residence to " 'F' him up." Defendant added that although Sokoni had promised to help, he reneged.

According to Wahome, defendant told her he hit the victim once with a bat or a stick and that Malik then took the bat or stick and hit the victim on the head so hard that he fell to the ground. While the victim was down, Malik kept hitting him until he stopped moving. Defendant told her he was not worried about DNA evidence, but mentioned that he had left his pack of Newport cigarettes at the scene. Wahome expressed skepticism, so defendant told her to look at the newspapers in the morning. When she did, she saw a report that the victim had been murdered.

At approximately 6:30 a.m. on 4 November 2002, the victim's roommates awoke to find him lying in a pool of blood outside the door to their apartment. The victim was breathing, but unresponsive and cold to the touch. Arriving paramedics found the victim flat on his back, unconscious. They observed a "very large amount of blood" and a laceration on the back of the victim's head. His eyes were bruised and swollen shut, indicating that he "ha[d] been down for quite a while." The victim was transported to Duke Hospital where he died approximately eleven days later. An autopsy revealed two lacerations to the victim's head, multiple skull fractures, bleeding in the brain, and bruising to his arms, neck, chest, and back. The cause of death was determined to be blunt force trauma to the head.

At the crime scene, investigators recovered the victim's wallet, a pack of Newport cigarettes, and samples of blood and hair. Although the blood and hair were identified as having come from the victim, no fingerprints were found on the cigarette pack.

Wahome further testified that she made several statements to police during the course of the investigation. She testified that she continued to date defendant after the telephone call in which he told her of his participation in the victim's murder but, following a discussion with her father, went to the Durham Police Department on 25 June 2003 and gave a written statement to Investigator Delores West. At the time Wahome initially contacted police, the investigation of the victim's murder had run into a dead end. In this statement, Wahome related that defendant identified Malik as having beat the victim, while also initially admitting, but then denying, his own complicity.

Although Wahome did not appear to Investigator West to be impaired in any way during the interview, a few days later she called Investigator West to retract her statement, claiming she had been high on drugs and had not told the truth. However, at defendant's trial, Wahome testified on cross-examination that she recanted her initial statement because of threats from defendant.

On 21 November 2003, Wahome gave another statement to investigators describing defendant's telephone call to her after the beating. This statement differed in several respects from her June 2003 statement, including the month of defendant's initial telephone call to her describing the incident.

On 21 June 2006, Wahome was arrested for trafficking heroin. While in custody, she sent letters from the Durham County Jail to Investigator West on 21 August and 27 September 2006. In response,

Investigator West interviewed Wahome on 28 August and again on 14 September 2006. During the September interview, Wahome provided Investigator West the name "Hasan" as someone who might have first-hand knowledge of the murder and gave information as to where he could be found. The drug charge against Wahome was dismissed on the ground that "[f]urther evidence indicates Defendant had no knowledge of presence of drugs and that drugs likely planted by another individual."

On 26 September 2006, Investigator West located and interviewed Hasan Sokoni. Sokoni implicated defendant, recounted the course of events the night of the victim's murder, and said that he, defendant, and defendant's two sisters and brother-in-law had later driven to Virginia, where defendant disposed of the murder weapon. Sokoni's trial testimony, though reluctant, was consistent with this statement.

On 27 September 2006, officers arrested defendant and Malik. Defendant waived his right to an attorney. When questioned by Investigator West, defendant denied killing the victim, stated that "Umar [Malik] must be smoking crack if he said [defendant] was part of the beating," and added that "[Wahome's] mother was paying people to lie on him." While being questioned by Investigator West, defendant told her that the Newport cigarettes she had taken from him in 2003 in connection with an unrelated matter were not the cigarettes recovered at the murder scene. Defendant made this statement even though Investigator West apparently had not referred to the cigarettes she had previously collected from him, nor had any television or newspaper report described evidence collected during the investigation of the victim's murder.

Defendant was indicted for first-degree murder on 27 November 2006. Malik had absconded to Pakistan and was unavailable, but Sokoni and Wahome testified on behalf of the State. As detailed below, defendant's counsel had previously represented Wahome in a different criminal case. On 19 September 2008, defendant was tried noncapitally and convicted of first-degree murder. The trial court imposed a sentence of life imprisonment without parole.

Defendant filed a notice of appeal to the Court of Appeals. In a split decision, the Court of Appeals found no error. *State v. Choudhry*, —— N.C. App. ——, ——, 697 S.E.2d 504, 512 (2010). The dissenting judge contended that, in light of the possible conflict of interest arising from defense counsel's earlier representation of Wahome, the trial court erred by failing to conduct an inquiry to fully inform

defendant of the consequences of the potential conflict "such that [d]efendant was able to knowingly, intelligently, and voluntarily make a decision regarding counsel." *Id.* at ——, 697 S.E.2d at 512. (Beasley, J., dissenting). Accordingly, the dissenting judge would remand for an evidentiary hearing on the matter. *Id.* at ——, 697 S.E.2d at 513. Defendant appeals to this Court as of right on the basis of the dissenting opinion pursuant to N.C.G.S. § 7A-30(2). Defendant's petition for discretionary review as to additional issues was denied by order of the Court on 7 October 2010.

Analysis

Underlying defendant's claim that the trial court's inquiry was inadequate is an assumption that defense counsel's multiple representation of Wahome constituted a conflict of interest. Accordingly, we begin with a review of conflicts arising from multiple representation and the trial court's responsibility when confronted with the possibility of such a conflict.

A defendant in a criminal proceeding has the right to effective assistance of counsel under both the federal and state constitutions. *Strickland v. Washington*, 466 U.S. 668, 686, 80 L. Ed. 2d 674, 692 (1984); *State v. Braswell*, 312 N.C. 553, 561-63, 324 S.E.2d 241, 247-48 (1985). "The right to effective assistance of counsel includes the 'right to representation that is free from conflicts of interest.' " *State v. Bruton*, 344 N.C. 381, 391, 474 S.E.2d 336, 343 (1996) (quoting *Wood v. Georgia*, 450 U.S. 261, 271, 67 L. Ed. 2d 220, 230 (1981)).

When a defendant raises a claim of ineffective assistance of counsel, in most instances he or she must show that (1) "counsel's performance was deficient" and (2) "the deficient performance prejudiced the defense." *Strickland*, 466 U.S. at 687, 80 L. Ed. 2d at 693; *accord State v. Waring*, 364 N.C. 443, 502, 701 S.E.2d 615, 652 (2010). However, when the claim of ineffective assistance is based upon an actual, as opposed to a potential, conflict of interest arising out of an attorney's multiple representation, a defendant may not be required to demonstrate prejudice under *Strickland* to obtain relief. *Strickland*, 466 U.S. at 692, 80 L. Ed. 2d at 696; *Cuyler v. Sullivan*, 446 U.S. 335, 349, 64 L. Ed. 2d 333, 347 (1980); *State v. Phillips*, 365 N.C. 103, 118, 711 S.E.2d 122, 135 (2011). The test to determine whether a defendant is entitled to relief under such circumstances without having to demonstrate prejudice is dependent upon the level of notice given to the trial court and the action taken by that court. *See Phillips*, 365 N.C. at 118-20, 711 S.E.2d at 135-36.

"Absent special circumstances" a trial court may assume multiple representation entails no conflict of interest or that the defendant and defense counsel knowingly accept the risk of a conflict. *Sullivan*, 446 U.S. at 346-47, 64 L. Ed. 2d at 345-46. However, this assumption may not apply if the trial court is "on notice that a multiple representation may create a conflict of interest." *Id.* at 346, 64 L. Ed. 2d at 345. While the court is not required to act if it is aware only "of a vague, unspecified possibility of conflict," *Mickens v. Taylor*, 535 U.S. 162, 169, 152 L. Ed. 2d 291, 302 (2002), when the court "knows or reasonably should know" of "a particular conflict," that court must inquire "into the propriety of multiple representation," *Sullivan*, 446 U.S. at 346-47, 64 L. Ed. 2d at 345-46. If a defendant who objects to multiple representation is denied "the opportunity to show that potential conflicts impermissibly imperil his right to a fair trial," prejudice is presumed. *Id.* at 348, 64 L. Ed. 2d at 346. But when no objection is raised to the multiple representation, reversal is not automatic if the trial court fails to conduct the *Sullivan* inquiry. *Id.* at 348-49, 64 L. Ed. 2d at 346-47; *see also Mickens*, 535 U.S. at 172-74, 152 L. Ed. 2d at 304-05. In such a scenario, prejudice will be presumed only if a defendant can establish on appeal that "an actual conflict of interest adversely affected his lawyer's performance." *Sullivan*, 446 U.S. at 350, 64 L. Ed. 2d at 348; *see also Mickens*, 535 U.S. at 173-75, 152 L. Ed. 2d at 304-05.

Applying the template set out in *Sullivan*, *Strickland*, and *Mickens* to this case, we must consider at the outset whether any inquiry by the trial court was necessary. The trial court was put on notice when the prosecutor brought the possible conflict to the judge's attention. The prosecutor began cautiously, telling the court that while she did not know whether a real conflict existed, failure to consider a genuine conflict could result in a reversal. Turning to specifics, the prosecutor advised the court that Wahome was defendant's former girlfriend, and that the two had a three-year-old child together. In 2003, while defendant and Wahome were in a relationship, charges were filed against Wahome arising from an incident at a Raleigh shopping mall. According to the prosecutor, the charges were "reduced down" to two counts of common law forgery. The prosecutor observed that, although defendant had not been charged in connection with the 2003 incident, both he and Wahome appeared in the video surveillance tape taken at the store, and the items involved were men's apparel. The prosecutor pointed out that Wahome had been represented by Durham criminal defense attorney James D. "Butch" Williams, Jr., who was representing defendant in

the case at bar. Further, Wahome told the prosecutor that defendant had instructed her to hire Mr. Williams as her defense attorney.

In response, Mr. Williams stated, "I don't know if it even needs addressing, Judge. There is not [a] conflict." He added that defendant had not hired him to represent Wahome on her 2003 charges. As to the case at bar, Mr. Williams told the court that he had not intended to cross-examine Wahome about the 2003 incident.

Thus, no party objected to defense counsel's multiple representation. Nevertheless, while we acknowledge the *Sullivan* assumption that, absent special circumstances, multiple representation does not give rise to a conflict of interest or that defendant and defense counsel knowingly accept the risk of a conflict, the prosecutor's description of defense counsel's multiple representation of Wahome and defendant was sufficient to put the trial court on notice of a "particular conflict." *See Sullivan*, 446 U.S. at 347, 64 L. Ed. 2d at 346. Accordingly, we agree with the trial court's tacit conclusion that Mr. Williams's prior representation of Wahome constituted at least a potential conflict of interest and that an inquiry was necessary.

After briefly discussing the multiple representation with counsel for both sides, the trial court placed defendant under oath and asked the following questions:

> THE COURT: Mr. Choudhry, I'm going to ask you some questions. You don't need to keep your hand raised. If you don't understand any question I ask you, tell me and we'll go over it again until you do. Are you able to hear and understand me?
>
> [DEFENDANT]: Yes.
>
> THE COURT: Do you understand that you are charged with First Degree Murder?
>
> [DEFENDANT]: Yes.
>
> THE COURT: And you understand that that charge carries a possible maximum term imprisonment of life in prison without parole?
>
> [DEFENDANT]: Yes.
>
> THE COURT: It has been indicated to this Court that a person may be called in as a witness in this case who was at some time in the past represented by your attorney, Mr. Williams. That witness being, is this Renee Wright?

[DEFENSE COUNSEL]: No. It's Michelle Wahome.

THE COURT: Michelle Wahome. Michelle Wahome.

. . . .

THE COURT: You understand that?

[DEFENDANT]: Yes.

THE COURT: And it's further—have you talked to Mr. Williams about that?

[DEFENDANT]: About the case?

THE COURT: No. Did you understand that Ms. Wahome might testify in this case and that Mr. Williams had represented her in the past?

[DEFENDANT]: Yes, sir.

THE COURT: Did you have any concerns about whether or not Mr. Williams can appropriately represent you in this case because he represented a witness for the State in the past?

[DEFENDANT]: No.

THE COURT: Are you satisfied with his representation of you to this point?

[DEFENDANT]: Yes.

THE COURT: And even in light of the fact that he represented a future witness in this case, do you desire for him to continue as your attorney in this matter?

[DEFENDANT]: Yes.

THE COURT: And do you want to talk to him or me to make any further inquiry of him about his participation in that prior case or are you satisfied where you are?

[DEFENDANT]: Satisfied.

THE COURT: Okay. Thank you, sir. Anything further from the State?

[PROSECUTOR]: No, sir.

THE COURT: Anything further from the Defendant?

[DEFENSE COUNSEL]: No, Judge.

THE COURT: Mr. Sheriff, you may bring the jury in.

Defendant contends that the trial court should have conducted an evidentiary hearing. However, trial courts can determine in their discretion whether such a full-blown proceeding is necessary or whether some other form of inquiry is adequate and sufficient. *See*, *e.g.*, *State v. Walls*, 342 N.C. 1, 39-40, 463 S.E.2d 738, 757-58 (1995), *cert. denied*, 517 U.S. 1197, 134 L. Ed. 2d 794 (1996) (finding trial court's inquiry into potential conflict of interest adequate).

Defendant further contends that the trial court's inquiry was not sufficient to inform him of the consequences of any potential conflict of interest and that, as a result, he did not knowingly, intelligently, and voluntarily waive any such conflict. When a conflict is identified, "[t]he standard for the validity of a sixth amendment waiver [by a defendant] is that it be voluntarily, knowingly, and intelligently made." *State v. Nations*, 319 N.C. 318, 326, 354 S.E.2d 510, 515 (1987) (citations omitted). Accordingly, at such an inquiry into the propriety of multiple representation, *Sullivan*, 446 U.S. at 346-47, 64 L. Ed. 2d at 345-46, the trial court is responsible for ensuring that the defendant fully understands the consequences of a potential or actual conflict. *See*, *e.g.*, *State v. Ballard*, 180 N.C. App. 637, 642-43, 638 S.E.2d 474, 479 (2006), *disc. rev. denied*, 361 N.C. 358, 646 S.E.2d 119 (2007); *State v. James*, 111 N.C. App. 785, 791, 433 S.E.2d 755, 758-59 (1993). As a trial court addresses conflicts and waivers, the position of defense counsel may be pertinent. "[D]efense counsel are often in the best position to recognize when dual representation presents a conflict of interest; thus, they shoulder an ethical obligation to avoid conflicting representations and to promptly inform the trial court when a conflict arises." *Walls*, 342 N.C. at 40, 463 S.E.2d at 758 (citing *Sullivan*, 446 U.S. at 346-47, 64 L. Ed. 2d at 345-46), *cert. denied*, 517 U.S. 1197, 134 L. Ed. 2d 794 (1996). In addition, defense attorneys are particularly well situated to advise their clients whether, and to what extent, a conflict exists. Accordingly, while a trial court may not rely solely on representations of counsel to find that a defendant understands the nature of a conflict, the court reasonably may consider the statements of counsel when determining both whether an actual conflict exists and, if so, whether the defendant is knowingly, intelligently, and voluntarily waiving his or her rights to conflict-free representation.

Here, once the prosecutor broached the issue of a possible conflict, defense counsel responded in defendant's presence that he did not intend to question Wahome about "any issues relative to [his prior representation]," characterizing the prosecutor's concerns as "total utter nonsense." The trial court then informed defendant directly that Mr. Williams had previously represented a witness who would be testifying for the State in the case at bar. After receiving defendant's acknowledgment, the court asked defendant if he had any concerns about Mr. Williams's ability appropriately to represent him, if he was satisfied with Mr. Williams's representation, and if he desired to have Mr. Williams continue to represent him. Defendant responded he had no concerns about Mr. Williams's representation and gave an affirmative answer to each remaining question posed by the court. However, the trial court did not specifically explain the limitations that the conflict imposed on defense counsel's ability to question Wahome regarding her 2003 criminal charges, nor did defense counsel indicate that he had given defendant such an explanation. Accordingly, we are unable to conclude that the trial court established that defendant had sufficient understanding of the implications of Mr. Williams's prior representation of Wahome to ensure a knowing, intelligent, and voluntary waiver of the potential conflict of interest.

Although the *Sullivan* line of cases deals with instances in which the trial court failed to conduct any inquiry "into the propriety of multiple representation," 446 U.S. at 346, 64 L. Ed. 2d at 345, we believe these cases also apply where, as here, the trial court's inquiry is inadequate or incomplete. Thus, prejudice to defendant is presumed if he can demonstrate an actual conflict of interest that adversely affected his defense counsel's performance. *Strickland*, 466 U.S. at 692, 80 L. Ed. 2d at 696 (citing *Sullivan*, 446 U.S. at 350, 348, 64 L. Ed. 2d at 348, 346). However, if defendant is unable to establish an actual conflict causing an adverse effect, he must show that he was prejudiced in order to obtain relief. *See*, *e.g.*, *Winkler v. Keane*, 7 F.3d 304, 307, 310 (2d Cir. 1993), *cert. denied*, 511 U.S. 1022, 128 L. Ed. 2d 79 (1994).

The record indicates that Wahome testified for the State that she had received a telephone call from defendant in November 2002, around the time the victim was killed. During this call, defendant admitted hitting the victim with a bat or a stick before Malik took over and continued the beating. Therefore, Wahome's testimony both corroborated Sokoni's and provided the only direct evidence that defendant himself had struck the victim.

Defendant elected not to present evidence. Instead, he focused on discrediting Wahome. Defense counsel cross-examined Wahome with vigor, attempting to demonstrate that she cooperated so she could get out of jail. He elicited from both Wahome and Investigator West testimony revealing that Wahome was in custody on a charge for heroin trafficking at the time she reinitiated contact with West, asking for help. Although Wahome insisted that the trafficking charge was baseless and that she had been framed by defendant, defense counsel was able to establish through cross-examination that it was only after Wahome gave statements to Investigator West that her bond was reduced twice, she was released from jail, and the trafficking charge was dismissed. Wahome acknowledged that after being released, she wrote a thank-you note to Investigator West.

In addition, defense counsel questioned Wahome about inconsistencies between her trial testimony and her various statements to police. He pointed out Wahome's uncertainty whether defendant first called her about the incident immediately after the beating or eleven days later, after the victim died. Defense counsel also pointed out that, even though the fatal beating occurred in November, Wahome said in her 21 November 2007 statement to Investigator West that she had received defendant's call in February or March. Under defense counsel's questioning, Wahome conceded that she failed to tell investigators that she and defendant met with the victim's uncle after the beating or that defendant had told her he had hidden the bat where investigators could not find it. Defense counsel elicited from Wahome an acknowledgment that in her first statement to Investigator West on 25 June 2003, she related that defendant initially told her that he and Malik had beat the victim, but that he then said Malik had committed the assault while he (defendant) did not hit the victim "because he got scared."

Defense counsel further established that the relationship between Wahome and defendant was rancorous and volatile and that Wahome's actions toward defendant were frequently spiteful and vindictive. She conceded that she wanted to obtain custody of their child from defendant. She further conceded that she had filed a domestic violence report against defendant and that the resulting charges had been dismissed when she did not come to court. She admitted making several harassing telephone calls to defendant's family. She acknowledged that, several days before defendant's trial began, she sent defendant the following text message: "[Y]ou let your ho's and your family f[—-] me up, so now I'm going to let [Investi-

gator] West and the jury f[—-] you up. It's called karma so, deal with it, and I will get my son without your help." The morning trial began, she sent him another text message stating that: "[B]itch, I'm going to f[—-] you up tomorrow. We not cool. Don't think I'm going to fall for your lies. Go to hell with feeling sorry for yourself."

Thus, while Wahome steadfastly contended that defendant was abusive toward her and had admitted his involvement in the killing, defense counsel was able to establish that Wahome's statements to investigators were incomplete and inconsistent, that she wanted to obtain custody of their child from defendant, that she used the legal system to seek revenge against those she felt had done her wrong, and that she wished defendant ill. Finally, though the record is sparse as to details of the 2003 incident that led to Wahome's forgery charges, the evidence provided suggests that defendant was involved. Defense counsel did not call defendant as a witness, thus protecting him from cross-examination about his criminal history. While cross-examination of Wahome about her 2003 charges could have further undermined her credibility, it equally well could have opened the door for redirect examination by the State relating to any role defendant may have played. Thus, objectively sound strategic reasons unrelated to the former representation appear to have existed for defense counsel to avoid asking Wahome about her charges.

Defense counsel's cross-examination of Wahome was extensive, searching, and adversarial. We see no indication of the adverse effect on defense counsel's performance required to win an automatic reversal under the *Sullivan* line of cases. In addition, we fail to find any prejudice accrued to defendant as a result of defense counsel's prior representation of Wahome. Accordingly, we modify and affirm the decision of the Court of Appeals.

MODIFIED AND AFFIRMED.

LEE v. GORE

[365 N.C. 227 (2011)]

RICHARD JAMES LEE, PETITIONER v. WILLIAM C. GORE, JR., AS COMMISSIONER OF THE DIVISION OF MOTOR VEHICLES, NORTH CAROLINA DEPARTMENT OF TRANSPORTATION, RESPONDENT

No. 418A10

(Filed 26 August 2011)

Motor Vehicles— revocation of driving privileges—driving while impaired—refusal of chemical analysis—no affidavit indicating willfulness

The Department of Motor Vehicles (DMV) did not have the authority to revoke petitioner's driving privileges for willful refusal to submit to chemical analysis after being arrested for driving while impaired where the documents submitted to DMV did not indicate that the refusal was willful. DMV has only the powers expressly granted by the legislature and did not have the authority to revoke petitioner's license without an affidavit indicating that petitioner willfully refused to submit to chemical analysis.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, —– N.C. App. ——, 698 S.E.2d 179 (2010), vacating an order entered on 22 October 2008 by Judge Henry E. Frye, Jr. in Superior Court, Wilkes County, and remanding the matter for reinstatement of petitioner's North Carolina driving privileges. Heard in the Supreme Court 15 March 2011.

Richard J. Lee, pro se, petitioner-appellee.

Roy Cooper, Attorney General, by William P. Hart, Jr. and Christopher W. Brooks, Assistant Attorneys General, for respondent-appellant.

TIMMONS-GOODSON, Justice.

The question presented is whether the Division of Motor Vehicles ("DMV") may revoke driving privileges for a willful refusal to submit to chemical analysis absent receipt of an affidavit swearing that the refusal was indeed willful. Because N.C.G.S. § 20-16.2(d) requires that the DMV first receive a "properly executed affidavit" from law enforcement swearing to a willful refusal to submit to chemical analysis before revoking driving privileges, we hold that the DMV lacked the authority to revoke the driving privileges of petitioner,

Richard James Lee. Accordingly, we affirm the decision of the Court of Appeals.

I. Background

A Wilkesboro police officer stopped petitioner for speeding on the night of 22 August 2007. Believing that probable cause existed to arrest petitioner for driving while impaired, the officer took petitioner to an intake center to undergo chemical analysis by way of an Intoxilyzer test. Petitioner did not submit to chemical analysis.

The officer told petitioner several times that his failure to take the Intoxilyzer test would be regarded as a refusal to take the test. This, the officer stated, would result in revocation of petitioner's North Carolina driving privileges. Nevertheless, petitioner did not agree to take the test, and the officer marked on form DHHS 3908 that petitioner "refused" the test at 12:47 a.m. on 23 August 2007.

Later that day the officer appeared before a magistrate and executed an affidavit regarding petitioner's refusal to submit to chemical analysis. Form DHHS 3907, entitled "Affidavit and Revocation Report," was created by the Administrative Office of the Courts for this purpose. The form includes fourteen sections, each preceded by an empty box. The person swearing to the accuracy of the affidavit checks the boxes relevant to the circumstances and then signs the affidavit in the presence of an official authorized to administer oaths and execute affidavits.

Section fourteen of form DHHS 3907 states: "The driver willfully refused to submit to a chemical analysis as indicated on the attached [form] [ ] DHHS 3908. [ ] DHHS 4003." The officer did not check the box for section fourteen. The officer then mailed both the DHHS 3907 and DHHS 3908 forms to the DMV. Neither form indicated a *willful* refusal to submit to chemical analysis.

Nevertheless, upon receiving the forms, the DMV suspended petitioner's North Carolina driving privileges for one year, effective 30 September 2007, for refusing to submit to chemical analysis. Upon petitioner's request,[1] a review to contest the revocation was conducted before an administrative hearing officer on 20 November 2007. At this hearing it came to light that the copy of form DHHS 3907

1. By statute this request postponed the revocation of petitioner's driving privileges until the outcome of the hearing had been determined. N.C.G.S. § 20-16.2(d) (2006). The postponement of the suspension was continued pending the outcome of petitioner's appeal.

on file with the DMV had an "*x*" in the section fourteen box. All the other boxes marked on the form DHHS 3907 contained check marks, not *x*s. Petitioner's copy of form DHHS 3907 did not contain an *x* in the box preceding section fourteen.

On 20 November 2007, the day of the administrative hearing, the hearing officer concluded that the revocation of petitioner's North Carolina driving privileges was proper. Petitioner appealed to Superior Court, Wilkes County, which affirmed the decision of the hearing officer on 20 October 2008. Petitioner then appealed to the Court of Appeals, which concluded unanimously on 19 January 2010 that the DMV lacked the authority to revoke petitioner's North Carolina driving privileges. *Lee v. Gore*, —– N.C. App. ——, 688 S.E.2d 734 (2010). Critical to the Court of Appeals' analysis was that the DMV never received the statutorily required affidavit indicating that petitioner had willfully refused to submit to a chemical analysis of his blood alcohol level.

The DMV thereafter sought and was granted a rehearing. Upon rehearing, a majority of the Court of Appeals reached the same conclusion in a decision dated on 17 August 2010. *Lee v. Gore*, —– N.C. App. ——, 698 S.E.2d 179 (2010). One member of the panel dissented, concluding that any problems posed by the DHHS 3907 affidavit amounted to an inconsequential violation of administrative procedure, rather than a violation of petitioner's right to due process. The DMV brings the appeal to us based upon this dissent.

II. Analysis

Whether the DMV may revoke driving privileges for a willful refusal to submit to chemical analysis, absent a "properly executed affidavit" requires us to interpret a provision of the Motor Vehicle Laws of North Carolina, which are set forth in Chapter 20 of the General Statutes. When, as here, statutory construction is at issue we must ascertain the intent of the legislating body and adhere to that intent. "[T]he language of the act, the spirit of the act and what the act seeks to accomplish" are the greatest indicia of intent. *N.C. Sav. & Loan League v. N.C. Credit Union Comm'n*, 302 N.C. 458, 467, 276 S.E.2d 404, 410 (1981) (citation and quotation marks omitted). While "the interpretation of a statute by an agency created to administer that statute is traditionally accorded some deference by appellate courts," an agency's interpretation is not binding. *Id.* at 466, 276 S.E.2d at 410; *see also Frye Reg'l Med. Ctr., Inc. v. Hunt*, 350 N.C. 39, 45, 510 S.E.2d 159, 163 (1999) ("The interpretation of a statute given

by the agency charged with carrying it out is entitled to great weight." (citation omitted)). However, when, as here, the language of a statute is clear and unambiguous, there is no room for judicial construction, and we give the statute its plain and definitive meaning. *Walker v. Bd. of Trs. of N.C. Local Gov'tal Emps.' Ret. Sys.*, 348 N.C. 63, 65-66, 499 S.E.2d 429, 430–31 (1998) (concluding that when statutory language is clear, there is no need for judicial construction).

Our disposition of this case turns on the limited authority of the DMV. The DMV is a division of the North Carolina Department of Transportation ("DOT"), which has been described by this Court as " 'an inanimate, artificial creature of statute [whose] . . . form, shape and authority are defined by the Act by which it was created' " and which " 'is as powerless to exceed its authority as is a robot to act beyond the limitations imposed by its own mechanism.' " *Clark v. Asheville Contr'g Co., Inc.*, 316 N.C. 475, 486, 342 S.E.2d 832, 838 (1986) (citation omitted); *see also In re Broad & Gales Creek Cmty. Ass'n*, 300 N.C. 267, 280, 266 S.E.2d 645, 654 (1980) (observing that an administrative agency "is a creature of the statute creating it and has only those powers expressly granted to it or those powers included by necessary implication from the legislative grant of authority" (citation omitted)). Chapter 20 of our statutes creates the DMV, sets out its powers and duties, and delineates the DMV's authority to discharge these duties. *See* N.C.G.S. § 20-1 (2009) ("The Division of Motor Vehicles of the Department of Transportation is established. This Chapter sets out the powers and duties of the Division."). As such, the DMV possesses only those powers expressly granted to it by our legislature or those which exist by necessary implication in a statutory grant of authority.

N.C.G.S. § 20-16.2, the statutory grant of authority at issue here, enables the DMV to act when a driver is charged with an implied-consent offense, such as driving while impaired, and the driver refuses to submit to chemical analysis.[2] Under subsection (a) of the statute, drivers on our highways "consent to a chemical analysis [test] if charged with an implied-consent offense." *Id.* § 20-16.2(a) (2006). Before the test is administered, however, a chemical analyst who is authorized to administer a breath test must give the person charged both oral

2. The events related to this appeal occurred before the effective date of the current version of N.C.G.S. § 20-16.2. Though we cite the version of the statute in effect on 23 August 2007, for the purposes of this appeal there are no material differences between the current version of this statute and the version in effect on 23 August 2007.

and written notice of his rights as enumerated in that subsection, including his right to refuse to be tested. *Id.*[3]

Subsections (c) and (c1) then address the refusal to submit to chemical analysis, providing as follows:

> (c) Request to Submit to Chemical Analysis.—A law enforcement officer or chemical analyst shall designate the type of test or tests to be given and may request the person charged to submit to the type of chemical analysis designated. If the person charged willfully refuses to submit to that chemical analysis, none may be given under the provisions of this section, but the refusal does not preclude testing under other applicable procedures of law.
>
> (c1) Procedure for Reporting Results and Refusal to Division.—Whenever a person refuses to submit to a chemical analysis . . . the law enforcement officer and the chemical analyst *shall* without unnecessary delay *go before an official authorized to administer oaths and execute an affidavit(s) stating* that:
>
> . . . .
>
> (5) The results of any tests given or *that the person willfully refused to submit to a chemical analysis.*
>
> . . . The officer shall immediately mail the affidavit(s) to the Division. If the officer is also the chemical analyst who has notified the person of the rights under subsection (a), the officer may perform alone the duties of this subsection.

N.C.G.S. § 20-16.2(c), (c1) (2006) (emphases added).

Next, subsection (d) addresses the consequences stemming from a driver's refusal to submit to chemical analysis and provides for administrative review:

> (d) Consequences of Refusal; Right to Hearing before Division; Issues.—*Upon receipt of a properly executed affidavit required by subsection (c1)*, the Division shall expeditiously notify the person charged that the person's license to drive is revoked for 12 months, effective on the tenth calendar day after the mailing of the revocation order unless, before the effective

3. Subsection (b) addresses the testing of unconscious persons and is not at issue here. N.C.G.S. § 20-16.2(b) (2006).

> date of the order, the person requests in writing a hearing before the Division.

Id. § 20-16.2(d) (2006) (emphasis added).

Last, subsection (e) authorizes superior court review.

> (e) Right to Hearing in Superior Court.—If the revocation for a willful refusal is sustained after the hearing, the person whose license has been revoked has the right to file a petition in the superior court for a hearing on the record. The superior court review shall be limited to whether there is sufficient evidence in the record to support the Commissioner's findings of fact and whether the conclusions of law are supported by the findings of fact and whether the Commissioner committed an error of law in revoking the license.

Id. § 20-16.2(e) (2006).

Our appellate courts have had a number of opportunities to consider N.C.G.S. § 20-16.2. These decisions confirm that a person's refusal to submit to chemical analysis must be willful to suspend that person's driving privileges. *See, e.g.*, *Etheridge v. Peters*, 301 N.C. 76, 81, 269 S.E.2d 133, 136 (1980) (analyzing N.C.G.S. § 20-16.2 and concluding that a "willful refusal" permitting suspension of driving privileges must include actions "constitut[ing] a conscious choice purposefully made" (citation and quotation marks omitted)); *Steinkrause v. Tatum*, 201 N.C. App. 289, 292, 689 S.E.2d 379, 381 (2009) ("N.C. Gen. Stat. § 20-16.2 . . . authorizes a civil revocation of the driver's license when a driver has willfully refused to submit to a chemical analysis."), *aff'd per curiam*, 364 N.C. 419, 700 S.E.2d 222 (2010).

Here the Court of Appeals concluded that the DMV did not receive " 'a properly executed affidavit required by subsection (c1)' " indicating petitioner's willful refusal to submit to chemical analysis. —— N.C. App. at ——, 698 S.E.2d at 188. Consequently, the Court of Appeals held that the DMV lacked authority to revoke petitioner's driving privileges under N.C.G.S. § 20-16.2(d). *Id.* at ——, 698 S.E.2d at 188. The Court of Appeals further held that, absent this authority, there was also no authority in N.C.G.S. § 20-16.2 for a review hearing or superior court review. *Id.* at ——, 698 S.E.2d at 188.

Echoing the dissent, however, the DMV contends that the Court of Appeals erred in reaching these conclusions. The DMV argues that

it has the authority to revoke petitioner's driving privileges because petitioner was charged upon reasonable grounds with the implied-consent offense of driving while impaired, was notified of his rights under N.C.G.S. § 20-16.2(a) and willfully refused to submit to chemical analysis, and thus was subject to the consequences outlined in N.C.G.S. § 20-16.2(d). We disagree that the DMV had the authority to revoke petitioner's license under these circumstances, absent an affidavit indicating that petitioner willfully refused to submit to chemical analysis.

N.C.G.S. § 20-16.2(c1) is clear and unambiguous. When a person refuses to submit to chemical analysis "the law enforcement officer and the chemical analyst shall without unnecessary delay go before an official authorized to administer oaths and execute an affidavit(s) stating . . . [t]he results of any tests given or that the person willfully refused to submit to a chemical analysis." N.C.G.S. § 20-16.2(c1). In the instant case the officer swore out the DHHS 3907 affidavit and attached to that affidavit the DHHS 3908 chemical analysis result form indicating the test was "refused." Yet, neither document indicated that petitioner's refusal to participate in chemical analysis was willful. As such, the requirements of section 20-16.2(c1) have not been met.

Additionally, the requirements of N.C.G.S. § 20-16.2(d) have not been satisfied. The plain language of subsection (d) requires that the DMV receive "a properly executed affidavit" meeting all the requirements set forth in N.C.G.S. § 20-16.2(c1) before the DMV is authorized to revoke a person's driving privileges under N.C.G.S. § 20-16.2. Here neither the DHHS 3907 affidavit submitted to the DMV, nor the attached DHHS 3908 form indicating a refusal, states that the refusal was willful. Consequently, the DMV lacked authorization to revoke petitioner's license.

These conclusions are sufficient to dispose of the issue before us. Nevertheless, we address three additional concerns. One aspect of this case is particularly disturbing. Specifically, the affidavit sworn to by the officer and sent to the DMV, which gave no indication that petitioner's refusal was willful, was later altered to indicate otherwise. We are not called upon today to determine the outer boundaries of what constitutes "a properly executed affidavit" under section 20-16.2(d) so as to enable the DMV to revoke a license for willful refusal. Nevertheless, we are quite confident that an affidavit materially altered outside the presence of someone authorized to administer oaths, or an affidavit that omits entirely the material element of

"willfulness," is not "properly executed" for the purposes of section 20-16.2(d).

Second, while we are cognizant of the strong public policy favoring the removal of unsafe drivers from our roads, the DMV's burden here was light. The DMV could have cured the deficiency in the affidavit by simply inquiring of the officer whether the affidavit contained an omission. If so, the DMV could have requested that the officer swear out a new, properly executed affidavit. Instead, the DMV took the position that the error described here was cured through a hearing the DMV lacked the authority to conduct. To countenance this interpretation would render meaningless the statutory requirement that the DMV receive an affidavit attesting to willful refusal before suspending driving privileges for that reason. *See Town of Pine Knoll Shores v. Evans*, 331 N.C. 361, 366, 416 S.E.2d 4, 7 (1992) (observing that this Court "follow[s] the maxims of statutory construction that words of a statute are not to be deemed useless or redundant" (citations omitted)). The DMV's interpretation would also permit suspension of driving privileges for willful refusal without an evidentiary predicate. The suspended driver would then have to request a hearing to contest the State's actions. Yet, if the driver failed to request a hearing, his driving privileges likely would be suspended even though the DMV never received evidence of willful refusal. This result is not contemplated in N.C.G.S. § 20-16.2. Simply put, the DMV lacks the authority to suspend driving privileges, or revoke a driver's license, without some indication that a basis for suspension or revocation as required by N.C.G.S. § 20-16.2(c1) has occurred.

Finally, to hold otherwise essentially adopts a "no harm, no foul" analysis. Absent prejudice, so the argument goes, a statutory violation such as we have here may be overlooked. As we explain above, however, this case involves the DMV's authority to act. This is not a case that turns upon prejudice to the petitioner.

III. Conclusion

For the reasons stated above, we affirm the decision of the Court of Appeals.

AFFIRMED.

WILLIAM L. UNDERWOOD v. TERESA W. UNDERWOOD

No. 447PA09-2

(Filed 26 August 2011)

Divorce— alimony—cohabitation of dependent spouse—consent order modifiable

The trial court did not err in terminating plaintiff's court-ordered alimony obligation because N.C.G.S. § 50-16.9(b) requires alimony payments to terminate upon cohabitation by a dependent spouse. The consent order between the parties was an order of the court, the consent order unambiguously demonstrated that the parties intended to support defendant with alimony payments, and defendant engaged in cohabitation. The reciprocal consideration provision contained in the consent order did not render the alimony provisions nonmodifiable.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous, unpublished decision of the Court of Appeals, —— N.C. App. ——, 699 S.E.2d 478 (2010), reversing an order entered on 8 May 2008 by Judge Amy R. Sigmon in District Court, Catawba County, and remanding for further proceedings. Heard in the Supreme Court on 3 May 2011.

Wesley E. Starnes and Blair E. Cody, III for plaintiff-appellant.

Crowe & Davis, P.A., by H. Kent Crowe, for defendant-appellee.

TIMMONS-GOODSON, Justice.

After two decades of marriage, William and Teresa Underwood divorced. Ten years later, Mr. Underwood asked the trial court to terminate his alimony obligation because his former wife was cohabitating with another man. We hold that the trial court did not err in terminating alimony payments pursuant to section 50-16.9(b) of our General Statutes. Accordingly, we reverse the Court of Appeals.

I.

Plaintiff William Underwood and defendant Teresa Underwood divorced in late 1997, and in March 1999 the District Court, Catawba County, ordered plaintiff to pay his former wife $1000 per month in postseparation support "until further Order of [the] Court." Almost one year later, on 14 February 2000, the district court entered a

Consent Order of Alimony and Equitable Distribution ("Consent Order"), superseding the postseparation support order. Specifically, the Consent Order required Mr. Underwood to make forty-eight monthly payments of $1000 each to defendant. After forty-eight months, plaintiff's monthly alimony obligation dropped to $700. The Consent Order also provided that the payments would cease upon defendant's death or remarriage. Significantly, the Order contained the following reciprocal consideration provision: "The agreements of the parties as to the payment of alimony as set forth herein have been made and are given in reciprocal consideration for the agreements of the parties as to Equitable Distribution and property settlement of the parties."

Plaintiff made alimony payments for the next seven years, but on 6 July 2007, he filed a Motion to Terminate/Modify Alimony. In this motion, plaintiff sought termination of his alimony obligation in light of defendant's cohabitation. N.C.G.S. § 50-16.9(b) (2009) (requiring termination of alimony upon cohabitation by the dependent spouse). Alternatively, plaintiff sought a downward modification of alimony payments, citing defendant's improved financial condition as a "substantial and material change in circumstances." *Id.* § 50-16.9(a) (2009) (permitting modification of alimony upon a "showing of changed circumstances"). In turn, defendant moved to dismiss plaintiff's motion on the basis that the reciprocal consideration provision in the Consent Order rendered the Order nonmodifiable.

On 22 October 2007,[1] the trial court issued an order that denied defendant's motion to dismiss and terminated plaintiff's alimony payments to her. The court also ordered defendant to reimburse plaintiff for alimony paid since 6 July 2007, the date plaintiff filed his motion. The trial court, however, reserved ruling on defendant's request for attorney fees and plaintiff's request for reimbursement of alimony paid before 6 July 2007.

Defendant appealed, and the Court of Appeals reversed on 15 September 2009, holding the trial court lacked the authority to terminate or modify the alimony payments specified in the Consent Order. *Underwood v. Underwood*, 199 N.C. App. 757, 687 S.E.2d 540, 2009 WL 2929307, at *9 (2009) (unpublished). The Court of Appeals concluded that the reciprocal consideration provision demonstrated that the parties unambiguously intended the Order to be nonmodifiable.

1. The order was signed and filed on 8 May 2008.

Id., at *7 (citing *Hayes v. Hayes*, 100 N.C. App. 138, 147, 394 S.E.2d 675, 680 (1990)). Next, plaintiff petitioned for discretionary review, and we ordered that the case be "remand[ed] to the Court of Appeals for reconsideration in light of *Walters v. Walters*, 307 N.C. 381, 298 S.E.2d 338 (1983)." *Underwood v. Underwood*, 364 N.C. 238, 699 S.E.2d 925 (2010).

Upon reconsideration, the Court of Appeals again held that the trial court was not authorized to modify the Consent Order and accordingly, reversed and remanded the case. *Underwood v. Underwood*, —— N.C. App. ——, 699 S.E.2d 478, 2010 WL 3633025, at *3 (2010) (unpublished). The Court of Appeals concluded that support provisions subject to a reciprocal consideration provision are not modifiable and that *Walters* made no change in the law applicable to this case. *Id.* Plaintiff then filed a second petition for discretionary review with this Court, which we allowed. *Underwood v. Underwood*, —— N.C. ——, 705 S.E.2d 740 (2011). For the reasons set forth below, we reverse the decision of the Court of Appeals and remand this case for further proceedings.

II.

The issue presented is whether the trial court erred in terminating plaintiff's court-ordered alimony obligation. We hold the trial court did not err because section 50-16.9(b) of our General Statutes requires the termination of alimony payments to a dependent spouse who engages in cohabitation. N.C.G.S. § 50-16.9(b). ("If a dependent spouse who is receiving . . . alimony from a supporting spouse under a judgment or order of a court of this State . . . engages in cohabitation, the . . . alimony shall terminate.").

This Court previously set forth the proper analysis for determining whether a court order is modifiable under section 50-16.9(a), *Marks v. Marks*, 316 N.C. 447, 451, 342 S.E.2d 859, 861-62 (1986); *White v. White*, 296 N.C. 661, 666-70, 252 S.E.2d 698, 701-03 (1979), and that general framework applies here. Termination of alimony payments depends upon (1) the presence of a court order (2) requiring alimony payments to a dependent spouse (3) that has cohabitated. N.C.G.S. § 50-16.9(b). Here the third prong has been satisfied because the trial court's conclusion that "Defendant has been cohabitating" is unchallenged. Therefore, we must determine whether the Consent Order is an order of the court and whether the support payments are in fact alimony.

A.

The Consent Order before us is an "order of a court" for the purposes of section 50-16.9(b). We reach this conclusion because the trial court decreed, "This Consent Order is hereby adopted by this Court as an Order of this Court," and neither party argues otherwise.

There appears to be lingering confusion about the effect of *Walters*. Plaintiff argues that the present Consent Order is modifiable because *Walters* rendered all consent judgments modifiable, even those containing a reciprocal consideration provision. But the consent judgment in *Walters* contained no reciprocal consideration provision, and thus, *Walters* did not alter the treatment of consent orders containing such a provision. Rather, as stated in *Marks*, *Walters* simplified the test for determining whether a consent judgment is a court order. *Marks*, 316 N.C. at 452, 342 S.E.2d at 862. Before *Walters*, consent judgments that "merely approve[d]" a separation agreement were not considered orders of the court under section 50-16.9. *Id.* But in *Walters* this Court held that such judgments are court orders. *Walters*, 307 N.C. at 386, 298 S.E.2d at 342 ("All separation agreements approved by the court as judgments of the court will be treated . . . as court ordered judgments."); *Marks*, 316 N.C. at 452, 342 S.E.2d at 862. Because the Consent Order at issue here did not "merely approve" a separation agreement, we need not draw upon *Walters* to identify the Order as an "order of the court."

B.

Next, we address whether the support provisions benefiting defendant constitute alimony. If a consent judgment unambiguously conveys that the parties intended support payments to constitute alimony, and relevant statutory requirements are met, then the support payments are in fact alimony. *See Marks*, 316 N.C. at 454-58, 342 S.E.2d at 864-66; *White*, 296 N.C. at 666, 670–71, 252 S.E.2d at 701, 703-04. However, merely labeling support payments as "alimony" does not make them alimony for purposes of section 50-16.9. *Marks*, 316 N.C. at 454, 342 S.E.2d at 864. For example, support provisions exchanged for property settlement provisions are part of a nonmodifiable division of property. *Id.* at 455, 342 S.E.2d at 864. Such provisions are not alimony provisions. *Id.* ("If support provisions are found to be consideration for, and inseparable from, property settlement provisions, the support provisions, even if contained in a court-ordered consent judgment, *are not alimony* but instead are merely a part of an integrated property settlement which is *not* modifiable by the courts.").

In the instant case the Consent Order unambiguously demonstrates that the parties intended to support defendant with alimony payments. First, the Consent Order methodically enumerates stipulations and findings that establish the essential elements of an alimony award set forth in section 50-16.3A. An award of alimony is required when (1) one spouse is the dependent spouse, (2) the other spouse is a supporting spouse, (3) an award of alimony is equitable, and (4) the supporting spouse participated in "illicit sexual behavior." N.C.G.S. § 50-16.3A (2009). Here the findings of fact in the Consent Order satisfy these elements. The parties stipulate and agree that defendant meets the statutory definition of a dependent spouse. Additional findings determine that plaintiff is a supporting spouse and has the ability to pay defendant the amounts set forth in the Consent Order. Also, the parties stipulate that the alimony award is fair and equitable and that plaintiff "committed acts of marital misconduct." Moreover, the Consent Order concludes as a matter of law that "the Defendant is entitled to an award of alimony as set forth herein pursuant to the provisions of N.C.G.S. [§] 50-16.3A *et seq.*" Were the periodic payments merely support payments given in exchange for property division provisions, these findings would have been unnecessary.

Second, the parties consented to support provisions that comply with the statutory definition of "alimony" as "an order for payment for the support and maintenance of a spouse or former spouse, periodically or in a lump sum, for a specified or for an indefinite term, ordered in an action for divorce . . . or in an action for alimony without divorce." *Id.* § 50-16.1A (2009). Here, the parties stipulated and the court concluded that defendant was in substantial need of maintenance and support from plaintiff and that the support would consist of monthly payments. Moreover, while not dispositive, the parties consented to the term "alimony," and the Consent Order refers to the support payments as "alimony" sixteen times, including in the title of the Order.

Third, the organization of the Consent Order indicates that the support payments are alimony because support provisions are listed separately from property provisions. For example, the first decree provides for alimony,[2] and the second decree, with its thirteen sub-

2. 1. The Plaintiff shall pay alimony to the Defendant as follows:

The Plaintiff shall pay directly to the Defendant the sum of $1,000.00 per month as alimony for a period of forty-eight (48) consecutive months beginning with the month of March, 2000, and continuing the same for forty-seven (47) consecutive months thereafter. However, this obligation shall terminate if

sections, divides the marital property.[3] All support payment provisions are contained in the alimony decree, and none of the property subsections mention a periodic payment. Finally, the reciprocal consideration provision itself, by using the term "alimony," signals that the support provisions are alimony.

Despite these many indications that the parties intended to provide defendant with alimony, defendant argues that the reciprocal consideration provision demonstrates an intent not to provide alimony. Therefore, defendant contends, the support provisions are not modifiable. We reject this selective reading of the Consent Order. Considering the Order as a whole, the reciprocal consideration provision communicates an intent to make the modification and termination provisions of subsections 50-16.9(a) and (b) inapplicable to this case. The provision first recognizes the payments as alimony, which is consistent with the rest of the Order. But the provision then states that alimony was "given in reciprocal consideration for the agreements of the parties as to Equitable Distribution and property settlement of the parties."

A reciprocal consideration provision cannot immunize alimony payments from modification or termination. Alimony is a creature of statute, subject to both modification and termination under sections 50-16.9(a) and (b), and a reciprocal consideration provision cannot override these statutory requirements. Rather, an enforceable reciprocal consideration provision indicates that the parties agreed to certain support provisions in exchange for property provisions. *See White*, 296 N.C. at 666, 252 S.E.2d at 701 ("[P]eriodic support payments to dependent spouse may not be alimony within the meaning

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> the Defendant remarries or dies before the expiration of the aforementioned forty-eight (48) months.
>
> In addition to the foregoing, beginning March 1, 2004, the Plaintiff shall pay directly to the Defendant the sum of $700.00 per month as alimony until the death of the Defendant or remarriage of the Defendant.
>
> The Plaintiff's monthly alimony obligations to the Defendant shall be due on or before the first (1st) day of each month, beginning March 1, 2000, and shall continue the same each month thereafter until the death or remarriage of the Defendant. In the event the Defendant receives any monthly payment of alimony from the Plaintiff to the Defendant more than five (5) days after the same is due, the Plaintiff shall be obligated to and shall immediately pay a $25.00 late charge to the Defendant for each late payment.

3. 2. The following division of marital property between the parties hereto shall discharge and satisfy all rights or obligations of either party under or pursuant to the provisions of N.C.G.S. [§] 50-20 *et seq.*: . . . .

of the statute and thus modifiable if they and [property division provisions] constitute reciprocal consideration for each other."). Mere incantation of the phrase "reciprocal consideration" does not spontaneously render alimony nonmodifiable. *Cf. Marks*, 316 N.C. at 454, 342 S.E.2d at 864 (explaining that denominating a support provision as "alimony" does not automatically make it alimony under section 50-16.9(a)). Indeed, a consent order cannot preclude enforcement of a statute. *See Walters*, 307 N.C. at 386, 298 S.E.2d at 342 (concluding that a consent judgment provision declaring that alimony is not modifiable upon remarriage by dependent spouse does not exempt the judgment from section 50-16.9(b)). To hold that this reciprocal consideration provision renders the alimony provisions at issue here nonmodifiable would violate the nature of alimony and of reciprocal consideration provisions. The reciprocal consideration provision here is therefore unenforceable and section 50-16.9 applies.

III.

In sum, we hold that the parties unambiguously intended for the support provisions to constitute alimony and that the reciprocal consideration provision is unenforceable. Because section 50-16.9(b) requires alimony payments to terminate upon cohabitation by a dependent spouse, the trial court did not err in terminating plaintiff's alimony obligation. Accordingly, we reverse the decision of the Court of Appeals. Further, we remand this case to that court with instructions to reinstate the order of the trial court and to further remand this case to the trial court for proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

Justice HUDSON concurs in the result only.

JERRY W. CONNER, JAMES A. CAMPBELL, JAMES EDWARD THOMAS, MARCUS ROBINSON, AND ARCHIE LEE BILLINGS, PETITIONERS v. NORTH CAROLINA COUNCIL OF STATE, RESPONDENT

No. 213PA10

(Filed 7 October 2011)

1. Administrative Law— North Carolina Administrative Procedure Act—approval of lethal injection protocol

Respondent North Carolina Council of State's statutorily-mandated approval of the lethal injection protocol for inmates who have been sentenced to death by lethal injection was not subject to the requirements of the North Carolina Administrative Procedure Act N.C.G.S. § 15-188 placed primary responsibility for the lethal injection protocol upon the promulgating agency, the Department of Correction, and the statute did not give the Council authority beyond merely approving or disapproving the submitted protocol.

2. Prisons— approval of execution protocol—statutory rights of prisoners

Although the superior court erred by dismissing petitioners' declaratory judgment action claiming that the North Carolina Council of State's approval of the execution protocol violated N.C.G.S. § 15-188, the superior court correctly concluded that petitioner death row prisoners' rights under N.C.G.S. § 1 5-188 were limited to the obligation that their deaths be by lethal injection, in a permanent death chamber in Raleigh, and carried out pursuant to an execution protocol approved by the Governor and the Council of State.

On discretionary review pursuant to N.C.G.S. § 7A-31, prior to a determination by the Court of Appeals, of an order dismissing petitioners' petition for judicial review and denying and dismissing petitioners' declaratory judgment action entered on 14 May 2009 by Judge Donald W. Stephens in Superior Court, Wake County. Heard in the Supreme Court on 14 March 2011.

Center for Death Penalty Litigation, by David Weiss, for petitioner-appellants; and Kevin P. Bradley for petitioner-appellant Billings; Kenneth J. Rose, E. Hardy Lewis, and Mark J. Kleinschmidt for petitioner-appellant Conner; Elizabeth F. Kuniholm for petitioner-appellant Campbell;

Michael R. Ramos and Geoffrey W. Hosford for petitioner-appellant Robinson; and Ann Groninger and Robert E. Zaytoun for petitioner-appellant Thomas.

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

JACKSON, Justice.

Petitioners in this action are inmates who have been sentenced to death by lethal injection. Respondent is the North Carolina Council of State ("the Council"). Although the underlying substance of this case centers on the constitutionality of the State's method of execution, the narrow issue before us in this appeal is a procedural one: Is the Council's statutorily-mandated approval of an administrative agency's action subject to the requirements of the North Carolina Administrative Procedure Act ("APA") when the promulgating agency's action is exempt from the APA? We hold that it is not. We also address whether the superior court erred by dismissing petitioners' declaratory judgment action. Although we conclude that the superior court erred by dismissing the claim, we also hold that the superior court correctly defined petitioners' rights pursuant to the statute at issue.

Factual and Procedural Background

The events related to this matter began in early 2007.[1] On 31 January 2007, the North Carolina Academy of Trial Lawyers[2] submitted a letter, along with approximately 150 pages of additional materials, to Governor Michael F. Easley. The letter informed Governor Easley that a lethal injection protocol likely would be submitted to the Council for its approval, outlined the legal controversies sur-

1. This case is one of several related legal actions, filed in both state and federal courts, challenging the constitutionality of lethal injection as a method of executing inmates sentenced to death. Two recent iterations of this complex legal question are the Fourth Circuit Court of Appeals case of *Brown v. Beck*, 445 F.3d 752, 752-53 (4th Cir.) (per curiam) (affirming the district court's denial of a preliminary injunction enjoining petitioner's execution on the condition that medical personnel be present at petitioner's execution to ensure that the inmate is unconscious prior to and during administration of the lethal drugs), *cert. denied*, 547 U.S. 1096, 164 L. Ed. 2d 566 (2006), and this Court's decision in *N.C. Dep't of Corr. v. N.C. Med. Bd.*, 363 N.C. 189, 205, 675 S.E.2d 641, 651 (2009) (holding that the Medical Board exceeded its authority by issuing a Position Statement that "directly contravene[d] the specific requirement of physician presence found in N.C.G.S. § 15-190").

2. Now the North Carolina Advocates for Justice.

rounding lethal injection, and requested an opportunity to address the Council.

On 1 February 2007, attorneys for petitioners Conner and Billings submitted a "Petition for Rule Related to the Duties of the Council of State Pursuant to N.C. Gen. Stat. § 15-188" to the Council via its secretary, David McCoy ("McCoy"). Petitioners' proposed rule read: "The State of North Carolina shall not employ the bispectral ('BIS') index monitor for use in executions."[3] Petitioners explained that no other state uses the BIS monitor during executions, that the Food and Drug Administration ("FDA") has not approved the BIS monitor for use in executions, that the company that sold the BIS monitor to the Department of Correction ("DOC") had not been informed that it would be used in executions and would not have sold the device to the State had it known of the anticipated use, and that "the BIS monitor is not an effective measure of an inmate's level of consciousness." Petitioners also set forth the procedures they believed the Council should employ to adopt their proposed rule in accordance with the APA.

On 5 February 2007, an attorney for petitioner Campbell also requested the opportunity to be heard by the Council at its next meeting. McCoy responded on the same day and informed the attorney that "[t]he Council of State's monthly meeting is a regularly scheduled business meeting and is not a public hearing," and "[r]outinely, there is no public comment component on the Council's agenda."

A proposed execution protocol was on the agenda for the Council's 6 February 2007 meeting. In accordance with statutory requirements, the Warden of Central Prison ("the Warden") and the Secretary of the DOC submitted a lethal injection protocol to the Council of State for its review prior to its 6 February meeting. *See* N.C.G.S. § 15-188 (2009) ("The superintendent of the State penitentiary shall also cause to be provided, in conformity with this Article and approved by the Governor and Council of State, the necessary appliances for the infliction of the punishment of death and qualified personnel to set up and prepare the injection, administer the preinjections, insert the IV catheter, and to perform other tasks required for this procedure in accordance with the requirements of this Article."). The protocol read:

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3. The BIS monitor is an appliance that measures the electrical activity in one's brain. Its purpose in this context is to monitor a condemned prisoner's level of consciousness during the execution procedure.

Execution Protocol

Chapter 15, Article 19, of the North Carolina General Statutes prescribes the manner and procedures through which the sentence of death shall be carried out through lethal injection by the State of North Carolina acting through the North Carolina Department of Correction and the Warden of Central Prison. Article 19 vests the Warden of Central Prison with direct responsibility for providing necessary drugs, appliances and qualified personnel to carry out the sentence of death in accordance with law and the Execution Protocol approved by the Governor and Council of State. The following Execution Protocol has therefore been developed by the Warden of Central Prison and approved by the Secretary of the North Carolina Department of Correction.

I. Lethal Injection

Death by lethal injection is caused by the administration of a lethal quantity of an ultrashort-acting barbiturate, such as sodium pentothal, in combination with a chemical paralytic agent, such as pancuronium bromide, and potassium chloride into the veins of a condemned prisoner. The condemned prisoner's level or state of consciousness during the execution process is observed visually and monitored utilizing an appliance, such as a bispectral index (BIS) monitor, from which the electrical activity in the condemned prisoner's brain can be interpreted.

The lethal injection protocol ordinarily involves the successive, simultaneous slow intravenous administration of the three lethal chemicals and non-lethal saline solution into the body of a condemned prisoner through two IV lines by means of a series of five injections. The lethal injection protocol is composed of the following steps:

a) The first injection is an ultrashort-acting barbiturate, such as a dose of not less than 3000 mg of sodium pentothal, which quickly renders the condemned prisoner unconscious.

b) The second injection is a dose of not less than 30 mL of a saline solution, which flushes the equipment used for the intravenous administration of the lethal chemicals and saline solution following the administration of the ultrashort-acting barbiturate.

c) The Warden of Central Prison pauses the administration of the lethal chemicals and saline solution to verify

that the output value displayed on the monitoring appliance, such as a value reading on a BIS monitor below 60, confirms a reduced level of electrical activity in the condemned prisoner's brain sufficient to indicate a very high probability of unconsciousness.

d) If a very high probability of unconsciousness is confirmed, such as a value reading on a BIS monitor below 60, the Warden resumes the injection of the remaining lethal chemicals and saline solution. However, if a very high probability of unconsciousness is not confirmed, such as a value reading on a BIS monitor of 60 or above, repeated identical injections of the ultrashort-acting barbiturate, such as doses of not less than 3000 mg of sodium pentothal, will be administered until a very high probability of unconsciousness is confirmed, such as a value reading on a BIS monitor below 60, and the injection of the remaining lethal chemicals and saline solution is resumed.

e) The third injection is a chemical paralytic agent, such as a dose of not less than 40 mg of pancuronium bromide, which paralyzes the muscles of the condemned prisoner.

f) The fourth injection is a dose of not less than 160 mEq of potassium chloride, which interrupts nerve impulses to the heart causing the condemned prisoner's heart to stop beating.

g) The fifth injection is a dose of not less than 30 mL of a saline solution, which flushes the equipment used for the intravenous administration of the lethal chemicals and saline solution and completes the lethal injection protocol.

II. Appliances

The Warden will acquire, from reputable manufacturers or suppliers, all appliances, equipment and other supplies as are required to carry out the administration of lethal drugs as described above. Such appliances, equipment and supplies shall include, at a minimum, the syringes, intravenous tubes and related materials ordinarily used by medical personnel to administer intravenous fluids to human patients. The Warden will also acquire and maintain such monitors or other equipment as shall be necessary to review human vital signs and functions, including cardiac activity, electrical activity in the brain, and respiration. The Warden

will also be responsible for acquiring such other appliances, equipment, supplies or materials as medical personnel shall recommend for the purpose of ensuring that the sentence of death is carried out without exposing the condemned prisoner to a substantial risk of serious harm, pain or suffering and in accordance with constitutional requirements.

III. Personnel

The Warden shall ensure that the lethal injection procedure is administered by personnel who are qualified to set up and prepare the injections described above, administer the preinjections, insert the IV catheter, and to perform other tasks required for this procedure in accordance with the requirements of Article 19 and this Execution Protocol. Medical doctors, physician assistants, advanced degree nurses, registered nurses, and emergency medical technician-paramedics, who are licensed or certified by their respective licensing boards and organizations, shall be deemed qualified to participate in the execution procedure. As required by Article 19, a licensed medical doctor shall be present at each execution. The doctor shall monitor the essential body functions of the condemned inmate and shall notify the Warden immediately upon his or her determination that the inmate shows signs of undue pain or suffering. The Warden will then stop the execution. The doctor shall also be responsible for certifying the death of the inmate at such time as he or she determines the procedure has been completed as required by N.C.G.S. §15-192.

It is the intent of this Execution Protocol to carry out the sentence of death as required by the North Carolina General Statutes in accordance with all constitutional requirements as determined by the courts of North Carolina and the United States.

According to a representative from the Attorney General's Office who spoke at the Council's 6 February meeting, the protocol was intended to address concerns raised in the context of pending litigation. Stays had been issued in three pending executions until the protocol was adopted by the DOC and approved by the Council.

At the 6 February meeting, the Council addressed the lethal injection protocol submitted by the DOC. The Council's discussion focused on two primary issues: (1) the historical basis for the 1909 General Assembly's requirement that the Council approve execution protocols, which, according to Governor Easley, was "to make cer-

tain that the cost did not overrun" when the legislature was not in session to make that determination, and (2) the controversy with the North Carolina Medical Board with respect to its position statement prohibiting physician participation in executions. The State Treasurer specifically expressed concern with the Council's approval role with respect to the execution protocol, noting that "this body is not equipped to have a—a policy discussion. And I don't know a better way to make that point than we're not even allowed to hear from people, . . . and . . . that's a consistent rule on all matters we hear from duly hired members of the executive branch." Following presentations from the Attorney General's Office and the DOC Secretary about the pending litigation concerning the constitutionality of the lethal injection procedure and the stays issued in those cases, the Council approved the protocol by a voice vote. Three "no" votes were recorded; however, there is no record of how the Governor or the remaining six members of the Council voted. The Council also unanimously approved a motion to request that the General Assembly "remove the requirement that the Governor and Council of State be required to approve appliances or personnel procedures in capital cases involving the punishment of death."

On 15 and 20 February 2007, petitioners filed petitions for contested case hearings with the Office of Administrative Hearings ("OAH"), alleging, in relevant part, that the Council is an "Agency" within the meaning of the APA and that the Council "failed to follow the requirements for the adoption of a permanent rule" when it approved the protocol.

On 2 May 2007, the OAH administrative law judge ("ALJ") assigned to the matter allowed the Council's motion to dismiss the contested case "as to the allegations regarding rulemaking." However, he denied the motion to dismiss "as to the other matters regarding the actions of the [Council] in approving the execution protocol."

On 21 May 2007, the ALJ conducted an evidentiary hearing as to petitioners' contested case proceeding. Then on 31 May 2007, McCoy responded to the rule-making petition on behalf of the Council, quoting the APA with respect to the DOC's exemption and stating that "since the General Assembly has provided clear and strict guidance to the Council of State and all others on the application of Chapter 150B [the APA] to rules related to 'prisoners, probationers, and parolees', your request to 'Petition for Rule" cannot be granted."

On 9 August 2007, the ALJ recommended that the Council reconsider its approval of the lethal injection protocol. On 1 November 2007, the Governor and Council issued a final agency decision and order, in which the Council declined to reconsider its approval based upon its conclusion that the OAH did not have jurisdiction to review the issue.

Petitioners filed for judicial review of the Council's final decision in Wake County Superior Court on 3 December 2007. Their petition challenged the Council's final agency decision and its 6 February 2007 approval of the protocol, claiming that such actions did not "satisf[y] the requirements mandated by N.C.G.S. § 15-188 and by the [APA]." The petition also included a claim for declaratory judgment as to the Council's potential violation of petitioners' due process rights and of section 15-188 of the North Carolina General Statutes. On 6 February 2008, the Council filed a response to the petition, which included a motion to dismiss the claim for declaratory judgment.

The superior court heard oral arguments from the parties in October 2008, but deferred ruling upon the issues presented until this Court issued its decision in *North Carolina Department of Correction v. North Carolina Medical Board*, 363 N.C. 189, 675 S.E.2d 641 (2009). Then on 13 May 2009, the superior court: (1) dismissed petitioners' request for judicial review, holding that the court lacked jurisdiction to review the matter pursuant to the judicial review provisions of the APA; (2) dismissed petitioners' claims for declaratory judgment, concluding that "[t]here appears to be no case or controversy or unique statutory construction necessary to interpret the language of this statute" and "[a]ny rights of a condemned inmate under this statute are limited to the obligation that his death be by lethal injection, in a permanent death chamber in Raleigh, and carried out pursuant to an execution protocol approved by the Governor and the Council of State"; and (3) upheld the Council's approval of the execution protocol.

On 11 June 2009, petitioners appealed the superior court's order to the Court of Appeals. This Court allowed the Council's petition for discretionary review prior to a determination by the Court of Appeals on 7 October 2010.

Applicability of the APA

[1] Petitioners' first argument to this Court is that the superior court erred in concluding that they cannot challenge the Council's approval of the execution protocol pursuant to the APA. We disagree.

In this action, petitioners do not challenge the substance of the lethal injection protocol or the role of the DOC in promulgating it; rather, the question before us is a narrow one, which centers on the Council of State and the procedural requirements that may be attached to its approval authority. Because the Council of State rarely has been the subject of this Court's jurisprudence, we begin our discussion with a brief overview of the Council's purpose and the scope of its authority.

Unlike many other state agencies, the Council of State is a creation of the North Carolina Constitution. Our constitution provides that "[t]he Council of State shall consist of the [State's executive] officers," namely, the Governor, Lieutenant Governor, Secretary of State, Auditor, Treasurer, Superintendent of Public Instruction, Attorney General, Commissioner of Agriculture, Commissioner of Labor, and Commissioner of Insurance. N.C. Const. art. III, § 8; *see also id.* art. III, §§ 2, 7. The constitution further provides, in general terms, for the creation of "administrative departments" as part of the State's executive branch. *Id.* art. III, § 11. Whereas each administrative department focuses on a discrete area of expertise, *see*, *e.g.*, N.C.G.S. § 143B-137.1 (2009) (setting forth the duties of the Department of Health and Human Services "to provide the necessary management, development of policy, and establishment and enforcement of standards for the provisions of services in the fields of public and mental health and rehabilitation"), the Council of State advises the Governor and approves certain actions taken by other agencies, *see*, *e.g.*, *id.* § 53-77 (2009) (The Council advises the Governor regarding the establishment of banking holidays.); *id.* § 146-27 (2009) (The Department of Administration must "ma[k]e" "[e]very sale, lease, rental, or gift of land owned by the State," and such action must be "approved by" the Council.). Therefore, although the Council is defined as an executive agency, its constitutional creation, composition, purpose, and functions set it apart from agencies created and defined by statute.

This Court explicitly has recognized the complexity of governing in the administrative state. *Adams v. N.C. Dep't of Natural & Econ. Res.*, 295 N.C. 683, 249 S.E.2d 402 (1978). Although this Court noted in *Adams* that " 'the legislature may not abdicate its power to make

laws [or] delegate its *supreme* legislative power to any . . . coordinate branch or to any agency which it may create,' " *id.* at 696, 249 S.E.2d at 410 (quoting *N.C. Tpk. Auth. v. Pine Island, Inc.*, 265 N.C. 109, 114, 143 S.E.2d 319, 323 (1965) (alterations in original)), we also concluded that "strict adherence to ideal notions of the non-delegation doctrine would unduly hamper the General Assembly in the exercise of its constitutionally vested powers," *id.* at 696-97, 249 S.E.2d at 410 (citations omitted). These observations were made during the infancy of the APA, which initially went into effect in North Carolina in 1975, but they continue to hold true today so long as the "adequate guiding standards" mandated by *Adams* are put in place. *Id.* at 697, 249 S.E.2d at 410. Here, the mandate set forth explicitly in section 15-188 of the North Carolina General Statutes, coupled with guidance from the APA and the Council's own administrative rules is sufficient to satisfy the requirement that "adequate guiding standards" be put in place to govern the Council's actions.

According to our legislature, the purpose of the APA is to "establish[] a uniform system of administrative rule making and adjudicatory procedures for agencies." N.C.G.S. § 150B-1(a) (2009). However, the APA expressly exempts several agencies from its rule-making procedures, including "[t]he Department of Correction, with respect to matters relating solely to persons in its custody or under its supervision, including prisoners, probationers, and parolees." *Id.* § 150B-1(d)(6) (2009). The APA also fully exempts the DOC with respect to contested case proceedings. *Id.* § 150B-1(e)(7) (2009) ("The contested case provisions of this Chapter apply to all agencies and all proceedings not expressly exempted from the Chapter. The contested case provisions of this Chapter do not apply to . . . [t]he Department of Correction."). In contrast, although the APA designates the Council of State as an "agency," *id.* § 150B-2(1a) (2009) (" 'Agency' means an agency or an officer in the executive branch of the government of this State and includes the Council of State, the Governor's Office, a board, a commission, a department, a division, a council, and any other unit of government in the executive branch. A local unit of government is not an agency."), the Council is not expressly exempted from any of the APA's provisions, *id.* § 150B-1.

Although the issue before us is one of first impression in North Carolina, other states have addressed whether a lethal injection protocol created by agencies analogous to the DOC is subject to their APAs. While their decisions are not binding upon this Court, *see*

Carolina Power & Light Co. v. Emp't Sec. Comm'n, 363 N.C. 562, 569, 681 S.E.2d 776, 780 (2009), these decisions are instructive.

A number of state courts have held that their APA applies to the adoption of such protocols. *See Morales v. Cal. Dep't of Corr. & Rehab.*, 168 Cal. App. 4th 729, 741, 85 Cal. Rptr. 3d 724, 733 (2008) ("The procedural requirements designated by the APA for administrative regulations are applicable to [the lethal injection protocol]. Appellants' failure to comply with them invalidates the challenged protocol."); *Bowling v. Ky. Dep't of Corr.*, 301 S.W.3d 478, 489-90 (Ky. 2009) ("[T]he lethal injection protocol is not an issue 'purely of concern' to the Department [of Corrections] and its staff. Nor is there any basis for concluding that the Kentucky General Assembly intended for the Department to be able to modify at will, without any oversight, the manner in which the Commonwealth's most serious punishment is meted out."); *Evans v. State*, 396 Md. 256, 349-50, 914 A.2d 25, 80 (2006) (holding that "those aspects of the [protocol] that direct the manner of executing the death sentence—the Lethal Injection Checklist—constitute regulations . . . and, because they were not adopted in conformance with the requirements of the APA, are ineffective and may not be used until such time as they are properly adopted"), *cert. denied*, 552 U.S. 835, 169 L. Ed. 2d 53 (2007).

In other states in which the APA includes an exemption similar to this State's DOC exemption "with respect to matters relating solely to persons in its custody or under its supervision, including prisoners, probationers, and parolees," N.C.G.S. § 150B-1(d)(6), courts have held that the APA does not apply to the protocols adopted. *See Middleton v. Mo. Dep't of Corr.*, 278 S.W.3d 193, 197 (Mo.) (holding that the legislature intended "that execution protocols would not be subject to rulemaking" and that "merely because an event or topic is interesting or important does not make it subject to rulemaking given that there is a specific statutory exemption, 'concerning only inmates' "), *cert. denied*, —– U.S. —–, 173 L. Ed. 2d 1331 (2009); *Abdur'Rahman v. Bredesen*, 181 S.W.3d 292, 311-12 (Tenn. 2005) ("[T]he lethal injection protocol is not a rule as defined by the UAPA. The protocol instead fits squarely within two exceptions to the meaning of 'rule': statements concerning only the internal management of state government and not affecting private rights privileges or procedures available to the public, and statements concerning inmates of a correctional or detention facility." (internal citations omitted)), *cert. denied*, 547 U.S. 1147, 164 L. Ed. 2d 813 (2006); *Porter v. Commonwealth*, 276 Va. 203, 239, 661 S.E.2d 415, 432–33 (2008)

(holding that the Virginia APA "exempts actions of agencies relating to '[i]nmates of prisons or other such facilities or parolees therefrom,' " that "the Virginia Department of Corrections is an agency whose sole purpose is related to inmates of prisons," and that the Department "is thus exempt from the strictures of the APA" (internal citation omitted)), *cert. denied*, —— U.S. ——, 173 L. Ed. 2d 1097 (2009). In the case *sub judice*, neither party disputes that the DOC's APA exemption "with respect to matters relating solely to persons in its custody or under its supervision," N.C.G.S. § 150B-1(d)(6), applies to the lethal injection protocol. Instead, their arguments center on whether the APA applies to the Council's role in approving the protocol.

Petitioners argue that, because the Council of State is defined as an "agency" in the APA and because it lacks an express exemption from Chapter 150B, the Council's approval of another agency's actions still must conform to the broad, overall requirements set forth in the APA. However, the Council contends that the North Carolina Administrative Code directs the Council to employ the same hearing procedures that apply to the promulgating agency when the Council reviews actions taken by that agency and that a contrary decision by this Court would eviscerate the legislature's intent to exempt the DOC from the requirements of the APA in this circumstance.

Specifically, the parties disagree as to the correct interpretation of one of the Council's own rules that addresses this issue. The North Carolina Administrative Code provides in relevant part:

> In those instances where the Council of State must approve a rule adopted by an executive department or when it adopts a rule itself, proposed text for the rule must be submitted to the Council for review beforehand. The proposed text shall be submitted by the executive department responsible for administering the statute to which the proposed rule relates. The executive department must follow Chapter 150B of the General Statutes on rule-making [the APA] before submitting its recommendation to the Council. *The hearing procedures applicable to that executive department apply.* The Council may initiate rule-making in those matters which require its approval.

6 NCAC 2 .0001 (June 2010) (emphasis added). Petitioners' contention—that the statement that "[t]he hearing procedures applicable to that executive department apply" relates only to the sentence

immediately preceding it—simply reiterates that the executive department that submits the proposed rule must adhere to the APA. That interpretation does not answer the question before us and, essentially, renders the sentence meaningless. Notably, the earliest version of this rule, adopted in 1976, does appear to have given the Council more latitude in the rule-making process. At that time, the rule read:

> Prior to consideration of rules or regulations by the Council of State, the executive department vested by statute with responsibility for administering the statutes to which the rules relate shall prepare proposed rules or amendments to existing rules for recommendation to the council. Before presentation of the proposed rules or regulations to the council, the responsible executive branch department shall, according to its administrative procedures adopted pursuant to the North Carolina Administrative Procedure Act, give proper notice of proposed rule-making and provide an opportunity for interested parties to present opinions and positions on the proposed rules. *The council reserves the right to initiate consideration of rules and regulations and amendments to the same.*

Id. 2. 0001 (Feb. 1976) (emphasis added). Although this earliest version of the rule governing the Council's conduct does not align perfectly with today's version, this antecedent shows plainly how the Council once might have been called upon to take a more active role in the rule-making process instead of the more limited role it plays today.

The Council's own argument does comport with this analysis. As noted above, the critical phrase in the Administrative Code relates to which hearing procedures apply to the Council's review of the protocol. The Council argues that the controlling sentence relates to the Council's approval process and that the Council is exempt from the requirements of the APA when the promulgating executive department is exempt. As we discuss below, based upon the treatment of the Council in prior case law, we agree with the Council's position regarding its role in the approval process.

Martin v. Thornburg, 320 N.C. 533, 359 S.E.2d 472 (1987), is most instructive on this point. In that case, the Department of Administration had received bids for a building to be leased by the State and occupied by the Employment Security Commission. *Id.* at 536, 359 S.E.2d at 474. The Department then had submitted the lowest bid to

the Council of State for approval, in accordance with the applicable statutes. *Id.* When the matter came before the Council of State, the Council disapproved the proposal submitted, discussed one of the other lease proposals with an agent of another bidder who was present at the meeting, and subsequently approved a motion to require the Department to renegotiate the proposal with that other bidder. 320 N.C. at 536-37, 359 S.E.2d at 474.

Similar to the statute we consider here, the statutes in *Martin* provided that "[e]very acquisition of land . . . shall be made by the Department of Administration and approved by the Governor and Council of State," N.C.G.S. § 146-22 (1983), and that "[a]ll lease and rental agreements entered into by the Department shall be promptly submitted to the Governor and Council of State for approval or disapproval," *id.* § 146-25 (1983). However, in contrast to section 15-188, the Court in *Martin* had the benefit of a specific directive to the Council, which stated: "In the event the lowest rental proposed is not presented to the Council of State, that body may require a statement of justification, and may examine all proposals." *Id.* § 146-25.1(c) (1983).

In *Martin*, the Court noted that the "statutes clearly indicate that it is the role of the Department of Administration to investigate and negotiate lease proposals on behalf of the State and where applicable to require and approve specifications for such proposals." 320 N.C. at 540, 359 S.E.2d at 476. The Court then held that, when the lowest bid was submitted to the Council, the Council's authority was limited to either approval or disapproval of that proposal. *Id.* at 540-41, 359 S.E.2d at 476. The Council's authority exceeded mere approval or disapproval only if the Department did not submit the lowest bid, and even then, its authority did not include "requir[ing] the Department of Administration to negotiate and enter any lease other than the lease proposed to [the Council] by the Department of Administration." *Id.* at 541, 359 S.E.2d at 476-77. The Court then reversed the trial court's order that "authoriz[ed] the Council of State to direct the Department of Administration to execute a lease." *Id.* at 548, 359 S.E.2d at 481.

Like the statute in *Martin*, the law here unmistakably places primary responsibility for the lethal injection protocol upon the promulgating agency, the DOC. The relevant statute provides, in part, that:

> The superintendent of the State penitentiary shall also cause to be provided, in conformity with this Article and approved by the Governor and Council of State, the necessary appliances for the

> infliction of the punishment of death and qualified personnel to set up and prepare the injection, administer the preinjections, insert the IV catheter, and to perform other tasks required for this procedure in accordance with the requirements of this Article.

N.C.G.S. § 15-188 (2009). The administrative head of the State penitentiary is the subject of this statute, and he is the one charged with ensuring that the protocol is drafted and instituted properly. It is clear that the General Assembly intended that the DOC have primary responsibility for the lethal injection process. As in *Martin*, the statute does not give the Council authority beyond merely approving or disapproving the submitted protocol. *Cf. State ex rel. Comm'r of Ins. v. N.C. Auto. Rate Admin. Office*, 292 N.C. 1, 11, 231 S.E.2d 867, 872 (1977) (concluding that, pursuant to the relevant statute, the Commissioner of Insurance "was authorized to approve the filing in toto, approve the filing in part, or disapprove the filing," but could not fix rates himself).

Our case law provides a clear view of the limited role that the General Assembly intends the Council of State to play when it requires the Council to approve an action taken by another state agency. *See id.* at 12, 231 S.E.2d at 873 ("We recognize that the provisions of G.S. 58-248 might have been written so as to give the Commissioner more authority as a rate-maker or so as to provide a more expeditious procedure in altering proposed rates. However, this Court cannot, under the guise of judicial interpretation, interpolate into the statute provisions which are wanting." (citations omitted)); *see also Lewis v. White*, 287 N.C. 625, 642, 216 S.E.2d 134, 145 (1975) ("The Legislature having given this wide discretion to the Art Museum Building Commission, subject only to the specified approvals[by, *inter alia*, the Governor and the Council of State], the courts are not authorized to substitute their judgment for that of the Commission concerning the proper location of the Museum."), *superseded by statute*, *North Carolina Environmental Policy Act of 1971*, *N.C.G.S. § 113A-4*, *on other grounds*, *as recognized in Goldston v. State*, 361 N.C. 26, 31-32, 637 S.E.2d 876, 880 (2006). It is clear that the General Assembly did not intend to negate the express exemption that it provided to the DOC in the APA by including a requirement that the Council approve the lethal injection protocol. Although we may question the wisdom of permitting the DOC "to be able to modify at will, without any oversight, the manner in which the [State's] most serious punishment is meted out," *Bowling*, 301 S.W.3d at 489-90, that policy decision is within the province of the legisla-

ture, not the courts, *Bacon v. Lee*, 353 N.C. 696, 717, 549 S.E.2d 840, 854 ("The political question doctrine controls, essentially, when a question becomes 'not justiciable . . . because of the separation of powers provided by the Constitution.' 'The . . . doctrine excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch.' " (alterations in original) (citation omitted)), *cert. denied*, 533 U.S. 975, 150 L. Ed. 2d 804 (2001). Accordingly, we hold that the process by which the Council approves or disapproves the DOC's lethal injection protocol is not subject to the APA, and petitioners cannot challenge it by going through the Office of Administrative Hearings through the APA. Instead, any issue petitioners have with the protocol rests with the General Court of Justice or the federal courts.

As part of their argument that the APA applies to their case, petitioners also contend that they are "persons aggrieved" within the meaning of the APA and that section 15-188 of the North Carolina General Statutes confers rights upon them. Because our holding that the Council's approval of the lethal injection protocol is not subject to the APA is dispositive of this issue, we do not address the remaining portions of petitioners' first argument.

Declaratory Judgment Claim

[2] Petitioners' second contention is that the superior court erred by dismissing their declaratory judgment claim that the Council's approval of the execution protocol violated section 15-188 of the North Carolina General Statutes. Although petitioners correctly contend that dismissal of the claim was improper, we agree with the superior court's conclusion that petitioners' rights pursuant to section 15-188 "are limited to the obligation that [their] death[s] be by lethal injection, in a permanent death chamber in Raleigh, and carried out pursuant to an execution protocol approved by the Governor and the Council of State."

Section 1-254 of the North Carolina General Statutes provides, in relevant part, "Any person . . . whose rights, status or other legal relations are affected by a statute . . . may have determined any question of construction or validity arising under the . . . statute . . . and obtain a declaration of rights, status, or other legal relations thereunder." N.C.G.S. § 1-254 (2009). With respect to declaratory judgments, our General Assembly provided: "This Article is declared to be remedial,

its purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations, and it is to be liberally construed and administered." *Id.* § 1-264 (2009).

For a declaratory judgment action to proceed, an actual controversy must exist between the parties. *Sharpe v. Park Newspapers of Lumberton, Inc.*, 317 N.C. 579, 583, 347 S.E.2d 25, 29 (1986) ("Although the North Carolina Declaratory Judgment Act does not state specifically that an actual controversy between the parties is a jurisdictional prerequisite to an action thereunder, our case law does impose such a requirement." (citing *Gaston Bd. of Realtors, Inc. v. Harrison*, 311 N.C. 230, 234, 316 S.E.2d 59, 61 (1984))). "Although a declaratory judgment action must involve an actual controversy between the parties, plaintiffs are not required to allege or prove that a traditional cause of action exists against defendant[s] in order to establish an actual controversy." *Goldston*, 361 N.C. at 33, 637 S.E.2d at 881 (alteration in original) (quoting *Town of Emerald Isle v. State*, 320 N.C. 640, 646, 360 S.E.2d 756, 760 (1987)) (internal quotation marks omitted). "[A] declaratory judgment should issue (1) when [it] will serve a useful purpose in clarifying and settling the legal relations at issue, and (2) when it will terminate and afford relief from the uncertainty, insecurity and controversy giving rise to the proceeding." *Id.* (first alteration in original) (quoting *Augur v. Augur*, 356 N.C. 582, 588, 573 S.E.2d 125, 130 (2002) (alteration in original) (citation omitted)) (internal quotation marks omitted).

In other instances similar to this case, we have addressed questions presented to us through declaratory judgment actions. *See N.C. Dep't of Corr.*, 363 N.C. at 199, 675 S.E.2d at 648 (An action for declaratory judgment was proper when the actions of the DOC and North Carolina Medical Board, "both seeking to fulfill their statutory duties, are in irreconcilable conflict."); *Martin*, 320 N.C. at 535, 359 S.E.2d at 473 (noting that "[p]laintiffs brought this declaratory judgment action to determine the rights and duties of the Governor and Council of State with respect to the entry of leases on behalf of the State" and answering the questions presented); *Jernigan v. State*, 279 N.C. 556, 559-61, 184 S.E.2d 259, 262-64 (1971) (converting a claim pursuant to the Post Conviction Act to a Declaratory Judgment Act claim because "the question of [a parole statute's] constitutionality is a matter of importance both to the public and to prisoners" and "[w]hen a plaintiff has a property interest which may be adversely affected by the enforcement of the criminal statute, he may maintain an action under the Declaratory Judgment Act to determine the valid-

ity of the statute in protection of his property rights." (citations omitted)). In addition, other states have dealt with this precise issue—the conflict between the DOC's responsibility to develop a lethal injection protocol and the rights of death row inmates that flow from the adoption of the protocol—by issuing a declaratory judgment. *See, e.g.*, *Bowling*, 301 S.W.3d at 481 ("A declaratory judgment action is the appropriate means of challenging implementation of a defendant's death sentence . . . .").

As in the instant case, a declaratory judgment is proper when "[f]undamental rights are involved. Petitioner is entitled to know what effect the statute has upon his future." *Jernigan*, 279 N.C. at 562, 184 S.E.2d at 264. It is important to note that a motion to dismiss a declaratory judgment action should not be granted merely because the party seeking the declaration ultimately is incorrect in his interpretation of the statute at issue. As we previously have noted,

> "[w]here the plaintiff's pleading sets forth an actual or justiciable controversy, it is not subject to demurrer[4] since it sets forth a cause of action, even though the plaintiff may not be entitled to a favorable declaration on the facts stated in his complaint; that is, in passing on the demurrer, the court is not concerned with the question whether plaintiff is right in a controversy, but only with whether he is entitled to a declaration of rights with respect to the matters alleged."

Woodard v. Carteret Cnty., 270 N.C. 55, 61, 153 S.E.2d 809, 813-14 (1967) (citation omitted).

Here, the parties have fundamental differences as to how this Court should interpret section 15-188. According to petitioners, "[t]he Council of State's approval of an execution protocol which does not definitively specify the appliances and personnel to be employed in executions violated N.C.G.S. § 15-188 and violated Petitioners' constitutional rights to due process." To construe section 15-188 either to require the Council's substantive review of the DOC's provision of "the necessary appliances" "and qualified personnel," or to give death row inmates procedural rights with respect to the Council's approval, would create new causes of action that petitioners could pursue.

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4. A demurrer serves the same purpose as a motion to dismiss. *See Grant v. Emmco Ins. Co.*, 295 N.C. 39, 42, 243 S.E.2d 894, 897 (1978) ("A motion to dismiss for failure of the complaint to state a claim upon which relief can be granted is the equivalent of a demurrer under the old practice for failure of the complaint to state a cause of action." (citing *Sutton v. Duke*, 277 N.C. 94, 176 S.E.2d 161 (1970))).

However, the superior court's interpretation of the statute—that petitioners' rights "are limited to the obligation that [their] death[s] be by lethal injection, in a permanent death chamber in Raleigh, and carried out pursuant to an execution protocol approved by the Governor and the Council of State" and that no factual or legal authority "supports Petitioner[s'] claims of a due process right to participate in the approval process"—forecloses further review based upon the Council's process for approval of the protocol. Accordingly, a genuine controversy between the parties exists as to the proper construction of section 15-188, and a declaratory judgment would both "serve a useful purpose in clarifying and settling the legal relations at issue" and "terminate and afford relief from the uncertainty, insecurity and controversy giving rise to the proceeding." *Goldston*, 361 N.C. at 33, 637 S.E.2d at 881 (quoting *Augur*, 356 N.C. at 588, 573 S.E.2d at 130) (internal quotation marks omitted).

The statute at issue here reads:

> In accordance with G.S. 15-187, the mode of executing a death sentence must in every case be by administering to the convict or felon a lethal quantity of an ultrashort-acting barbiturate in combination with a chemical paralytic agent until the convict or felon is dead; and when any person, convict or felon shall be sentenced by any court of the State having competent jurisdiction to be so executed, the punishment shall only be inflicted within a permanent death chamber which the superintendent of the State penitentiary is hereby authorized and directed to provide within the walls of the North Carolina penitentiary at Raleigh, North Carolina. *The superintendent of the State penitentiary shall also cause to be provided, in conformity with this Article and approved by the Governor and Council of State, the necessary appliances for the infliction of the punishment of death and qualified personnel to set up and prepare the injection, administer the preinjections, insert the IV catheter, and to perform other tasks required for this procedure in accordance with the requirements of this Article.*

N.C.G.S. § 15-188 (emphasis added). The subject of petitioners' claim for declaratory judgment centers on the italicized portion of the statute and whether "[t]he Council of State's approval of an execution protocol which does not definitively specify the appliances and personnel to be employed in executions violated N.C.G.S. § 15-188." In other words, petitioners argue that section 15-188 requires the Council to conduct a substantive review of the protocol rather than

"[l]eaving those important decisions [with respect to specific appliances and personnel] to the discretion of the warden." However, as discussed previously, the General Assembly clearly has delegated primary responsibility for creating the execution protocol to the DOC. The General Assembly's requirement that the Council approve the protocol does not diminish DOC's authority. Furthermore, the plain language of section 15-188 mandates that the DOC "provide" both the "necessary appliances for the infliction of the punishment of death and qualified personnel" to perform the tasks involved. *Id.* § 15-188. The statute requires neither a step-by-step protocol nor a detailed description of the appliances or personnel to be used in order for the Council to give its approval. We decline to engraft onto the statute any requirements beyond what its plain language provides, and we see no indication that the Council is required, pursuant to section 15-188, to conduct a substantive review of the protocol.

We hold that, " 'even though the plaintiff [is not] entitled to a favorable declaration on the facts' " of this case, *Woodard*, 270 N.C. at 61, 153 S.E.2d at 813–14 (citation omitted), the superior court erred in dismissing the declaratory judgment claim because petitioners did present a genuine controversy. Nonetheless, we affirm the superior court's order as modified because the court correctly construed section 15-188 to mean that petitioners' rights "are limited to the obligation that [their] death[s] be by lethal injection, in a permanent death chamber in Raleigh, and carried out pursuant to an execution protocol approved by the Governor and the Council of State" and that no factual or legal authority "supports Petitioner[s'] claims of a due process right to participate in the approval process."

Conclusion

Accordingly, we affirm the superior court's ruling that the APA does not apply to the Council of State's approval of the lethal injection protocol in accordance with section 15-188. We also affirm the superior court's ruling, as modified, that petitioners' rights pursuant to section 15-188 do not include the right to present evidence to the Council and that the Council's obligations pursuant to section 15-188 do not include a substantive review of the protocol before it is approved.

MODIFIED AND AFFIRMED.

PENNY CUMMINGS v. AGNES ORTEGA, M.D. AND WOMEN'S HEALTH CARE SPECIALISTS, P.A.

No. 417PA10

(Filed 7 October 2011)

Jury— motion to set aside verdict—affidavits concerning juror's statements—internal influence—not admissible

When setting aside a jury verdict, the trial court improperly relied on evidence that a juror had expressed firm opinion to other jurors before deliberations began. The juror affidavits at issue were inadmissible pursuant to N.C.G.S. § 8C-1, Rule 606(b) because they spoke to a juror's state of mind and thus concerned an internal rather than an external influence.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 200 N.C. App. 432, 697 S.E.2d 513 (2010), affirming both an order granting plaintiff a new trial entered on 13 April 2009 and an order entered on 10 July 2009 denying defendants' motion for reconsideration and relief from the 13 April 2009 order, both entered by Judge Steve A. Balog in Superior Court, Harnett County. Heard in the Supreme Court 2 May 2011.

Neighbors Law Firm, P.C., by Patrick E. Neighbors, for plaintiff-appellee.

Crawford & Crawford, LLP, by Renee B. Crawford, Robert O. Crawford, III, and Arienne P. Blandina, for defendant-appellants.

JACKSON, Justice.

In this appeal we consider whether evidence contained in juror affidavits is admissible to support plaintiff's motion for a new trial in her medical malpractice case. Because we hold that these statements are inadmissible pursuant to Rule 606(b) of the North Carolina Rules of Evidence, we reverse.

On 18 May 2005, plaintiff Penny Cummings filed a medical malpractice action against defendants in the Superior Court, Harnett County. In her complaint, plaintiff alleged that she suffered personal injuries during a diagnostic laparoscopy performed by defendant Agnes Ortega, M.D. At the time of the surgery, Ortega was the owner of defendant Women's Health Care Specialists, P.A. Defendants answered, denying all allegations by plaintiff.

The case was called for jury trial on 1 December 2008. During slightly more than two weeks, sixteen witnesses presented testimony at trial focusing primarily on medical issues of a highly technical nature. On 16 December 2008, the jury returned a unanimous verdict finding that defendants were not liable for plaintiff's injuries. The trial court entered judgment for defendants on 5 January 2009.

On 18 December 2008, two days after the jury returned its verdict, Rachel Simmons, one of the jurors, contacted plaintiff's attorneys to report misconduct by a fellow juror, Charles Githens. According to Simmons, Githens made several statements about the case to the other jurors in the jury room before the case was submitted formally to the jury, notwithstanding repeated warnings from the trial court. On 2 January 2009, Simmons executed an affidavit stating:

> I served on the jury for the legal case Cummings v. Ortega. I believe that significant juror misconduct occurred during the trial. Upon my recollection, on December 4, 2008, prior to any evidence introduced by the plaintiff, Juror No. 8 [Githens], while in the jury deliberation room, and in the presence of myself and the other jurors, made the statement to the effect that his mind was made up, that the other jurors could agree with him or they would sit there through the rest of the year. He subsequently stated that he wished the plaintiff, Ms. Cummings, would have died, and we wouldn't have to be sitting there at all. He also attempted to discuss the case prior to deliberations with several jurors present, at which point another juror reprimanded him.
>
> These statements interfered with my thought process about the evidence during the plaintiff's case, and I believe it interfered with the other jurors as well during deliberation, as they began realizing any discussion about the evidence was futile, and they didn't want to continue serving through the holidays. In my opinion, there was not a full and frank discussion of the evidence.

On 12 January 2009, plaintiff's attorneys obtained a second affidavit from another juror, Joel Murphy. Murphy's affidavit corroborated Simmons's statements:

> I served on the jury for the legal case Cummings v. Ortega. Prior to actual deliberation on the evidence in this case, Juror No. 8 [Githens] made the statements that his mind was made up and no matter what the evidence he wasn't going to change it. This statement had a chilling effect on other jurors. He also exhibited extremely disruptive behavior and was especially dis-

> courteous to the female jurors in the case, to the extent that I believe it affected their ability to express their opinions about the evidence. I believe several jurors did not engage in full discussion of the evidence because they didn't want to sit through the holidays in a futile attempt to discuss the evidence with him.

Notably, neither Simmons nor Murphy reported Githens's misconduct to the trial court during the course of the trial, notwithstanding the trial court's repeated instructions to do so.[1]

Based upon these two affidavits, plaintiff filed a motion on 14 January 2009 to set aside the verdict and grant a new trial pursuant to Rule 59(a)(2) of the North Carolina Rules of Civil Procedure, arguing that she was denied a fair trial because of Githens's misconduct. The trial court heard plaintiff's motion on 20 March 2009. During this hearing defendants objected to introduction of the affidavits. The trial court ruled that the affidavits were inadmissible to the extent that they related to "extraneous matters and certain matters occurring after the commencement of deliberation of the jury." But the trial court ruled that the affidavits were admissible "as to the matters within that relate to juror misconduct occurring prior to deliberation of the jury." As a result, the trial court set aside the verdict and granted plaintiff's motion for a new trial in an order filed on 13 April 2009.

On 15 April 2009, defendants filed a motion seeking relief from the trial court's order pursuant to Rule 60(b) of the North Carolina Rules of Civil Procedure. Defendants' motion was supported by an affidavit from Githens, which stated in relevant part:

> 8. I am providing this affidavit because I cared deeply about serving as a juror on this trial and feel very distressed that my

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1. During the course of the proceedings, the trial court instructed the jurors approximately sixty times not to discuss the case before deliberations began. After the jury was impaneled, the trial court gave its most comprehensive statement regarding this duty:

> While you serve as a juror in this case, you must obey the following rules. First, you must not talk about the case among yourselves. The only place this case may be talked about is in the jury room, and then only after I tell you to begin your deliberations at the conclusion of the trial. You don't talk about the case while it's going on. You don't talk about the case until I tell you that you can at the end of the trial when you begin your deliberations in the jury room.

The trial court also instructed the jurors to notify the bailiff of any violations of its instructions stating, "If anyone communicates or attempts to communicate with you or in your presence about this case, you must notify me of that fact immediately through one of the bailiffs."

conduct has been construed by the court to cast any doubt upon the fairness of this trial to either party.

9. Except as set out in Paragraph 12, I do not recall making the specific statements that my fellow jurors allege I made.

10. However, if I did make such statements, they were made only to my fellow jurors while in the jury room. I know this because I certainly never spoke at any time to anyone else about the case until after the verdict was returned and we were discharged as a jury.

11. In addition, any such statements made to my fellow jurors in the jury room would not have been intended to be taken literally. Any such comments certainly would not have been intended to sway, intimidate or persuade any other jurors during the evidence portion of the trial. If anything, such comments would have been only a reflection of my state of mind at the time at having to anticipate a three-week trial.

12. I do recall making a general statement to the effect that, "once my mind was made up, I would not change it." However, I did not state that I had made up my mind before any evidence was presented, because I had not. The affidavits of Mr. Murphy and Ms. Simmons are inaccurate.

13. Any such statements by me also were not, and should not be construed as, an accurate statement of how I intended to conduct myself as a juror or how I did conduct myself as a juror regarding my duties to listen to and consider all of the evidence and the law before rendering my verdict.

14. Any such statements by me were not, and should not be construed as, an accurate statement of how I reached my verdict.

On 30 June 2009, the trial court denied defendants' motion.

At defendants' request, the trial court certified this matter for immediate appeal. On 17 August 2010, the Court of Appeals affirmed the trial court's order setting aside the verdict and awarding a new trial. *Cummings v. Ortega*, 206 N.C. App. 432, 697 S.E.2d 513 (2010). Defendants filed a petition for discretionary review on 21 September 2010, which we allowed in part on 15 December 2010.

Defendants argue that the trial court erred by considering evidence of alleged juror misconduct contained within juror affidavits to set aside the verdict and grant plaintiff a new trial. We agree.

"Ordinarily, a motion for a new trial is addressed to the sound judicial discretion of the trial judge and is not reviewable in the absence of an abuse of discretion." *Smith v. Price*, 315 N.C. 523, 533, 340 S.E.2d 408, 414 (1986). But a trial court's decision is reviewable when, as here, the court "acts based on an error in law." *Chandler v. U-Line Corp.*, 91 N.C. App. 315, 321, 371 S.E.2d 717, 721, *disc. review denied*, 323 N.C. 623, 374 S.E.2d 583, 583-84 (1988) (citing *Smith*, 315 N.C. at 533, 340 S.E.2d at 414; *Selph v. Selph*, 267 N.C. 635, 636-37, 148 S.E.2d 574, 575-76 (1966)).

The notion that juror testimony may not be permitted to impeach a verdict is both long-standing and well-settled. In 1821 this Court first recognized the common law rule that affidavits containing evidence of juror misconduct are inadmissible to impeach the validity of a jury's verdict. *State v. M'Leod*, 8 N.C. (1 Hawks) 344, 346 (1821) ("As to the misconduct of the Jury, it has been long settled, and very properly, that evidence impeaching their verdict must not come from the Jury; but must be shewn [sic] by other testimony."); *see also Purcell v. S. Ry. Co.*, 119 N.C. 728, 739, 26 S.E. 161, 162 (1896); *State v. Royal*, 90 N.C. 755, 755 (1884); *State v. Brittain*, 89 N.C. 481, 505 (1883); *State v. Smallwood*, 78 N.C. 560, 562-63 (1878). This rule, which was based upon Lord Mansfield's decision in *Vaise v. Delaval*, (1785) 99 Eng. Rep. 944 (K.B.), is intended to promote and protect the jury system. *See Jones v. Parker*, 97 N.C. 33, 34, 2 S.E. 370, 370 (1887) (characterizing the use of juror testimony to impeach a jury's verdict as "unsafe and unwise"). We have noted that without this rule "motions for a new trial would frequently be made, based upon incautious remarks of jurors, or declarations by them procured to be made by the losing party, or some person in his interest, and thus the usefulness and integrity of trial by jury would be impaired." *Johnson v. Allen*, 100 N.C. 131, 141, 5 S.E. 666, 670 (1888).

More than 160 years after our decision in *M'Leod*, the General Assembly enacted legislation codifying the North Carolina Rules of Evidence. *See* Act of July 7, 1983, ch. 701, sec. 1, 1983 N.C. Sess. Laws 666, 666. Rule 606(b) states in relevant part:

> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, except

> that a juror may testify on the question whether *extraneous* prejudicial information was improperly brought to the jury's attention or whether any *outside influence* was improperly brought to bear upon any juror. Nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received for these purposes.

N.C.G.S. § 8C-1, Rule 606(b) (2009) (emphasis added). As we have noted previously, Rule 606(b) "reflects the common law rule that affidavits of jurors are inadmissible for the purposes of impeaching the verdict except as they pertain to *extraneous influences* that may have affected the jury's decision." *State v. Robinson*, 336 N.C. 78, 124, 443 S.E.2d 306, 329 (1994) (emphasis added) (citing N.C.G.S. § 8C-1, Rule 606 cmt.), *superseded on other grounds by statute*, Act of Mar. 23, 1994, ch. 21, sec. 5, 1993 N.C. Sess. Laws (1st Extra Sess. 1994) 59, 60 (amending N.C.G.S. § 15A-2002 effective 1 Oct. 1994), *cert. denied*, 513 U.S. 1089, 130 L. Ed. 2d 650 (1995). As the embodiment of our long-standing rule barring jurors from testifying against verdicts in which they participated, Rule 606(b) is intended to reconcile the competing interests of ensuring a fair trial for litigants and protecting our jury system. N.C.G.S. § 8C-1, Rule 606 cmt. para. 6. The rule seeks to "promote[] . . . freedom of deliberation, stability and finality of verdicts, and protection of jurors against annoyance and embarrassment." *Id.* (citing *McDonald v. Pless*, 238 U.S. 264, 267-68, 59 L. Ed. 1300, 1302 (1915)). At the same time, the official commentary acknowledges that "simply putting verdicts beyond effective reach can only promote irregularity and injustice." *Id.*

Our version of Rule 606(b) is virtually "identical" to the federal rule.[2] N.C.G.S. § 8C-1, Rule 606 cmt. para. 1. When construing the North Carolina Rules of Evidence, our appellate courts may look to federal cases " 'for enlightenment and guidance in ascertaining the intent of the General Assembly.' " *State v. Quesinberry*, 325 N.C. 125, 133 n.1, 381 S.E.2d 681, 687 n.1 (1989) (quoting N.C.G.S. § 8C-1, Rule 102 cmt.), *judgment vacated*, 494 U.S. 1022, 108 L. Ed. 2d 603 (1990). As a result, we previously have relied on the Supreme Court of the United States' decision in *Tanner v. United States*, 483 U.S. 107, 97 L. Ed. 2d 90 (1985) in interpreting our version of Rule 606(b). *See Quesinberry*, 325 N.C. at 132-37, 381 S.E.2d at 686-89. In *Tanner* the

2. In 2006 Fed. R. Evid. 606(b) was "amended to provide that juror testimony may be used to prove that the verdict reported was the result of a mistake in entering the verdict on the verdict form." Fed. R. Evid. 606 advisory committee's note (2007). This amendment does not affect our consideration of this case.

Court considered whether evidence that jurors were consuming alcohol and controlled substances during the defendant's criminal trial was admissible to support a post-verdict motion for a new trial. 483 U.S. at 116, 97 L. Ed. 2d at 103. Before the Supreme Court, Tanner and his codefendant argued that "substance abuse constitutes an improper 'outside influence' about which jurors may testify under [Federal] Rule 606(b)." *Id.* at 122, 97 L. Ed. 2d at 107. The Court rejected this argument stating: "In our view the language of the Rule cannot easily be stretched to cover this circumstance. However severe their effect and improper their use, drugs or alcohol voluntarily ingested by a juror seems no more an 'outside influence' than a virus, poorly prepared food, or a lack of sleep." *Id.*

Policy considerations were critical to the Court's decision in *Tanner*. 483 U.S. at 119-25, 97 L. Ed. 2d at 105-09. The Court observed that "[t]here is little doubt that postverdict investigation into juror misconduct would in some instances lead to the invalidation of verdicts reached after irresponsible or improper juror behavior. It is not at all clear, however, that the jury system could survive such efforts to perfect it." *Id.* at 120, 97 L. Ed. 2d at 106. Specifically, the Court noted that allowing jurors to testify about juror misconduct in an attempt to invalidate a verdict to which they previously had assented would undermine "full and frank discussion in the jury room, [the] jurors' willingness to return an unpopular verdict, and the community's trust in a system that relies on the decisions of laypeople." *Id.* at 120-21, 97 L. Ed. 2d at 106. Foremost, "[a]llegations of juror misconduct, incompetency, or inattentiveness, raised for the first time days, weeks, or months after the verdict, seriously disrupt the finality of the process." *Id.* Consequently, the Court in *Tanner* affirmed "the near universal and firmly established" common law rule that "flatly prohibited the admission of juror testimony to impeach a jury verdict" except in situations in which an external influence, "was alleged to have affected the jury." 483 U.S. at 117, 97 L. Ed. 2d at 104 (citations omitted). In its analysis, the Court in *Tanner* "stressed the importance of protecting the 'internal processes of the jury' from post-verdict inquiry." *Quesinberry*, 325 N.C. at 134, 381 S.E.2d at 687 (quoting *Tanner*, 483 U.S. at 120, 97 L. Ed. 2d at 106).

Following these principles, "[t]his Court also has distinguished between 'external' and 'internal' influences on jurors" when determining the admissibility of evidence challenging the validity of a verdict. *Id.* at 135, 381 S.E.2d at 688. As the Court in *Tanner* noted, this distinction is "not based on whether the juror was literally inside or

outside the jury room when the alleged irregularity took place; rather, the distinction [is] based on the nature of the allegation." 483 U.S. at 117, 97 L. Ed. 2d at 104. We therefore have defined external influences, which generally are admissible to prove the invalidity of a verdict, to include "information dealing with the defendant or the case which is being tried, which . . . reaches a juror without being introduced in evidence." *Robinson*, 336 N.C. at 125, 443 S.E.2d at 329 (quoting *Quesinberry*, 325 N.C. at 135, 381 S.E.2d at 688) (quotation marks omitted). In contrast, we have defined internal influences as "information coming from the jurors themselves—the effect of anything upon [a] juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith." *Id.* (quoting *Quesinberry*, 325 N.C. at 134, 381 S.E.2d at 687) (alteration in original) (quotation marks omitted). Internal influences may include: "a juror not assenting to the verdict, a juror misunderstanding the instructions of the court, a juror being unduly influenced by the statements of his fellow-jurors, or a juror being mistaken in his calculations or judgments." *Berrier v. Thrift*, 107 N.C. App. 356, 365-66, 420 S.E.2d 206, 211-12 (1992) (quoting Lillian B. Hardwick & B. Lee Ware, *Juror Misconduct* § 6.04, at 6-109 (1990)) (quotation marks omitted), *disc. review denied*, 333 N.C. 254, 424 S.E.2d 918 (1993). Therefore, pursuant to Rule 606(b), "a juror may not testify to show the effect of any statement, conduct, event, or condition upon the mind of a juror or concerning the mental processes by which the verdict was determined." *State v. Elliott*, 360 N.C. 400, 420, 628 S.E.2d 735, 748 (internal quotation marks omitted), *cert. denied*, 549 U.S. 1000, 166 L. Ed. 2d 378 (2006).

In the case *sub judice*, plaintiff argues that Rule 606(b) does not control because the juror misconduct at issue allegedly occurred before her case was submitted formally to the jury. In support of her argument, plaintiff contends that the text of Rule 606(b) limits its application to matters occurring during deliberations. *See* N.C.G.S. § 8C-1, Rule 606(b) (stating in part that "a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations"). Plaintiff also relies upon the reasoning of the dissenting opinion in *Tanner*.[3] *See Tanner*, 483 U.S. at 134-42, 97

3. As a matter of appellate practice, we must note our disapproval of plaintiff's counsel's failure to cite to authority properly in his brief. Counsel failed to indicate that his quotations from *Tanner* came from Justice Marshall's dissenting opinion. Further, without properly setting forth the case's subsequent history, counsel inappropriately quoted from a Court of Appeals opinion that we reversed. *See Lindsey v.*

L. Ed. 2d at 115-20 (Marshall, J., concurring in part and dissenting in part). It appears that only one jurisdiction has adopted this interpretation. *See State v. Cherry*, 341 Ark. 924, 928-29, 20 S.W.3d 354, 357 (2000) (concluding in a 4-3 decision that Arkansas Rule of Evidence 606(b) and *Tanner* did not apply to juror discussions in a criminal case before formal deliberations commenced). *But see Larson v. State*, 79 P.3d 650, 656 (Alaska Ct. App. 2003) (stating that this interpretation—although "tenable"—is "incompatible with the policies underlying" Alaska Rule of Evidence 606(b), which focuses on the type rather than the timing of the impropriety alleged).

Notwithstanding the fact that at least one jurisdiction has found merit in plaintiff's contentions, we find these arguments unpersuasive. Instead, we hold that Rule 606(b) of the North Carolina Rules of Evidence bars jurors from testifying during consideration of post-verdict motions seeking relief from an order or judgment about alleged predeliberation misconduct by their colleagues. *See Tanner*, 483 U.S. at 116, 97 L. Ed. 2d at 103; *United States v. Cuthel*, 903 F.2d 1381, 1383 (11th Cir. 1990) (stating that Fed. R. Evid. 606(b) controls "even where the inquiry concerns misconduct prior to the deliberations"); *Larson*, 79 P.3d at 653. We observe that *Tanner* involved juror misconduct that allegedly occurred "throughout the trial," including the time before the case was submitted formally to the jury. *Tanner*, 483 U.S. at 116, 97 L. Ed. 2d at 103. But as noted above, determining whether jurors may present post-verdict testimony about alleged juror misconduct pursuant to Rule 606(b) depends on "the nature of the allegation," not when the misconduct allegedly occurred. *See id.* at 117-18; 97 L. Ed. 2d at 104 ("Clearly a rigid distinction based only on whether the event took place inside or outside the jury room would have been quite unhelpful."); *Larson*, 79 P.3d at 653 ("We hold that the admissibility of juror affidavits under [Alaska] Rule 606(b) turns on the *type* of impropriety they describe, not the timing of that impropriety.")

Denying a verdict the protection of Rule 606(b) merely because alleged juror misconduct occurred before the jury began deliberating would vitiate the policies underlying the rule. Without such protection a disgruntled juror could engage in jury nullification simply by making an allegation that juror misconduct occurred before the commencement of deliberations or while the jury was in recess. Such an interpretation strips the rule of all the protection it was designed to

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Boddie-Noell Enters., Inc., 147 N.C. App. 166, 555 S.E.2d 369 (2001), *rev'd per curiam*, 355 N.C. 487, 562 S.E.2d 420 (2002).

give. We cannot subject Rule 606(b) to potential manipulation and still give effect to its purpose to protect verdicts from attack and jurors from harassment.

The affidavits upon which plaintiff relies allege that, at some point before the case was submitted formally to the jury, Githens told his fellow jurors that "his mind was made up" and he would not change his view of the case. According to Simmons, Githens said the other jurors could either "agree with him or they would sit there through the rest of the year." Simmons stated that Githens's conduct "interfered with [her] thought process about the evidence during the plaintiff's case." Both Simmons and Murphy expressed their belief that Githens's statements inhibited jurors from engaging in full deliberations.

Although these affidavits contain troubling information, nevertheless they are inadmissible pursuant to Rule 606(b). As discussed above, we have interpreted Rule 606(b) to allow jurors to testify about external influences that affected their consideration of the case before them. *Robinson*, 336 N.C. at 124-25, 443 S.E.2d at 329-30. As described in the Simmons and Murphy affidavits—and even by his own admission—Githens's statements do not constitute an external influence as we have defined that term, *see id.*, nor do they pertain to "whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror," N.C.G.S. § 8C-1, Rule 606(b). Rather, Githens's statements are more properly described as an internal influence because, as recounted in the Simmons and Murphy affidavits, these statements reflect Githens's state of mind about the case. *See Robinson*, 336 N.C. at 125, 443 S.E.2d at 329. As such, the statements speak to "the effect of anything upon [his] . . . mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith." *Id.* (quotation marks omitted); N.C.G.S. § 8C-1, Rule 606(b). Even if Githens had made up his mind before plaintiff introduced any evidence, this state of mind is precisely the type of information that Rule 606(b) excludes. Consequently, the affidavits of Simmons and Murphy were inadmissible pursuant to Rule 606(b).

Exclusion of these affidavits also is consistent with the policies that support the rule. "The values sought to be promoted by excluding the evidence include freedom of deliberation, stability and finality of verdicts, and protection of jurors against annoyance and embarrassment." N.C.G.S. § 8C-1, Rule 606 cmt. para. 6. As we have

observed, allowing jurors to testify about misconduct by their fellow jurors would frustrate these policy goals. *See Quesinberry*, 325 N.C. at 134-35, 381 S.E.2d at 687-88; *Johnson*, 100 N.C. at 141, 5 S.E. at 670 (noting the consequences of allowing juror testimony to impeach verdicts in contradiction of the common law rule). Most notably, allowing consideration of affidavits like those at issue could encourage dissatisfied litigants to annoy, embarrass, and harass jurors until some evidence of juror misconduct is uncovered in the hopes of delaying or perhaps undermining implementation of a verdict. Like the Court in *Tanner*, we acknowledge that in some cases the losing party may obtain evidence of substantial injustice or unfairness, but we are uncertain "that the jury system could survive" even the most well-intentioned "efforts to perfect it." *Tanner*, 483 U.S. at 120, 97 L. Ed. 2d at 106.

According to the trial transcript, the trial court repeatedly admonished the jurors not to discuss the case until instructed by the court to do so. In light of these repeated warnings, we must conclude that Githens's colleagues were aware that his alleged statements violated the trial court's clear instructions. Further, the trial transcript indicates that the jury knew exactly how to address this type of misconduct. On 11 December 2008—at the end of the seventh day of trial—one of the jurors informed the bailiff that Githens was "taking pictures of some of the documents and exhibits with his cell phone." The trial court questioned Githens about these allegations the next day in the presence of counsel for both parties. Following its inquiry, the trial court elected to keep Githens on the jury, but warned him not to take any more photographs with his cell phone. This willingness by at least one juror to report misconduct undermines the credibility of the affidavits upon which plaintiff relies.

Pursuant to Civil Procedure Rule 59(a)(2), evidence of juror misconduct constitutes sufficient grounds for a trial court to grant a new trial to "all or any of the parties." N.C.G.S. § 1A-1, Rule 59(a)(2) (2009). Nevertheless, we long have held that evidence of juror misconduct must come from a source other than the jury. *M'Leod*, 8 N.C. (1 Hawks) at 346. The General Assembly codified this common law principle in Rule 606(b). *Robinson*, 336 N.C. at 124, 443 S.E.2d at 329. We acknowledge that this case involves tension between two important policy considerations: (1) ensuring that plaintiff received a fair trial; and (2) protecting the integrity of the jury system. But Rule 606(b) was enacted to "offer[] an accommodation between these competing considerations." N.C.G.S. § 8C-1, Rule 606 cmt. para. 6.

Simply put, Rule 606(b) was designed to prevent precisely what the trial court did here by ordering retrial of a complex medical malpractice case that took more than two weeks to complete and resulted in a unanimous verdict. The court's consideration of the juror affidavits at issue—which describe the mind-set and mental processes of jurors—conflicts with our long-standing precedent, the text of Rule 606(b), and the public policy that supports the rule. Accordingly, we hold that reliance on this evidence was improper pursuant to Rule 606(b). We therefore reverse the trial court's order setting aside the verdict and granting plaintiff a new trial and remand this case to the Court of Appeals with instructions to that court to remand to the trial court for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

STATE OF NORTH CAROLINA v. EUGENE TATE HILL

No. 134A11

(Filed 7 October 2011)

Robbery— with a dangerous weapon—sufficient evidence—motion to dismiss properly denied

The majority opinion of the Court of Appeals concluding that the trial court did not err in denying defendant's motion to dismiss the charge of robbery with a dangerous weapon was affirmed. The State presented sufficient evidence to support all the elements of the charge, including that the victim's money was taken via the use or threatened use of a dangerous weapon and that the victim's life was endangered or threatened by the assailant's possession, use, or threatened use of a dangerous weapon during the course of the robbery.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, —– N.C. App. ——, 706 S.E.2d 799 (2011), finding no error in a judgment entered on 29 September 2009 by Judge James U. Downs in Superior Court, Buncombe County. Heard in the Supreme Court 6 September 2011.

Roy Cooper, Attorney General, by Amanda P. Little, Assistant Attorney General, for the State.

Charlotte Gail Blake for defendant-appellant.

HUDSON, Justice.

The sole issue in this appeal is whether the State presented sufficient evidence to support defendant's conviction of robbery with a dangerous weapon. Specifically, we address whether the State presented substantial evidence that (1) the victim's money was taken via the use or threatened use of a dangerous weapon and (2) the victim's life was endangered or threatened by the assailant's possession, use, or threatened use of a dangerous weapon during the course of the robbery. Viewing the evidence under the well-established standard of review, we conclude that the State presented substantial evidence of these elements of robbery with a dangerous weapon. Hence, we affirm the majority opinion of the Court of Appeals concluding that the trial court did not err in denying defendant's motion to dismiss.

On 6 July 2009, defendant was indicted for allegedly committing robbery with a dangerous weapon on 13 May 2000 in Buncombe County. The indictment alleged that defendant took $100.00 from Kevin Cole ("Mr. Cole") "by means of an assault consisting of having in possession and threatening the use of a sharp object, whereby the life of [Mr.] Cole was threatened and endangered." At trial the State's theory of defendant's guilt was predicated on acting in concert, specifically that defendant had acted as a getaway driver for the man who had wielded the sharp object or knife. After the State presented its evidence, defendant moved to dismiss the charge, arguing the evidence was insufficient. The trial court denied his motion. Defendant then indicated he would not present evidence and renewed his motion to dismiss, which the court again denied. The jury convicted defendant of robbery with a dangerous weapon, and he was sentenced to an active term of 117 to 150 months of imprisonment.

Defendant appealed to the Court of Appeals and argued, *inter alia*, that the trial court erred by denying his motion to dismiss. The majority in the Court of Appeals determined that, viewed in the light most favorable to the State, the evidence was sufficient to survive defendant's motion to dismiss and the trial court did not err in denying the motion. *State v. Hill*, —— N.C. App. ——, ——, 706 S.E.2d 799, 803 (2011). The dissenting judge concluded that the State had failed to present "substantial evidence that a . . . dangerous weapon was

used" and that "a person's life was endangered or threatened" during the robbery, and consequently, "two of the three elements required for robbery with a dangerous weapon are not present." *Id.* at ——, 706 S.E.2d at 807 (Hunter, Jr., Robert N., J., dissenting). As such, the dissenter opined that the trial court should have allowed defendant's motion to dismiss and remanded his case for a new trial on common law robbery. *Id.* at ——, 706 S.E.2d at 807. Defendant appealed to this Court on the basis of the dissenting opinion.

Here defendant argues that his motion to dismiss should have been allowed because the evidence was insufficient to establish that (1) the individual who directly took Mr. Cole's money used or threatened to use a dangerous weapon to do so and (2) Mr. Cole's life was threatened or endangered by the robber's possession, use, or threatened use of a dangerous weapon.

In addressing this issue we are guided by a well-established standard:

> "In ruling on a motion to dismiss, the trial court need determine only whether there is substantial evidence of each essential element of the crime and that the defendant is the perpetrator." Substantial evidence is that amount of relevant evidence necessary to persuade a rational juror to accept a conclusion.

State v. Mann, 355 N.C. 294, 301, 560 S.E.2d 776, 781 (citations omitted), *cert. denied*, 537 U.S. 1005, 154 L. Ed. 2d 403 (2002). In deciding whether substantial evidence exists:

> The evidence is to be considered in the light most favorable to the State; the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom; contradictions and discrepancies are for the jury to resolve and do not warrant dismissal; and all of the evidence actually admitted, whether competent or incompetent, which is favorable to the State is to be considered by the court in ruling on the motion.

State v. Powell, 299 N.C. 95, 99, 261 S.E.2d 114, 117 (1980) (citations omitted). The elements of robbery with a dangerous weapon are: " '(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. Small*, 328 N.C. 175, 181, 400 S.E.2d 413, 416 (1991) (citations omitted); *see also* N.C.G.S. § 14-87(a) (2009).

We summarize the evidence in accordance with this standard. After 9:30 p.m. on 13 May 2000, Mr. Cole and his cousin drove up to an ATM in Asheville, North Carolina. While Mr. Cole was attempting to withdraw money from the ATM, a man approached his vehicle from behind, "pointed his hand with an object in it" at Mr. Cole, grabbed Mr. Cole's arm, and told Mr. Cole "to give [him] the cash or to leave it or something like that." At first, Mr. Cole thought it was a joke, and he grabbed the man's hand and turned to look at his face. Realizing he did not know the man, Mr. Cole tried to escape the situation by letting out the clutch of his car, which caused the vehicle to jump forward and the man's hand to slip free. The man grabbed the money from the ATM and fled on foot. Mr. Cole saw a pickup truck nearby and asked the driver if he had seen anyone, but the driver responded in the negative. Mr. Cole asked the driver to stay until police arrived, but the driver said he had an appointment and left. Mr. Cole's cousin called police to report the robbery, and while waiting for them, wrote down the truck's license plate number. Shortly thereafter, Detective Kevin Taylor ("Detective Taylor") of the Asheville Police Department arrived at the scene.

Mr. Cole sustained a "bleeding laceration on [his] left wrist . . . . [f]rom the robbery." The State introduced a photograph of the wound for "illustrative purposes," and the photograph was published to the jury.

Robert Jones ("Mr. Jones") testified that he was the victim of a similar robbery that also occurred at an ATM in Asheville at approximately 6:15 p.m. the same day.[1] According to Mr. Jones, while he was sitting in his car attempting to withdraw money from the ATM, a man approached, held a knife to his neck, and demanded his wallet. Mr. Jones was "able to push [the man's] arm up and let [his] car roll forward fifteen or twenty feet." He then saw the man take the money from the ATM, run, and enter the passenger's side of "a [19]80's model GMC . . . . or Chevrolet" pickup truck, which he described as "two-tone[d]." Mr. Jones chased the truck, but lost sight of it after several miles.

Detective Taylor testified that he investigated the alleged robberies of Mr. Cole and Mr. Jones. Detective Taylor stated that Mr. Jones told him that as he was trying to withdraw money from the

1. At the beginning of defendant's trial, the State indicated it was going to dismiss the robbery with a dangerous weapon charge against defendant for the robbery of Mr. Jones. The trial court permitted Mr. Jones and Detective Taylor to testify about those events.

ATM, a male "held a knife to him," took his money, fled, and got in the passenger's side of "a two-toned, white-and-purple GMC pick-up," which was driven by another white male. Detective Taylor also testified that Mr. Cole told him that "he [Mr. Cole] tried to withdraw money from the ATM and was approached by an individual with a knife who robbed him of his money." Detective Taylor further testified that while looking for the robber, Mr. Cole approached a "two-tone" pickup truck parked in a lot across the street and asked the driver if he had seen anyone fleeing. The driver initially responded " 'yes,' " and Mr. Cole asked him if he would wait for police to arrive while Mr. Cole continued to drive around looking for the suspect. A few minutes later, the same driver in the same truck came back and told Mr. Cole that he "did not see the suspect and that he had to leave to go to an appointment."

Detective Taylor radioed the truck's description and license plate number to other officers. "[W]ithin just a couple of minutes," another officer spotted a truck matching the description with the same license plate number parked behind a nearby hardware store. The officer stopped the truck, which defendant was driving. The license plate on the truck was not assigned to it; rather, it belonged to a van owned by David and Nancy Webb. Further investigation revealed that the Webbs also owned the truck but the license plate was affixed to the wrong vehicle. Police suspected that David Webb was the individual who had committed both ATM robberies and that defendant was the driver of the truck.

Defendant argues that, viewed in the light most favorable to the State, the evidence of the robbery of Mr. Cole merely establishes that "the robber pointed some unidentified object at [Mr.] Cole and took the money from the ATM." Defendant acknowledges that Detective Taylor testified that Mr. Cole told him that he was robbed by a man with a knife. Nonetheless, like the dissenting judge in the Court of Appeals, defendant contends that Detective Taylor's testimony could not be used for substantive purposes because the trial court limited his testimony to corroboration and that the testimony at issue did not corroborate Mr. Cole's testimony because Mr. Cole did not specifically identify or describe the object that he saw in the robber's hand. *Hill*, —— N.C. App. at ——, 706 S.E.2d at 806. We are not persuaded.

The trial transcript indicates that defendant did object to Detective Taylor's testimony on what *Mr. Jones* told him about the *earlier* robbery and that the court ruled this testimony was limited to corroborating *Mr. Jones*' sworn testimony and instructed the jury

accordingly. Yet, defendant did not object on this basis to Detective Taylor's testimony on what *Mr. Cole* told him about the *later* robbery, including the reported use of a knife, nor did defendant request an instruction to limit the purpose of the testimony. Furthermore, the trial court neither ruled that this testimony by Detective Taylor was limited to corroboration nor instructed the jury to this effect, as it did with the testimony regarding Mr. Jones. As this Court has explained: "It is well settled that 'evidence admitted without objection, though it should have been excluded had proper objection been made, is entitled to be considered for whatever probative value it may have,' and the judge is not required to exclude it." *State v.* Jones, 293 N.C. 413, 429, 238 S.E.2d 482, 492 (1977) (citation omitted). Moreover, even assuming, *arguendo*, that Detective Taylor's testimony that Mr. Cole was robbed by a man with a knife was incompetent, "all of the evidence actually admitted, whether competent or incompetent, which is favorable to the State is to be considered by the court in ruling on" a motion to dismiss; therefore, this testimony is properly considered for substantive purposes here. *Powell*, 299 N.C. at 99, 261 S.E.2d at 117; *see also State v. Jones*, 342 N.C. 523, 540, 467 S.E.2d 12, 23 (1996) ("When ruling on a defendant's motion to dismiss on the ground of insufficiency of the evidence, it is axiomatic that the trial court should consider all evidence actually admitted, whether competent or not, that is favorable to the State. Thus, the fact that some of the evidence was erroneously admitted by the trial court is not a sufficient basis for granting a motion to dismiss." (internal citation omitted)). Hence, viewed under the well-established standard, the evidence above, which includes Detective Taylor's testimony that Mr. Cole reported being robbed by a man with a knife, is sufficient to establish that the robber used or threatened to use a dangerous weapon to rob Mr. Cole.

Defendant similarly argues that the evidence here is insufficient to establish that Mr. Cole's life was endangered or threatened by the robber's possession, use, or threatened use of a dangerous weapon because

> there is no information about the object the robber may have held and pointed at [Mr.] Cole. There is nothing to identify it as a knife, a pointed object, a heavy object, or sharp object. There is no information as to how the robber used the object other than that he had an object in his hand.

Yet, as noted above, the evidence did suffice to establish that the robber had a knife and that Mr. Cole sustained a bleeding laceration on

his left wrist during the robbery. Defendant also argues that the evidence fails to support this element because Mr. Cole's testimony, his statement to police, and his actions at the scene of the robbery do not indicate that he was afraid of or felt threatened by the robber. But "[t]he question in an armed robbery case is whether a person's life was in fact endangered or threatened by [the robber's] possession, use or threatened use of a dangerous weapon, *not whether the victim was scared or in fear of his life*." *State v. Joyner*, 295 N.C. 55, 63, 243 S.E.2d 367, 373 (1978) (emphasis added) (citation omitted). Again, viewing the evidence under the well-established standard, we conclude it is sufficient to establish that Mr. Cole's life was "endangered or threatened by [the robber's] possession, use or threatened use of a dangerous weapon," namely a knife. *Id.*

We affirm the decision of the Court of Appeals as to the appealable issue of right and hold that the State presented sufficient evidence to support defendant's conviction of robbery with a dangerous weapon. The remaining issues addressed by the Court of Appeals are not properly before this Court and its decision as to these matters remains undisturbed.

AFFIRMED.

STATE OF NORTH CAROLINA v. NAKIA NICKERSON

No. 458PA10

(Filed 7 October 2011)

Possession of stolen property—unauthorized use of a motor vehicle—not lesser included offense—no jury instruction required

The trial court did not err in a felony possession of stolen goods case by denying defendant's request for a jury instruction on the unauthorized use of a motor vehicle. Unauthorized use of a motor vehicle is not a lesser included offense of possession of stolen goods because the crime of unauthorized use of a motor vehicle contains at least one essential element not present in the crime of possession of stolen goods. The decision of the Court of Appeals was reversed.

On discretionary review pursuant to N.C.G.S. § 7A 31 of a unanimous decision of the Court of Appeals, —— N.C. App. ——, 701 S.E.2d 685 (2010), reversing a judgment entered on 8 July 2009 by Judge Orlando F. Hudson in Superior Court, Orange County, and remanding for a new trial on two charges for which defendant was convicted and for resentencing on the remaining conviction, which was not challenged on appeal. Heard in the Supreme Court 8 September 2011.

Roy Cooper, Attorney General, by Catherine F. Jordan, Assistant Attorney General, for the State-appellant.

Ryan McKaig for defendant-appellee.

NEWBY, Justice.

This case presents the question whether unauthorized use of a motor vehicle is a lesser included offense of possession of stolen goods. Applying the required definitional test, we hold that the crime of unauthorized use of a motor vehicle contains at least one essential element not present in the crime of possession of stolen goods; therefore, the former is not a lesser included offense of the latter. Accordingly, we reverse the decision of the Court of Appeals.

Early on 20 November 2008, Darrel Haller awoke to discover that someone had entered his house, stolen his car keys, and taken his vehicle, a 1997 gold Chrysler Sebring convertible with a black top. Mr. Haller reported the break-in and the stolen vehicle to the police. Around 3:30 p.m. that afternoon, Sergeant Lehew of the Chapel Hill Police Department saw a gold Sebring with a black top while on patrol. When Sergeant Lehew checked the vehicle's license plate number, he discovered that the tag actually belonged to a Chevrolet Lumina. Thinking the vehicle was likely stolen, Sergeant Lehew stopped the vehicle, which was being driven by defendant. Defendant claimed that he borrowed the vehicle from a friend to attend a funeral in the area. According to defendant, his friend was too intoxicated to drive, and defendant had dropped him off at a nearby park. When police looked for defendant's friend, they could not locate him.

Defendant was arrested and indicted on several charges, including felony possession of stolen goods. Defendant pled not guilty. At trial, after defendant presented his evidence, he requested that the trial court also instruct the jury on unauthorized use of a motor vehicle, contending that it is a lesser included offense of the crime of possession of stolen goods. The trial court denied his request. The

jury ultimately found defendant guilty of felonious possession of stolen goods.

Defendant appealed. The Court of Appeals reversed the trial court's decision, concluding that unauthorized use of a motor vehicle is a lesser included offense of possession of stolen goods. *State v. Nickerson*, —— N.C. App. ——, ——, ——, 701 S.E.2d 685, 687, 689 (2010). As a result, that court determined that the trial court erred when it failed to instruct the jury on the lesser included offense, and it remanded for a new trial. *Id.* at ——, 701 S.E.2d at 688-89. We allowed the State's petition for discretionary review.

As presented to this Court, the principal question is whether the crime of unauthorized use of a motor vehicle is a lesser included offense of possession of stolen goods. The State argues that, under the definitional test, unauthorized use of a motor vehicle is not a lesser included offense because at least one of its elements is not required to prove possession of stolen goods. Defendant contends that the definitional test can be modified in cases in which the general elements of the greater crime cover the more specific elements of the lesser crime. As this is a legal question, our standard of review is de novo. *State v. Weaver*, 306 N.C. 629, 633, 295 S.E.2d 375, 377 (1982), *overruled in part on other grounds by State v. Collins*, 334 N.C. 54, 61, 431 S.E.2d 188, 193 (1993).

In *State v. Weaver* this Court adopted a definitional test for determining whether one crime is a lesser included offense of another crime. *Id.* at 635, 295 S.E.2d at 378-79. The defendant in *Weaver*, who was charged with, *inter alia*, first-degree rape of a child, argued that he was entitled to an instruction on three lesser crimes because the particular factual circumstances in that case satisfied the requirements of both first-degree rape and the lesser crimes. *Id.* at 633, 635, 295 S.E.2d at 377-78. This Court determined that since the "essential elements" of the lesser crimes were not "completely included" in the greater crime of first degree rape, those crimes were not lesser included offenses of rape. *Id.* at 635-38, 295 S.E.2d at 378-80. In reaching this conclusion, we stated:

> We do not agree with the proposition that the *facts* of a particular case should determine whether one crime is a lesser included offense of another. Rather, the *definitions* accorded the crimes determine whether one offense is a lesser included offense of another crime. In other words, all of the essential elements of the lesser crime must also be essential elements in-

> cluded in the greater crime. If the lesser crime has an essential element which is not completely covered by the greater crime, it is not a lesser included offense. The determination is made on a *definitional*, not a factual basis.

Id. at 635, 295 S.E.2d at 378-79 (citation omitted). Thus, the test is whether the essential elements of the lesser crime are essential elements of the greater crime. If the lesser crime contains an essential element that is not an essential element of the greater crime, then the lesser crime is not a lesser included offense.

As we did in *Weaver*, we must now compare the essential elements of the two offenses at hand. Possession of stolen goods requires as an essential element the "possession of personal property." *State v. Perry*, 305 N.C. 225, 233, 287 S.E.2d 810, 815 (1982) (citations omitted), *overruled in part on other grounds by State v. Mumford*, 364 N.C. 394, 402, 699 S.E.2d 911, 916 (2010); see also N.C.G.S. § 14-71.1 (2009). Unauthorized use of a motor vehicle has as an essential element the taking or operating of "an aircraft, motorboat, motor vehicle, or other motor-propelled conveyance." N.C.G.S. § 14-72.2(a) (2009). Both offenses concern personal property. However, the specific definitional requirement that the property be a "motor-propelled conveyance" is an essential element unique to the offense of unauthorized use of a motor vehicle. For the offense of possession of stolen goods, the State need not prove that defendant had a "motor-propelled conveyance" but rather that the property in defendant's possession is any type of personal property. As such, unauthorized use of a motor vehicle has an essential element not found in the definition of possession of stolen goods. Because we conclude that this element of the lesser crime is not an essential element of the greater crime, we need not address the other elements. *Weaver*, 306 N.C. at 635, 295 S.E.2d at 378.

In concluding that unauthorized use of a motor vehicle is a lesser included offense of possession of stolen goods, the Court of Appeals reasoned that "[a] motor vehicle of another is a type of personal property, which is an element of possession of stolen goods." *Nickerson*, —— N.C. App. at ——, 701 S.E.2d at 687. In making this determination the Court of Appeals engaged in the fact-based, case-specific inquiry expressly prohibited by the definitional test established in *Weaver*, 306 N.C. at 635, 295 S.E.2d at 378-79.

Because the offense of unauthorized use of a motor vehicle requires proof of at least one essential element not required to prove

possession of stolen goods, unauthorized use of a motor vehicle cannot be a lesser included offense of possession of stolen goods under the definitional test in Weaver. As such, defendant is not entitled to an instruction on unauthorized use of a motor vehicle. *Id.*; *see also Collins*, 334 N.C. at 61, 431 S.E.2d at 193 (clarifying actions a defendant must take to be entitled to a jury instruction on a lesser included offense). Accordingly, we reverse the decision of the Court of Appeals as to the issue before us on discretionary review and remand this case to that court for consideration of defendant's remaining issues on appeal.

REVERSED AND REMANDED.

STATE OF NORTH CAROLINA v. ROGER GENE MOORE

No. 94A11

(Filed 7 October 2011)

Damages and Remedies— restitution—amount not supported by evidence

The Court of Appeals' decision vacating a restitution award was reversed where there was some evidence to support an award of restitution, but the evidence presented did not adequately support the particular amount awarded. The matter was remanded to the Court of Appeals for further remand to the trial court for a new hearing to determine the appropriate amount of restitution.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, —— N.C. App. ——, 705 S.E.2d 797 (2011), finding no error in defendant's trial resulting in a judgment entered on 4 February 2010 by Judge Laura J. Bridges in Superior Court, Buncombe County, but vacating an order of restitution contained therein. Heard in the Supreme Court 7 September 2011.

Roy Cooper, *Attorney General*, *by Terence D. Friedman*, *Assistant Attorney General*, *for the State-appellant.*

Staples S. Hughes, *Appellate Defender*, *by Kathleen M. Joyce*, *Assistant Appellate Defender*, *for defendant-appellee.*

HUDSON, Justice.

This case presents the question whether evidence adequately supported an award of restitution ordered as a condition of probation. We hold that, while there was some evidence to support an award of restitution, the evidence presented did not adequately support the particular amount awarded here. Accordingly, we reverse the Court of Appeals decision vacating the award and remand to the trial court.

On 3 February 2010, defendant Roger Gene Moore was convicted of obtaining property by false pretense. The trial court sentenced defendant to six to eight months in prison, suspended subject to supervised probation. As a condition of his probation, defendant was ordered to pay restitution in the amount of $39,332.49. On appeal, a divided Court of Appeals panel affirmed defendant's conviction, but vacated the restitution award as unsupported by the evidence. *State v. Moore*, —— N.C. App. ——, ——, ——, 705 S.E.2d 797, 800, 804 (2011). The State appealed as of right based on the dissenting opinion. The sole issue before this Court is whether the evidence adequately supported the restitution award.

The evidence at trial pertaining to this issue is summarized here. Defendant's brother, Clayton Moore, died intestate in 2003. Clayton Moore owned a small house and lot in Woodfin, North Carolina, which passed to his minor son, Dale Moore. Tanya McCosker, Clayton Moore's widow and Dale Moore's mother, made some improvements to the house beginning in 2003 in preparation for renting it out but she never did so. The house remained unoccupied, and because Ms. McCosker lived some distance from the property, she rarely checked on it. Defendant Roger Moore owned property adjacent to the house.

In 2007, unknown to Ms. McCosker, defendant rented out the empty house to two transients, Michael Alan Wilson and Frederick Phythian. Phythian gave defendant five monthly payments of three hundred dollars each in late 2007 and in May 2008. In January 2009 Ms. McCosker visited the house and found it badly damaged. The front screen door and windows were broken; the cabinets had been taken down; the walls were dented; there was a hole in the floor; the carpet was ruined; and there were feces in the bathtub. Ms. McCosker's report of a break-in led to the discovery of defendant's actions, and he was arrested and charged with obtaining property by false pretense.

At trial Ms. McCosker testified that she had obtained an estimate for repairs to the house, which totaled "[t]hirty-something thousand dollars." She also verified that she had "submitted to the district attorney's office an estimate for repairs." The record on appeal contains no such estimate, but does contain the State's restitution worksheet showing the amount requested as $39,332.49. The worksheet is not itemized.

We have previously stated that "the amount of restitution recommended by the trial court must be supported by evidence adduced at trial or at sentencing." *State v. Wilson*, 340 N.C. 720, 726, 459 S.E.2d 192, 196 (1995) (citing *State v. Daye*, 78 N.C. App. 753, 756, 338 S.E.2d 557, 560, *aff'd per curiam*, 318 N.C. 502, 349 S.E.2d 576 (1986)). Though this Court has not explicitly addressed this issue, the Court of Appeals has repeatedly held that "a restitution worksheet, unsupported by testimony or documentation, is insufficient to support an order of restitution." *State v. Mauer*, 202 N.C. App. 546, 552, 688 S.E.2d 774, 778 (2010) (citing *State v. Swann*, 197 N.C. App. 221, 225, 676 S.E.2d 654, 657-58 (2009)).

Nonetheless, the quantum of evidence needed to support a restitution award is not high. "When . . . there is some evidence as to the appropriate amount of restitution, the recommendation will not be overruled on appeal." *State v. Hunt*, 80 N.C. App. 190, 195, 341 S.E.2d 350, 354 (1986). In applying this standard our appellate courts have consistently engaged in fact-specific inquiries rather than applying a bright-line rule. Prior case law reveals two general approaches: (1) when there is *no* evidence, documentary or testimonial, to support the award, the award will be vacated, and (2) when there is specific testimony or documentation to support the award, the award will not be disturbed. *Compare Daye*, 78 N.C. App. at 757-58, 338 S.E.2d at 561 (vacating restitution award when the only evidence presented was the prosecutor's unsworn statement indicating an estimated amount of appropriate restitution), *with State v. Cousart*, 182 N.C. App. 150, 154-55, 641 S.E.2d 372, 375 (2007) (holding that testimony that a stolen stereo was purchased for $787.00 supported restitution award of that exact amount).

This case, like many others, falls in between. Here, Ms. McCosker testified that the estimate for repairs was "[t]hirty-something thousand dollars." There was also testimony that defendant had received $1,500.00 in rent. While we do not agree with the State's argument that testimony about costs of "thirty-something thousand dollars" is sufficient to support an award "anywhere between $30,000.01 and

$39,999.99," the testimony here is not too vague to support *any* award. *See*, *e.g.*, *Hunt*, 80 N.C. App. at 195, 341 S.E.2d at 354 (1986) (affirming trial court's decision to combine the victim's specific testimony about a "$10,364" hospital bill with his nonspecific testimony about a doctor's bill of "around $8000" to support an award of $18,364.00).

Here there was "some evidence" to support an award of restitution; however, the evidence was not specific enough to support the award of $39,332.49. The Court of Appeals so held, but vacated the award without remanding for recalculation of an amount supported by the evidence. *Moore*, —— N.C. App. at ——, 705 S.E.2d at 804. We conclude that the appropriate course here is to remand for the trial court to determine the amount of damage proximately caused by defendant's conduct and to calculate the correct amount of restitution.[1]

Accordingly, we reverse that portion of the Court of Appeals decision vacating the restitution award, and remand this case to the Court of Appeals for further remand to the trial court for a new hearing to determine the appropriate amount of restitution. The remaining issues addressed by the Court of Appeals are not before this Court and its decision as to these matters remains undisturbed.

REVERSED IN PART AND REMANDED.

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1. We find no merit in defendant's contention that a remand would violate double jeopardy. " 'Until a convicted prisoner receives a sentence which can withstand attack, it may be conceived that his original jeopardy continues without interruption, and that he is therefore not put in jeopardy a second time when he receives his first valid sentence.' " *State v. Stafford*, 274 N.C. 519, 533, 164 S.E.2d 371, 381 (1968) (quoting *King v. United States*, 98 F.2d 291, 295 (D.C. Cir. 1938)).

STATE OF NORTH CAROLINA v. ROBERT LEE PASTUER

No. 327PA10

(Filed 7 October 2011)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, —— N.C. App. ——, 697 S.E.2d 381 (2010), reversing a judgment imposing a sentence of life imprisonment without parole entered on 13 April 2009 by Judge Henry W. Hight, Jr. in Superior Court, Franklin County, upon a jury verdict finding defendant guilty of first-degree murder. Heard in the Supreme Court 6 September 2011.

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

Staples S. Hughes, *Appellate Defender*, *and Charlesena Elliott Walker*, *Assistant Appellate Defender*, *for defendant-appellee.*

PER CURIAM.

Justice JACKSON took no part in the consideration or decision of this case. The remaining members of the Court are equally divided, with three members voting to affirm and three members voting to reverse the decision of the Court of Appeals. Accordingly, the decision of the Court of Appeals is left undisturbed and stands without precedential value. *See*, *e.g.*, *Goldston v. State*, 364 N.C. 416, 700 S.E.2d 223 (2010).

AFFIRMED.

LATRECIA TREADWAY v. SUSANNA KRAMMER DIEZ; GENE LUMMUS; GENE LUMMUS HARLEY DAVIDSON, INC.; MIKE CALLOWAY, INDIVIDUALLY AND OFFICIALLY; JOHN DOE, INDIVIDUALLY AND OFFICIALLY; COUNTY OF BUNCOMBE; AND BUNCOMBE COUNTY SHERIFF'S DEPARTMENT

No. 52A11

(Filed 7 October 2011)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, ––– N.C. App. ––––, 703 S.E.2d 832 (2011), affirming an order entered on 8 October 2009 by Judge Bradley B. Letts in Superior Court, Buncombe County. On 10 March 2011, the Supreme Court allowed defendant's petition for discretionary review of additional issues. Heard in the Supreme Court 8 September 2011.

Hyler & Lopez, P.A., by Robert J. Lopez, for plaintiff-appellee.

Doughton & Hart PLLC, by Thomas J. Doughton and Amy L. Rich, for defendant-appellant Buncombe County Sheriff's Department.

PER CURIAM.

We reverse the decision of the Court of Appeals for the reasons stated in the dissenting opinion. Further, we conclude that the petition for discretionary review as to additional issues was improvidently allowed. This case is remanded to the Court of Appeals for further remand to the trial court for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED; DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

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

TREADWAY v. DIEZ

[365 N.C. 289 (2011)]

HULIN K. TREADWAY v. SUSANNA KRAMMER DIEZ; GENE LUMMUS; GENE LUMMUS HARLEY DAVIDSON, INC.; MIKE CALLOWAY, INDIVIDUALLY AND OFFICIALLY; JOHN DOE, INDIVIDUALLY AND OFFICIALLY; COUNTY OF BUNCOMBE; AND BUNCOMBE COUNTY SHERIFF'S DEPARTMENT

No. 53A11

(Filed 7 October 2011)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, ––– N.C. App. ––, 703 S.E.2d 832 (2011), affirming an order entered on 8 October 2009 by Judge Bradley B. Letts in Superior Court, Buncombe County. On 11 March 2011, the Supreme Court allowed defendant's petition for discretionary review of additional issues. Heard in the Supreme Court 8 September 2011.

Hyler & Lopez, P.A., by Robert J. Lopez, for plaintiff-appellee.

Doughton & Hart PLLC, by Thomas J. Doughton and Amy L. Rich, for defendant-appellant Buncombe County Sheriff's Department.

PER CURIAM.

For the reasons stated in the dissenting opinion, the decision of the Court of Appeals is reversed. Further, we conclude that the petition for discretionary review as to additional issues was improvidently allowed. This case is remanded to the Court of Appeals for further remand to the trial court for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED; DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

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

STATE OF NORTH CAROLINA v. JEREMY DOUGLAS EDWARDS

No. 496PA10

(Filed 7 October 2011)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous, unpublished decision of the Court of Appeals, —— N.C. App. ——, 700 S.E.2d 248 (2010), finding no error in judgments entered on 23 April 2009 by Judge R. Stuart Albright in Superior Court, Guilford County. Heard in the Supreme Court 6 September 2011.

Roy Cooper, Attorney General, by Robert C. Montgomery, Special Deputy Attorney General, for the State.

Rudolph A. Ashton, III and Kirby H. Smith, III for defendant-appellant.

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

STATE OF NORTH CAROLINA v. CODY JAMES MARLER

No. 459PA10

(Filed 7 October 2011)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous, unpublished decision of the Court of Appeals, —— N.C. App. ——, 699 S.E.2d 140 (2010), finding no error in judgments entered on 18 September 2008 by Judge Ronald K. Payne in Superior Court, Haywood County. Heard in the Supreme Court 8 September 2011.

Roy Cooper, *Attorney General*, *by Catherine F. Jordan and Derrick C. Mertz*, *Assistant Attorneys General*, *for the State.*

David L. Neal for defendant-appellant.

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

STATE OF NORTH CAROLINA v. JULIE ANNE YENCER

No. 365PA10

(Filed 10 November 2011)

Constitutional Law— Establishment Clause—Campus Police Act—no excessive entanglement—motion to suppress properly denied

The trial court did not err in a driving while impaired case by denying defendant's motion to suppress. Applying the test enumerated in *Lemon v. Kurtzman*, 403 U.S. 602, the Supreme Court concluded that the Campus Police Act's provision of secular, neutral, and nonideological police protection for the benefit of the students, faculty, and staff of Davidson College, as applied to defendant's conviction for driving while impaired, did not offend the Establishment Clause of the First Amendment to the United States Constitution. Defendant failed to demonstrate that her arrest and conviction for driving while impaired were influenced by any consideration other than secular enforcement of a criminal statute, N.C.G.S. § 20-138.1.

On discretionary review pursuant to N.C.G.S. § 7A-31 and on appeal of right of a constitutional question pursuant to N.C.G.S. § 7A-30(1) to review a unanimous decision of the Court of Appeals, —— N.C. App. ——, 696 S.E.2d 875 (2010), reversing an amended order denying defendant's motion to suppress entered on 29 May 2007 by Judge W. Robert Bell and a judgment entered on 1 August 2008 by Judge Jesse B. Caldwell, III, both in Superior Court, Mecklenburg County. On 7 October 2010, the Supreme Court allowed defendant's conditional petition for discretionary review as to an additional issue. Heard in the Supreme Court 15 March 2011.

Roy Cooper, Attorney General, by Amy Kunstling Irene and Tamara Zmuda, Assistant Attorneys General, for the State-appellant.

Knox, Brotherton, Knox & Godfrey, by Allen C. Brotherton, for defendant-appellee.

Goldsmith, Goldsmith & Dews, P.A., by C. Frank Goldsmith, Jr., for North Carolina Advocates for Justice, amicus curiae.

Poyner Spruill LLP, by Thomas R. West and Pamela A. Scott, for N.C. Association of Campus Law Enforcement Administrators;

Edmond W. Caldwell, Jr., General Counsel, for N.C. Sheriffs' Association, Inc.; and Kochanek Law Group, by Colleen Kochanek, for North Carolina Association of Chiefs of Police, amici curiae.

Poyner Spruill LLP, by Thomas R. West and Pamela A. Scott, for North Carolina Independent Colleges and Universities, Inc., amicus curiae.

Richard L. Hattendorf, General Counsel, and Bailey & Dixon, LLP, by Jeffrey P. Gray, for State Lodge, Fraternal Order of Police, amicus curiae.

McGuireWoods, LLP, by Bradley R. Kutrow, for Trustees of Davidson College, amicus curiae.

MARTIN, Justice.

The North Carolina General Assembly enacted the Campus Police Act to provide police protection at "institutions of higher education" and to ensure "this protection is not denied to students, faculty, and staff at private, nonprofit institutions of higher education originally established by or affiliated with religious denominations." N.C.G.S. § 74G-2 (2009). Under the authority of the Act, an officer of the Davidson College Campus Police arrested defendant for driving while impaired. We hold that the Campus Police Act, as applied to defendant, does not offend the Establishment Clause of the First Amendment to the United States Constitution.

On 5 January 2006, Davidson College Campus Police Officer Wesley L. Wilson observed defendant's vehicle traveling at a high rate of speed and crossing the center lines of two streets near the Davidson College campus. Officer Wilson stopped defendant's vehicle and, with defendant's consent, administered two breath alcohol tests. Officer Wilson arrested defendant for driving while impaired and reckless driving.

Defendant filed a pretrial motion to suppress, contending that the exercise of police power by an officer of the Davidson College Campus Police violated the North Carolina and United States Constitutions because Davidson College is a "religious institution" for Establishment Clause purposes. The trial court issued a written order denying defendant's motion on 21 May 2007. Defendant pled guilty on 31 July 2008 to driving while impaired but reserved her right to appeal the trial court's denial of the motion to suppress.

On appeal, the Court of Appeals reversed the trial court's denial of defendant's motion to suppress, holding that two state court decisions, *State v. Pendleton*, 339 N.C. 379, 451 S.E.2d 274 (1994), *cert. denied*, 515 U.S. 1121, 115 S. Ct. 2276 (1995), and *State v. Jordan*, 155 N.C. App. 146, 574 S.E.2d 166 (2002), *appeal dismissed and disc. rev. denied*, 356 N.C. 687, 578 S.E.2d 321 (2003), compelled the conclusion that "Davidson College is a religious institution for the purposes of the Establishment Clause." *State v. Yencer*, —— N.C. App. ——, ——, 696 S.E.2d 875, 879 (2010). The court held that the Campus Police Act granted an unconstitutional delegation of discretionary power to a religious institution. *Id.* at ——, 696 S.E.2d at 879. The court observed, however, that both *Pendleton* and *Jordan* were decided before passage of the Campus Police Act, "one of the stated purposes of which is to 'assure, to the extent consistent with the State and federal constitutions, that [police] protection is not denied to students, faculty, and staff at private, nonprofit institutions of higher education originally established by or affiliated with religious denominations.' " *Id.* at —— n.10, 696 S.E.2d at 880 n.10 (alteration in original) (quoting N.C.G.S. § 74G-2). The Court of Appeals concluded its opinion by urging this Court to review its decision. *Id.* at ——, 696 S.E.2d at 880. On 7 October 2010, we retained the State's notice of appeal, allowed the State's petition for discretionary review, and allowed defendant's conditional petition for discretionary review.

At the outset, we observe that "[t]he standard of review in evaluating the denial of a motion to suppress is whether competent evidence supports the trial court's findings of fact and whether the findings of fact support the conclusions of law." *State v. Biber*, 365 N.C. 162, 167-68, 712 S.E.2d 874, 878 (2011) (citation omitted). We review conclusions of law de novo. *Id.* at 168, 712 S.E.2d at 878 (citations omitted).

It is well established that "religious institutions need not be quarantined from public benefits that are neutrally available to all." *Roemer v. Bd. of Pub. Works*, 426 U.S. 736, 746, 96 S. Ct. 2337, 2344 (1976) (Blackmun, J.) (plurality opinion). "The purposes of the First Amendment guarantees relating to religion were twofold: to foreclose state interference with the practice of religious faiths, and to foreclose the establishment of a state religion familiar in other 18th-century systems." *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 122, 103 S. Ct. 505, 510 (1982). When, as here, the facts evince no preference for one religion over another, we apply the test enumerated in *Lemon v. Kurtzman*, 403 U.S. 602, 91 S. Ct. 2105 (1971), to resolve an

Establishment Clause challenge. *See Hernandez v. Comm'n*, 490 U.S. 680, 695, 109 S. Ct. 2136, 2146 (1989) ("If no . . . facial [denominational] preference exists, we proceed to apply the customary three-pronged Establishment Clause inquiry derived from *Lemon v. Kurtzman*." (citations omitted)).

In *Lemon* the United States Supreme Court established the seminal three-pronged inquiry: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.' " 403 U.S. at 612-13, 91 S. Ct. at 2111 (internal citations omitted) (quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 674, 90 S. Ct. 1409, 1414 (1970)). In recent years the Court has increasingly treated excessive entanglement "as an aspect of the inquiry into a statute's effect." *Agostini v. Felton*, 521 U.S. 203, 233, 117 S. Ct. 1997, 2015 (1997); *see also Zelman v. Simmons-Harris*, 536 U.S. 639, 648-49 (majority), 668-69 (O'Connor, J., concurring), 122 S. Ct. 2460, 2465 (majority), 2476 (O'Connor, J., concurring) (2002). Accordingly, we apply *Lemon* and its progeny to address the Establishment Clause challenge raised by defendant in the instant case.

The Supreme Court has indicated that the fact-centered analysis necessary to resolve Establishment Clause challenges "lacks the comfort of categorical absolutes." *McCreary Cnty., Ky. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 859 n.10, 125 S. Ct. 2722, 2733 n.10 (2005). "It is perhaps unfortunate, but nonetheless inevitable, that the broad language of many clauses within the Bill of Rights must be translated into adjudicatory principles that realize their full meaning only after their application to a series of concrete cases." *Cnty. of Allegheny v. Am. Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U.S. 573, 606, 109 S. Ct. 3086, 3108 (1989). "[A]nalysis in this area must begin with a consideration of the cumulative criteria developed over many years and applying to a wide range of governmental action challenged as violative of the Establishment Clause." *Tilton v. Richardson*, 403 U.S. 672, 677-78, 91 S. Ct. 2091, 2095 (1971) (plurality opinion).

Defendant does not dispute that the Campus Police Act has a "secular legislative purpose." *Lemon*, 403 U.S. at 612, 91 S. Ct. at 2111. The legislature explicitly stated its purpose in enacting the Campus Police Act: "[T]o protect the safety and welfare of students, faculty, and staff in institutions of higher education by fostering integrity, proficiency, and competence among campus police agen-

cies and campus police officers." N.C.G.S. § 74G-2(a). We need not pursue this inquiry further because defendant in no way suggests that this provision is "anything other than a good-faith statement of purpose." *Hunt v. McNair*, 413 U.S. 734, 741, 93 S. Ct. 2868, 2873 (1973). Therefore, it is undisputed that the Campus Police Act has a secular legislative purpose as required by *Lemon*.

Turning to the disputed aspects of the *Lemon* test, we must consider whether the principal effect of the statute advances or inhibits religion and whether the statute fosters an excessive government entanglement with religion. *See*, *e.g.*, *Agostini*, 521 U.S. at 232-34, 117 S. Ct. at 2014-15. The Supreme Court has provided guidance for applying the *Lemon* test when the government has conferred aid and delegated authority, both of which necessitate discussion here. *See Bd. of Educ. v. Grumet*, 512 U.S. 687, 702-06, 114 S. Ct. 2481, 2491-92 (1994) (addressing an alleged Establishment Clause violation by drawing from cases involving delegation of authority, monetary aid, and other governmental benefits).

In cases of government aid to organizations that are not churches, the Court has considered "the character of the institutions benefited (*e.g.*, whether the religious institutions [are] 'predominantly religious') and the nature of the aid that the State provided (*e.g.*, whether it was neutral and nonideological)."[1] *Id.* at 232, 117 S. Ct. at 2015 (citations omitted); *see also Hunt*, 413 U.S. at 743-44, 93 S. Ct. at 2874-75; *Everson v. Bd. of Educ.*, 330 U.S. 1, 17-18, 67 S. Ct. 504, 512-13 (1947). Although "the proposition that the Establishment Clause prohibits any program which in some manner aids an institution with a religious affiliation has consistently been rejected," *Hunt*, 413 U.S. at 742, 93 S. Ct. at 2874 (citations omitted), courts must necessarily conduct a factual inquiry to ensure that the governmental benefit does not flow directly "to the religious as opposed to the secular activities of the [institution]," *id.* at 744, 93 S. Ct. at 2874. If an institution is so "pervasively sectarian," *id.* at 743, 93 S. Ct. at 2874, that governmental benefits cannot be directed primarily toward neutral, nonreligious purposes, then the benefit likely would advance

1. More recently, there has been some question as to the continued applicability of the pervasively sectarian analysis. *See Mitchell v. Helms*, 530 U.S. 793, 826, 827, 829, 120 S. Ct. 2530, 2550-52 (2000) (plurality opinion) ("[T]here was a period when [the pervasively sectarian nature of a benefit recipient] mattered . . . . But that period . . . is thankfully long past. . . . [T]he religious nature of a recipient should not matter to the constitutional analysis, so long as the recipient adequately furthers the government's secular purpose. . . . [N]othing in the Establishment Clause requires the exclusion of pervasively sectarian schools from otherwise permissible aid programs, and other doctrines of this Court bar it.").

religion in a manner inconsistent with *Lemon*, *see id.* at 743-44, 93 S. Ct. at 2874-75.

The Supreme Court has also considered whether the aid "result[s] in governmental indoctrination; define[s] its recipients by reference to religion; or create[s] an excessive entanglement." *Agostini*, 521 U.S. at 234, 117 S. Ct. at 2016. When assessing a delegation of governmental power to a church, the Court has considered whether the delegation advances religion and whether the delegation is limited by an " 'effective means of guaranteeing' that the delegated power 'will be used exclusively for secular, neutral, and nonideological purposes.' " *Larkin*, 459 U.S. at 125, 103 S. Ct. at 511 (quoting *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 780, 93 S. Ct. 2955, 2969 (1973)). In such circumstances, the Court has found excessive entanglement when the statute "substitutes the unilateral and absolute power of a church for the reasoned decision-making of a public legislative body acting on evidence and guided by standards, on issues with significant economic and political implications." *Id.* at 127, 103 S. Ct. at 512.

Davidson College is not a church but a private liberal arts college. Students are admitted regardless of their religious beliefs and they are not required to attend religious services. Students represent a wide diversity of faith traditions. To graduate from Davidson College with a Bachelor of Science degree, a student must satisfactorily complete thirty-two courses. Of those thirty-two courses, only one must be in religion. Staff and faculty are not required to have a religious affiliation or to attend religious services; they merely must agree that they will work in harmony with the College's statement of purpose. The Presbyterian Church of the United States of America (PC-USA) has no role either in the hiring or firing of staff or faculty, or in the student admissions process. The PC-USA neither owns the land on which Davidson College is situated, nor has any role in setting the curriculum or in making management and policy decisions. In short, the PC-USA does not run or control the College.

Davidson College was established in 1837 by the Presbyterians of North Carolina and is voluntarily affiliated with the PC-USA. Davidson's historical relationship with the PC-USA is memorialized in its statement of purpose.[2] According to this statement of purpose:

2. The statement of purpose, in relevant part, provides as follows:

> Since its founding, the ties that bind the college to its Presbyterian heritage, including the historic understanding of Christian faith called The Reformed

"The primary purpose of Davidson College is to assist students in developing humane instincts and disciplined and creative minds for lives of leadership and service. . . . The loyalty of the college thus extends beyond the Christian community to the whole of humanity and necessarily includes openness to and respect for the world's various religious traditions." The bylaws require that at least eighty percent of Davidson's board of trustees be active members of some Christian church. Twenty-four of the forty-four elected trustees must be members of PC-USA churches, and all must agree to "honor the traditions that have shaped Davidson as a place where faith and reason work together in mutual respect for service to God and humanity." Davidson's bylaws also elaborate that the president should be a Christian who is a member of a PC-USA church.

The trial court considered this evidence and concluded that Davidson's primary purpose is secular education. We affirm the trial court's determination that Davidson College is not a church and that its primary purpose is not religious in nature. Davidson College's secular, educational mission predominates. While a reading of Davidson's statement of purpose shows that the College is church affiliated, the statement also shows that the College is not a "predominantly religious" institution. *Agostini*, 521 U.S. at 232, 117 S. Ct. at 2015 (citations omitted).

We now pause to examine the Campus Police Act. *See* N.C.G.S. §§ 74G-1 to -13 (2009).[3] Before the enactment of the Campus Police

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> Tradition, have remained close and strong. The college is committed to continuing this vital relationship.
>
> The primary purpose of Davidson College is to assist students in developing humane instincts and disciplined and creative minds for lives of leadership and service. . . .
>
> The Christian tradition to which Davidson remains committed recognizes God as the source of all truth, and believes that Jesus Christ is the revelation of that God, a God bound by no church or creed. The loyalty of the college thus extends beyond the Christian community to the whole of humanity and necessarily includes openness to and respect for the world's various religious traditions.

3. Three statutes authorizing certified police agencies will be referenced in this opinion: Chapters 74A, 74E, and 74G. The police agency in *Pendleton* was authorized under the Chapter 74A Company Police Act. In *Pendleton* this Court found Chapter 74A unconstitutional as applied. 339 N.C. at 390, 451 S.E.2d at 281. In 1992 the General Assembly repealed Chapter 74A and enacted Chapter 74E. Under Chapter 74E, all police agencies certified under Chapter 74A were converted to certifications under Chapter 74E. Act of July 25, 1992, ch. 1043, sec. 9, 1991 N.C. Sess. Laws (Reg. Sess. 1992) 1150, 1158. In 2005 the General Assembly enacted Chapter 74G to provide police

Act, the Davidson College Campus Police were regulated under Chapter 74E. *See* N.C.G.S. §§ 74E-1 to -13 (2009). The session law enacting the Campus Police Act "automatically convert[ed]" all campus police agency certifications and officer commissions issued under Chapter 74E to authorizations under the Campus Police Act, unless the board of trustees of the educational institution requested in writing to remain under Chapter 74E. Act of July 18, 2005, ch. 231, sec. 12, 2005 N.C. Sess. Laws 531, 541. Because Davidson's board of trustees did not elect to continue certification under Chapter 74E, Officer Wilson was commissioned as a police officer under the Campus Police Act at the time of defendant's arrest.

The Campus Police Act imposes more stringent limitations than did the statute this Court considered in *Pendleton*, 339 N.C. 379, 451 S.E.2d 274. The Court in *Pendleton* was tasked with addressing whether the former statute, Chapter 74A, was unconstitutional as applied to an arrest by campus police at Campbell University. We are faced with a very different statute here, designed to address concerns about the delegation of governmental power. In addition to the former statute's requirement for officers to "take and subscribe the usual oath," N.C.G.S. § 74A-2(a) (1989) (repealed 1992), the Campus Police Act imposes further limitations to ensure neutral, uniform enforcement of the law by campus police agencies. The Act requires that campus police officers maintain the same minimum standards that are required for state police officers generally. N.C.G.S. § 74G-8. The Act also imposes constraints and checks on campus police agencies. Specifically, the Act authorizes the Attorney General to (1) "establish minimum education, experience, and training standards"; (2) set and enforce certification requirements; (3) require reports from campus police officers and agencies; (4) inspect records maintained by campus police agencies; (5) conduct investigations to ensure that campus police agencies and officers are complying with the Act; and (6) "deny, suspend, or revoke" campus police agency certifications and campus police officer commissions for failure to comply with the Act. *Id.* § 74G-4. The Attorney General is the legal custodian of all records of the Campus Police Program, including personnel files for campus police officers. *Id.* § 74G-5. When campus police officers exercise the power of arrest, they must "apply the standards established by the law of this State and the United States."

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protection in the specific context of institutions of higher education. N.C.G.S. § 74G-2. At the time of defendant's arrest, the Davidson College Campus Police agency was certified under Chapter 74G.

Id. § 74G-6(b). In other words, campus police officers may enforce only the law, not campus policies or religious rules. Further, any arrests made by campus police officers are "reviewable by the General Court of Justice and the federal courts." *Id.* § 74G-2(b)(9). Accordingly, the Campus Police Act provides substantially more protections to ensure neutrality and guard against excessive church-state entanglement than did the statute at issue in *Pendleton*.

Cognizant of Davidson's institutional characteristics and of the underlying differences between Chapter 74G and the former statute, Chapter 74A, we examine the primary effect and excessive entanglement aspects of the *Lemon* test in the context of this case. First, the "nature of the aid that the State provided" in certifying the Davidson College Campus Police is secular. *Agostini*, 521 U.S. at 232, 117 S. Ct. at 2015 (citations omitted). This benefit offers the College a state-certified police agency to enforce federal and state laws, not religious rules. Defendant has not argued that the delegation of police power to the Davidson Campus Police is anything but "secular, neutral, [and] nonideological." *Lemon*, 403 U.S. at 616, 91 S. Ct. at 2113 ("Our decisions from *Everson* to *Allen* have permitted the States to provide church-related schools with secular, neutral, or nonideological services, facilities, or materials."). Rather, like those at other colleges and universities, the students, faculty, and staff at Davidson are simply receiving the secular benefit of police protection. Moreover, defendant has not argued that the statute "define[s] its recipients by reference to religion." *Agostini*, 521 U.S. at 234, 117 S. Ct. at 2016. The benefits of the Campus Police Act are available both to religiously affiliated schools and to nonreligiously affiliated schools. Further, defendant has failed to demonstrate that the operation of the Act has resulted in "governmental indoctrination" of religion. *Id.* Specifically, defendant makes no contention that the Davidson Campus Police attempt to proselytize or enforce any private or religious rules, or that her arrest was religiously motivated. Similarly, defendant makes no claims that the campus police infringe on students' or town residents' religious liberties. The campus police merely enforce secular law—nothing more, nothing less.

Next, the delegation of governmental power here is limited by an " 'effective means of guaranteeing' that the delegated power 'will be used exclusively for secular, neutral, and nonideological purposes.' " *Larkin*, 459 U.S. at 125, 103 S. Ct. at 511 (quoting *Comm. for Pub. Educ.*, 413 U.S. at 780, 93 S. Ct. at 2969). As outlined above, the Campus Police Act establishes numerous clear and comprehensive

standards that constrain the authority of campus police officers. These officers are permitted only to enforce secular law, not campus policies or religious rules. *See* N.C.G.S. § 74G-6(b). Further, the Attorney General may revoke a campus police agency's certification or a campus officer's commission for failure to comply with the requirements of the Act. N.C.G.S. § 74G-4. Having seen no evidence to the contrary, we may assume that the Davidson College Campus Police act in good faith in their exercise of the statutory power. *See Larkin*, 459 U.S. at 125, 103 S. Ct. at 511 (citing *Lemon*, 403 U.S. at 618-19, 91 S. Ct. at 2114); *see also Agostini*, 521 U.S. at 223-24, 117 S. Ct. at 2010-11; *Roemer*, 426 U.S. at 760, 96 S. Ct. at 2351; *Tilton*, 403 U.S. at 679-80, 91 S. Ct. at 2096.

Finally, we consider whether the statutory delegation results in "an 'excessive' entanglement that advances or inhibits religion." *Agostini*, 521 U.S. at 233, 117 S. Ct. at 2015. Having reviewed Davidson's institutional characteristics—its secular purpose, faculty, students, curriculum, and management—it is clear that religion is not "so pervasive that a substantial portion of its functions are subsumed in the religious mission." *Hunt*, 413 U.S. at 743, 93 S. Ct. at 2874; *see also Agostini*, 521 U.S. at 232, 117 S. Ct. at 2015. Because campus police officers' enforcement of the secular law is statutorily separated from the school's religious affiliation, there is little danger that the governmental benefit will accrue to religious rather than secular activities. *See Hunt*, 413 U.S. at 743-44, 93 S. Ct. at 2874-75; *see also Lemon*, 403 U.S. at 618, 91 S. Ct. at 2114 (declining to assume "bad faith or any conscious design to evade the limitations imposed by the statute and the First Amendment" in the absence of evidence otherwise).

While Davidson has historical ties to the PC-USA, the College pursues the predominant purpose of secular education. The potential influence of the PC-USA over the College is minimal, as the Church does not run or control the College and has no role in management or policy decisions. *See Hunt*, 413 U.S. at 742-45, 93 S. Ct. at 2874-75 (finding that a Baptist-affiliated college was not "pervasively sectarian" even though the school's trustees were elected by the South Carolina Baptist Convention and the Convention's approval was required for certain financial transactions). The religious beliefs held by members of the Davidson College board of trustees, president, and dean of students do not demonstrate—or even suggest—that the PC-USA controls their roles in directing the school's policies and practices. Although the dean of students serves in a supervisory

capacity over the campus chief of police, the chief and departmental police officers exercise their authority consistent with "standards established by the law of this State and the United States." N.C.G.S. § 74G-6(b). Because defendant has failed to argue here or present any evidence in the trial court to the contrary, we decline to assume that the trustees, the dean of students, and the chief perform their duties in any manner other than good faith compliance with the Campus Police Act and the First Amendment. *See Lemon*, 403 U.S. at 618, 91 S. Ct. at 2114. Accordingly, the statutory provision of police protection for the students, faculty, and staff at Davidson, an educational institution with the primary purpose of secular education, does not result in excessive entanglement between church and state.

The United States Supreme Court's decision in *Hunt v. McNair* is instructive in the present case. While *Hunt* involved the grant of aid to secure funding for educational buildings at a religiously affiliated institution of higher education, the Baptist College at Charleston, the parallels are significant. *See* 413 U.S. at 741-42, 93 S. Ct. at 2873-74. As is the case here, the government benefit in *Hunt* had a secular purpose and was available to both religiously and nonreligiously affiliated institutions. *Id.* Also analogous to the instant case, the Supreme Court declined to find that the educational institution's purpose was predominantly religious, despite its observations that the members of the College's board of trustees were elected exclusively by the South Carolina Baptist Convention, certain financial transactions required approval by the South Carolina Baptist Convention, and the College's charter could be amended only by the South Carolina Baptist Convention. *Id.* at 743-44, 93 S. Ct. at 2874. Important to this conclusion was the absence of religious qualifications for faculty appointments or student admissions. *Id.* (noting that nearly sixty percent of the College's students were Baptist). The Court therefore concluded that the primary purpose of the College was secular education and that the grant of aid would benefit the secular, rather than the religious, activities of the College. *Id.* at 744-45, 93 S. Ct. at 2874-75. The Court also held that there was not excessive entanglement between church and state because the College was not "an instrument of religious indoctrination," *id.* at 746, 93 S. Ct. at 2876, and the government would not become deeply involved in the day-to-day decisionmaking of the College under the statutory scheme, *id.* at 747-49, 93 S. Ct. at 2876-77; *see id.* at 746, 93 S. Ct. at 2875 ("[T]he degree of entanglement arising from inspection of facilities as to use varies in large measure with the extent to which religion permeates the institution.").

As in *Hunt*, the secular educational purpose predominates at Davidson, and the governmental benefit neutrally advances the purpose of police protection for the campus community. Because the campus police agency benefits Davidson's secular rather than religious activities, this case does not give rise to excessive entanglement or have the primary effect of advancing or inhibiting religion. *See id.* at 742-45, 93 S. Ct. at 2874-75. Notably, the PC-USA exercises significantly less control over Davidson College than the South Carolina Baptist Convention exercised over the Baptist College at Charleston. The State's supervisory role over the police agency does not interfere with the day-to-day decisionmaking of Davidson, while it ensures that the officers' power is used to further Davidson's secular educational purpose. *See id.* at 745-49, 93 S. Ct. at 2875-77.

Defendant contends that the Campus Police Act is an unconstitutional delegation of governmental authority to a religious institution. *See Larkin*, 459 U.S. 116, 103 S. Ct. 505. In *Larkin*, a state statute gave churches absolute veto power over liquor licensing, resulting in excessive entanglement between church and state. *Id.* at 117, 130, 103 S. Ct. at 507, 514. The Supreme Court determined that the statute unconstitutionally "substitute[d] the unilateral and absolute power of a church for the reasoned decisionmaking of a public legislative body acting on evidence and guided by standards, on issues with significant economic and political implications." *Id.* at 127, 103 S. Ct. at 512. In other words, the statutory delegation of power to the churches was "standardless, calling for no reasons, findings, or reasoned conclusions." *Id.* at 125, 103 S. Ct. at 511. For that reason, "[t]hat power may therefore [have] be[en] used by churches to promote goals beyond insulating the church from undesirable neighbors; it could [have] be[en] employed for explicitly religious goals, for example, favoring liquor licenses for members of that congregation or adherents of that faith." *Id.* at 125, 103 S. Ct. at 511. Because Davidson College is not "predominantly religious"—let alone a religious authority—the delegation of power here bears little resemblance to that in *Larkin*. These cases are further differentiated in that the statute here does not delegate absolute police power to Davidson College. Rather, the statute certifies Davidson College's campus police as a campus police agency under the secular law of North Carolina. *See* N.C.G.S. § 74G-2. The statute grants only limited supervisory powers to Davidson College, while ultimate control of the police power—which the individual officers alone exercise—remains in the hands of the State. *See id.* § 74G-4. Thus, this is not a case in which a statute delegates unbridled discretionary governmental powers to a religious

organization. The delegation of limited power to campus police officers here "does not result in an 'excessive' entanglement that advances or inhibits religion." *Agostini*, 521 U.S. at 233, 117 S. Ct. at 2015; *Larkin*, 459 U.S. at 127, 103 S. Ct. at 512.

The Campus Police Act's provision of secular, neutral, and nonideological police protection for the benefit of the students, faculty, and staff of Davidson College, as applied to defendant's conviction for driving while impaired, does not offend the Establishment Clause of the First Amendment to the United States Constitution. Defendant has failed to demonstrate that her arrest and conviction for driving while impaired were influenced by any consideration other than secular enforcement of a criminal statute, N.C.G.S. § 20-138.1. Accordingly, we reverse the decision of the Court of Appeals.

REVERSED.

LINDA G. DOBSON v. SUBSTITUTE TRUSTEE SERVICES, INC., SUBSTITUTE TRUSTEE; WELLS FARGO BANK MINNESOTA, N.A., AS TRUSTEE FOR EQUIVANTAGE HOME EQUITY LOAN TRUST, 1996-4, NOTE HOLDER; EQUIVANTAGE, INC.; AND AMERICA'S SERVICING COMPANY

No. 260A11

(Filed 10 November 2011)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, ––– N.C. App. ––––, 711 S.E.2d 728 (2011), reversing an order granting partial summary judgment for plaintiff and denying summary judgment for defendants entered on 28 December 2009 by Judge Russell J. Lanier, Jr. in Superior Court, Duplin County, and remanding for additional proceedings. Heard in the Supreme Court 17 October 2011.

Legal Aid of North Carolina, Inc., by Celia Pistolis, John Christopher Lloyd, and Anne J. Randall, for plaintiff-appellant.

Law Firm of Hutchens, Senter & Britton, P.A., by John A. Mandulak, for defendant-appellees Wells Fargo Bank Minnesota, N.A., as Trustee for Equivantage Home Equity Loan Trust, 1996-4, and America's Servicing Company.

Steven M. Virgil for North Carolina Association of Community Development Corporations, amicus curiae.

Carlene McNulty and Judith Welch Wegner for North Carolina Justice Center; Carlene McNulty, Nina F. Simon, pro hac vice, and Joanne L. Werdel for Center for Responsible Lending; Carlene McNulty and Thomas A. Cox, pro hac vice, for Maine Attorneys Saving Homes; and North Carolina Justice Center, by Carlene McNulty, for North Carolina Advocates for Justice, AARP Foundation Litigation, Financial Protection Law Center, and National Association of Consumer Advocates, amici curiae.

PER CURIAM.

AFFIRMED.

AMWARD HOMES, INC.; ANGE CONSTRUCTION COMPANY; BLUEPOINT HOMES, INC.; HOMESCAPE BUILDING COMPANY; IMPACT DESIGN-BUILD, INC.; JOHN LEGGETT AND COMPANY; POYTHRESS CONSTRUCTION COMPANY, INC.; POYTHRESS HOMES, INC.; WARDSON CONSTRUCTION, INC.; WHG, INC. D/B/A TIMBERLINE BUILDERS; AND ZEIGLER & COMPANY v. TOWN OF CARY, A BODY POLITIC AND CORPORATE

TRADITION AT STONEWATER I, LP v. TOWN OF CARY, A BODY POLITIC AND CORPORATE

No. 390PA10

(Filed 10 November 2011)

On discretionary review pursuant to N.C.G.S. § 7A-31 from the decision of a divided panel of the Court of Appeals, —— N.C. App. ——, 698 S.E.2d 404 (2010), affirming orders entered on 5 March 2009, 1 April 2009, and 2 April 2009, all by Judge Carl R. Fox in Superior Court, Wake County. Heard in the Supreme Court 17 October 2011.

K&L Gates LLP, by William J. Brian, Jr. and Keith P. Anthony, for plaintiff-appellees.

Womble Carlyle Sandridge & Rice, LLP, by Michael T. Henry, Burley B. Mitchell, Jr., and John C. Cooke; and Brough Law Firm, by Michael B. Brough, for defendant-appellant.

Kimberly S. Hibbard, General Counsel, and Gregory F. Schwitzgebel III, Senior Assistant General Counsel, for North Carolina League of Municipalities, amicus curiae.

J. Michael Carpenter, *General Counsel*, *North Carolina Home Builders Association*, *for Raleigh-Wake County Home Builders Association and North Carolina Home Builders Association*, *amici curiae.*

PER CURIAM.

Justice JACKSON took no part in the consideration or decision of this case. The remaining members of the Court are equally divided, with three members voting to affirm and three members voting to reverse the decision of the Court of Appeals. Accordingly, the decision of the Court of Appeals is left undisturbed and stands without precedential value. *See*, *e.g.*, *Hall v. Toreros II*, *Inc.*, 363 N.C. 114, 678 S.E.2d 656 (2009).

AFFIRMED.

STATE OF NORTH CAROLINA v. ELIJAH OMAR NABORS

No. 479PA10

(Filed 9 December 2011)

1. Drugs— possession with intent to sell and deliver cocaine—sale of cocaine—testimony of defendant's witness—sufficient evidence—substance cocaine

The trial court did not err by denying defendant's motion to dismiss charges of possession with intent to sell and deliver cocaine and sale of cocaine for insufficient evidence. When a defense witness's testimony characterizes a putative controlled substance as a controlled substance, the defendant cannot on appeal escape the consequences of the testimony in arguing that his motion to dismiss should have been allowed. The testimony of defendant's witness, which identified as cocaine the items sold to an undercover operative, provided evidence of a controlled substance sufficient to withstand defendant's motion to dismiss. Furthermore, assuming *arguendo* that the trial court erroneously admitted lay testimony offered by the State that the substance sold was cocaine, defendant could not show plain error inasmuch as his own evidence established that the substance was cocaine.

2. Evidence— trial court's question—witness's drug activities—response not prejudicial

Defendant's contention that the trial court erred by questioning a witness concerning his drug activities was overruled. Assuming, without deciding, that the question was improper, defendant could not show prejudice as the witness had already testified without objection that he had used cocaine, had been arrested for possession of cocaine, and had telephoned defendant to set up the drug buy.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, —— N.C. App. ——, 700 S.E.2d 153 (2010), finding error in a judgment entered on 25 August 2009 by Judge W. Russell Duke, Jr. in Superior Court, Harnett County, and vacating defendant's convictions. Heard in the Supreme Court on 7 September 2011.

Roy Cooper, Attorney General, by Charles E. Reece and Kathleen N. Bolton, Assistant Attorneys General, for the State-appellant.

Jesse W. Jones for defendant-appellee.

PARKER, Chief Justice.

The issue in this case is whether the Court of Appeals erred in reversing the trial court's denial of defendant's motion to dismiss at the close of all evidence. For the reasons stated herein, we reverse the decision of the Court of Appeals.

Defendant was arrested following an undercover drug transaction at a convenience store parking lot in Dunn, North Carolina. Subsequently, defendant was indicted for one count each of possession with intent to sell and deliver cocaine and sale of cocaine and for being an habitual felon. Defendant was convicted of both cocaine charges and pled guilty to habitual felon status. The trial court entered judgment sentencing defendant in the presumptive range to imprisonment for a minimum term of 96 months and a maximum term of 125 months. Defendant gave timely notice of appeal to the Court of Appeals.

At trial the State's evidence tended to show the following. Christopher Gendreau (Gendreau), who had been charged with possession of cocaine, volunteered to assist police by acting as the buyer

in an undercover cocaine purchase from defendant, with whom Gendreau was familiar. From inside a police vehicle, Gendreau telephoned defendant and said he needed to buy something from defendant. The two agreed to meet at a Liberty gas station in Dunn to complete the transaction. Police officers positioned themselves near the gas station to observe Gendreau make the purchase or to be prepared to intercept defendant thereafter. When defendant pulled into the Liberty parking lot, he was driving an Oldsmobile; and another person, later identified as Quinton Smith (Smith), was sitting in the passenger seat. Gendreau approached the passenger side of the vehicle, and defendant told him to retrieve the drugs from the armrest panel inside the passenger door. Gendreau then handed eighty dollars in pre-marked bills to defendant. After completing the transaction, Gendreau gave the officers the "take-down" signal. The officers stopped defendant's vehicle and, after arresting him, found the marked bills and a large amount of other cash on defendant's person. Officers also arrested Smith, who was later charged with possession of marijuana.

Gendreau testified that the substance he purchased from defendant was "[a] white, rock-like substance that [he] knew to be crack cocaine," a substance with which he had personal experience as a drug user during the two and one-half years preceding these events. Agent Joseph Byrd (Byrd), a three-year officer with specialized training in narcotics investigation who was part of the take-down team, testified that the substance collected from Gendreau immediately following the purchase was crack cocaine. Byrd also testified that this substance had been analyzed by the North Carolina State Bureau of Investigation to determine its identification and weight. Defendant did not object to this or any other testimony.

During defendant's case in chief, defense counsel called Smith to testify on defendant's behalf. The trial court conducted a voir dire in which the court questioned Smith regarding a statement he had previously signed incriminating defendant and inquired whether Smith understood the implications of changing his story on the witness stand. Smith confirmed that he intended to recant his previous statement and explained, "I just don't want to see nobody go to jail for something I did." On direct examination the thrust of Smith's testimony was that he, not defendant, arranged and executed the cocaine sale, as evidenced by the following testimony:

Q. And do you recall being at the Liberty gas station or convenience store?

A. Yes, sir.

Q. And your reason for being there was what?

A. To see Chris [Gendreau].

. . . .

Q. And what was your purpose for seeing Chris?

A. He had wanted some cocaine.

Q. Did you have cocaine?

A. Yes, sir.

. . . .

Q. Who had possession of the drugs when Chris took delivery of the cocaine?

A. I had it.

Q. Who had it?

A. I did. Oh, he—I had put it on the door panel.

Q. The what?

A. The door panel. Like on the door panel, he had reached in and got it from there.

. . . .

Q. Did you get the drugs from [defendant]?

A. Oh, no, sir.

Q. So you had those with you?

A. Yes, sir.

. . . .

Q. And which side of the car did Chris some [sic] to?

A. Passenger side.

Q. And what—was [defendant] in the vehicle at that time?

A. No, sir. He was in the store paying for the gas and getting me a pack of cigarettes.

Q. And who took possession of the money?

A. I did.

Q. And what did you do with the money?

A. I had—I had—really, I had owed [defendant] $100, and I had $20 of it on me, which I gave him that as soon as I got in the car. So I told him I was going to pay him the rest of the money when I get it, and which, when I got it, I finished paying him.

. . . .

Q. Did, at any time, [defendant] have any cocaine in his possession?

A. No, sir. I didn't see any. I had it.

Smith also testified that he had been the driver of the car during the drug sale and that because he did not want to get caught driving without a license, he and defendant had changed seats shortly after leaving the gas station.

On cross examination the prosecutor confronted Smith with the handwritten statement he had signed shortly after being arrested, and Smith admitted having made it. His statement contained the following narrative:

> [Defendant] said he needed to go to Liberty for a minute because he needed to stop by there for some money and gas. As we pulled in the gas station, we went on the side of the store to meet somebody. So [defendant] said, "Get the dope, Chris. It's on the door panel." So he did, and Chris gave him [defendant] the $80.

(Quotation marks omitted.) During the State's rebuttal the trial court admitted the statement into evidence, and it was published to the jury. The State also reexamined Sergeant Dallas Autry, who testified that Smith, following his arrest, "admitted that . . . [defendant] was the one that passed the dope to the door panel and that [defendant] received the money from . . . Gendreau."

On appeal to the Court of Appeals, defendant argued that the trial court committed plain error by admitting into evidence Agent Byrd's testimony that the substance sold to Gendreau was "crack cocaine." Defendant also argued that the trial court erred in denying his motion to dismiss for insufficiency of the evidence, contending that "there was no properly admitted evidence which proved the existence of a

controlled substance or that [defendant] was ever in possession or control of any item which purported to be a controlled substance."

A unanimous panel of the Court of Appeals agreed. *State v. Nabors*, —— N.C. App. ——, ——, 700 S.E.2d 153, 159 (2010). Relying on this Court's opinion in *State v. Ward*, 364 N.C. 133, 142, 147, 694 S.E.2d 738, 744, 747 (2010), the court below concluded that in the absence of expert testimony as to the chemical analysis of the substance, the evidence was insufficient to prove an essential element of the crime, namely, that the substance was a controlled substance. *Nabors*, —— N.C. App. at ——, 700 S.E.2d at 159. In *Ward* this Court noted that the legislature had provided both procedures for the admissibility of laboratory reports and a technical definition of cocaine, and we stated, " '[I]f it was intended by the General Assembly that an officer could make a visual identification of a controlled substance, then such provisions in the statutes would be unnecessary.' " 364 N.C. at 142, 694 S.E.2d at 744 (quoting *State v. Llamas-Hernandez*, 189 N.C. App. 640, 653, 659 S.E.2d 79, 87 (2008) (Steelman, J., dissenting), *rev'd per curiam for reasons stated in dissent*, 363 N.C. 8, 673 S.E.2d 658 (2009)). The Court of Appeals reasoned that Byrd's and Gendreau's previous exposure to cocaine and their observation of the substance involved in this transaction did not equate to the "scientifically valid chemical analysis" necessary "to establish the identity of the controlled substance beyond a reasonable doubt." *Nabors*, —— N.C. App. at ——, 700 S.E.2d at 159 (brackets omitted) (quoting *Ward*, 364 N.C. at 147, 694 S.E.2d at 747) (internal quotation marks omitted). Given the State's lack of scientific proof, the Court of Appeals concluded "there was insufficient evidence that the substance that formed the basis of the controlled substance charges in this case was cocaine." *Id.* at ——, 700 S.E.2d at 158-59. The Court of Appeals reversed the trial court's denial of defendant's motion to dismiss and vacated defendant's convictions. *Id.* at ——, 700 S.E.2d at 159. This Court allowed the State's petition for discretionary review of the Court of Appeals' decision.

[1] Before this Court the State argues that the Court of Appeals erred in vacating defendant's convictions and dismissing the charges by (i) failing to address whether the trial court committed plain error in admitting the lay opinion testimony that the substance was crack cocaine and (ii) misapplying the standard for determining the sufficiency of the evidence to withstand a motion to dismiss. The State asserts that the Court of Appeals conflated defendant's sufficiency claim with his claim concerning admissibility of lay opinion testi-

mony. The State further argues that even if admission of the lay testimony identifying the substance as a controlled substance was error, defendant could not meet his burden of showing plain error in that defendant's own evidence demonstrated that the substance was cocaine.

In deciding a defendant's motion to dismiss a charge on the basis of insufficiency of the evidence, the trial court must determine whether "substantial evidence" has been presented "in support of each element of the charged offense." *State v. Chapman*, 359 N.C. 328, 374, 611 S.E.2d 794, 827 (2005); *see also State v. McNeil*, 359 N.C. 800, 803-04, 617 S.E.2d 271, 273-74 (2005); *State v. Garcia*, 358 N.C. 382, 412, 597 S.E.2d 724, 746 (2004), *cert. denied*, 543 U.S. 1156, 161 L. Ed. 2d 122 (2005). The evidence is to be considered "in the light most favorable to the State, giving the State the benefit of 'every reasonable inference to be drawn' " from that evidence. *State v. Denny*, 361 N.C. 662, 665, 652 S.E.2d 212, 213 (2007) (quoting and citing *State v. Lowery*, 309 N.C. 763, 766, 309 S.E.2d 232, 236 (1983)). "The defendant's evidence, unless favorable to the State, is not to be taken into consideration." *State v. Jones*, 280 N.C. 60, 66, 184 S.E.2d 862, 866 (1971). However, if the defendant's evidence is consistent with the State's evidence, then the defendant's evidence "may be used to explain or clarify that offered by the State." *Id.* (citing *State v. Sears*, 235 N.C. 623, 624, 70 S.E.2d 907, 908 (1952)). Moreover, both competent and incompetent evidence that is favorable to the State must be considered by the trial court in ruling on a defendant's motion to dismiss. *State v. Israel*, 353 N.C. 211, 216, 539 S.E.2d 633, 637 (2000).

In his briefs to the Court of Appeals and to this Court, defendant challenged the sufficiency of the evidence as to whether the substance sold was in fact a controlled substance, an essential element of the drug offenses for which he was convicted. *See* N.C.G.S. §§ 90-87(5), -90(1)(d), -95(a)(1) (2009). However, defendant did not raise this issue at trial. Rather his defense was that Smith, not defendant, orchestrated the drug transaction.

Defendant's witness Smith testified that Gendreau had told him on the telephone that he wanted to buy "cocaine," that Smith had brought "cocaine" with him to the Liberty gas station, and that what he sold to Gendreau was "cocaine." The obvious import of this testimony was not to contest the illicit nature of the merchandise but to persuade the jury that Smith, rather than defendant, was guilty of the drug crimes. Smith's testimony thus provided substantial evidence that the substance defendant sold to Gendreau was cocaine. *See*

Garcia, 358 N.C. at 412, 597 S.E.2d at 746 (defining substantial evidence as "relevant evidence that a reasonable person might accept as adequate, or would consider necessary to support a particular conclusion" (citations omitted)). Moreover, Smith's identification of the substance as cocaine was favorable to and did not conflict with evidence offered by the State; hence, the trial court could properly consider that testimony in ruling on defendant's motion to dismiss. *See Jones*, 280 N.C. at 66, 184 S.E.2d at 866. The trial court was not, however, required to consider Smith's claim that the drugs and the transaction were his, as that evidence was not consistent with the State's evidence. *See id.*

In sum, while the State has the burden of proving every element of the charge beyond a reasonable doubt, when a defense witness's testimony characterizes a putative controlled substance as a controlled substance, the defendant cannot on appeal escape the consequences of the testimony in arguing that his motion to dismiss should have been allowed. *See, e.g.*, *State v. Morganherring*, 350 N.C. 701, 733-34, 517 S.E.2d 622, 641 (1999) (noting that the defendant's own evidence was sufficient to support an instruction on voluntary intoxication), *cert. denied*, 529 U.S. 1024, 146 L. Ed. 2d 322 (2000); *State v. House*, 340 N.C. 187, 198, 456 S.E.2d 292, 298 (1995) (concluding that the defendant's own evidence was sufficient to support an inference that he left the scene of his crime and took steps to avoid apprehension, thereby supporting an instruction on flight); *State v. Allen*, 279 N.C. 406, 412-13, 183 S.E.2d 680, 685 (1971) (holding that the defendant's own evidence was sufficient to establish that he was an adult for purposes of deciding defendant's motion to dismiss the charge of unlawfully dispensing a narcotic to a minor by an adult).

We hold, therefore, that the testimony of defendant's witness, which identified as cocaine the items sold to the undercover operative, provided evidence of a controlled substance sufficient to withstand defendant's motion to dismiss. In that this evidence is an independent basis for upholding the trial court's denial of the motion, we need not address whether the trial court erred in admitting Agent Byrd's and Gendreau's lay testimony that the substance was crack cocaine or whether the Court of Appeals correctly applied *Ward* and *Llamas-Hernandez* in its discussion of the State's lay opinion testimony regarding the nature of the controlled substance. Assuming arguendo that admission of the lay testimony was error, defendant cannot satisfy his burden of showing plain error inasmuch as his own evidence established that the substance sold was cocaine.

[2] Finally, we note that defendant argued in his brief to the Court of Appeals another issue that the Court of Appeals did not address. Rather than remanding to that court for consideration of the issue, we have reviewed defendant's argument that the trial court erred by questioning witness Gendreau concerning his drug activities and find no merit to defendant's contention. Specifically, the trial court asked Gendreau if he had ever bought drugs from defendant before, and Gendreau answered, "Yes." Assuming, without deciding, that the question was improper, defendant cannot show prejudice. Gendreau had already testified without objection that he had used cocaine, that he had been arrested for possession of cocaine, and that he had telephoned defendant to set up the drug buy. Without the trial judge's question, the jury could certainly infer from Gendreau's call to defendant that defendant was a supplier with whom Gendreau was familiar.

For the reasons stated herein, we reverse the decision of the Court of Appeals.

REVERSED.

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

STATE OF NORTH CAROLINA v. THOMAS JOHN STARR

No. 64PA11

(Filed 9 December 2011)

Jury— request to review testimony denied—trial court's failure to exercise discretion—inability to provide transcript

Although the trial court violated N.C.G.S. § 15A-1233(a) by failing to exercise its discretion in a multiple assaulting a firefighter with a firearm case by denying the jury's request to review a firefighter's testimony based on the inability to provide a transcript, defendant failed to show a reasonable possibility that a different result would have been reached at trial absent this error.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, —— N.C. App. ——, 703 S.E.2d 876 (2011), finding no error in judgments entered on 12 November 2008 by Judge W. Allen Cobb, Jr. in Superior Court, New Hanover County. Heard in the Supreme Court on 14 November 2011.

Roy Cooper, Attorney General, by Karen A. Blum, Assistant Attorney General, for the State.

Thomas Reston Wilson for defendant-appellant.

MARTIN, Justice.

This case presents the question of whether the trial court exercised its discretion in accordance with N.C.G.S. § 15A-1233(a) when it denied the jury's request to review the trial transcript. For the reasons stated herein, we modify and affirm the decision of the Court of Appeals finding no error in the trial court's denial of the jury's request.

On 27 September 2007, members of the Wilmington Fire Department arrived at an apartment complex in response to a 911 call reporting water leaking into one of the units. Concerned that defendant, the upstairs resident, might need medical assistance, four firefighters and a police officer knocked loudly on his door and identified themselves. When there was no response from defendant's apartment, they forced entry with a Halligan tool. Firefighters Spruill, Lacewell, Chadwick, and Comer, along with the police officer, stood directly in front of defendant's door during this process. Spruill wedged the Halligan tool between the door and the jamb, while Chadwick hammered the tool with an axe to break the lock. As Chadwick hammered, Spruill, Lacewell, and he heard a "pop" sound. When Spruill pushed the door open, he heard a second "pop" just before entering the apartment. He then saw defendant standing about twelve feet away, pointing a gun at him. Defendant fired at Spruill, who quickly exited and shouted, "He's got a gun[!]" Chadwick also saw defendant pointing his gun and ducked out of the doorway just as another "pop" sounded. The police officer entered the apartment with his gun drawn and ordered defendant to drop his weapon. Defendant complied and was promptly arrested.

Defendant was charged with one count of assaulting a law enforcement officer with a firearm and four counts of assaulting a firefighter with a firearm. Defendant pleaded not guilty and the case proceeded to trial. Corporal Musacchio and three of the four firemen

testified. The jury acquitted defendant of the charge of assaulting a law enforcement officer with a firearm, but convicted him of all four counts of assaulting a firefighter with a firearm. The trial court sentenced defendant to two consecutive active terms of nineteen to twenty-three months, suspended for thirty-six months with supervised probation.

Defendant filed a petition for writ of certiorari with the Court of Appeals on 26 August 2010. Among other things, defendant argued that the trial court erred in failing to follow the procedures of N.C.G.S. § 15A-1233 when it denied the jury's request to review Firefighter Spruill's testimony. The Court of Appeals stated that a "trial court properly exercises its discretion in denying the jury's request to review testimony when the court instructs the jurors to rely on their recollection of the evidence in reaching a verdict." *State v. Starr*, —— N.C. App. ——, ——, 703 S.E.2d 876, 882 (2011) (citing *State v. Harden*, 344 N.C. 542, 563, 476 S.E.2d 658, 669 (1996), *cert. denied*, 520 U.S. 1147, 117 S. Ct. 1321 (1997), and *State v. Corbett*, 339 N.C. 313, 338, 451 S.E.2d 252, 265 (1994)). The court held that because the trial court instructed the jurors to rely on their recollection of the evidence, the trial court "properly exercised its discretion in denying the jury's request to review Firefighter Spruill's trial testimony." *Id.* at ——, 703 S.E.2d at 882 (citing *State v. Lawrence*, 352 N.C. 1, 27, 530 S.E.2d 807, 824 (2000), *cert. denied*, 531 U.S. 1083, 121 S. Ct. 789 (2001)). On 15 June 2011, we allowed defendant's petition for discretionary review on that issue.

Jury requests for review of evidence during deliberations are governed by section 15A-1233(a), which states:

> If the jury after retiring for deliberation requests a review of certain testimony or other evidence, the jurors must be conducted to the courtroom. The judge in his discretion, after notice to the prosecutor and defendant, may direct that requested parts of the testimony be read to the jury and may permit the jury to reexamine in open court the requested materials admitted into evidence. 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) (2009). This statutory provision is a codification of the common law rule that "the decision whether to grant or refuse the jury's request for a restatement of the evidence lies within the discretion of the trial court." *State v. Ford*, 297 N.C. 28, 30, 252

S.E.2d 717, 718 (1979) (citations omitted); *see also State v. Ashe*, 314 N.C. 28, 34-35, 331 S.E.2d 652, 656-57 (1985). Under this rule, the trial court "must exercise its discretion in determining whether to permit requested evidence to be read to or examined by the jury together with other evidence relating to the same factual issue." *Ashe*, 314 N.C. at 34, 331 S.E.2d at 656.

When 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. *State v. Barrow*, 350 N.C. 640, 646, 517 S.E.2d 374, 378 (1999) (quoting *State v. Johnson*, 346 N.C. 119, 124, 484 S.E.2d 372, 375-76 (1997)). "[T]here is error when the trial court refuses to exercise its discretion in the erroneous belief that it has no discretion as to the question presented." *Id.* (quoting *Johnson*, 346 N.C. at 124, 484 S.E.2d at 376 (quotation marks omitted)).

Here, after the jury retired to deliberate, the following exchange took place:

> THE COURT: They've got a question. Let the record reflect that they have sent another note saying, "We are requesting the testimony of Marvin Spruill."
>
> Of course, we don't have that. We don't have that capability and I thought if it was okay with you, since we're in the middle of jury selection in this one, that we would open the door without y'all being seen and let [the court reporter] take everything down and me just inform them to rely on their recollections. We don't have the modern day equipment to provide real-time transcript or something.
>
> (NO VERBAL RESPONSE.)
>
> (THE FOLLOWING TOOK PLACE AT THE JURY ROOM DOOR.)
>
> THE COURT: Hey, freeze what you're doing right now. I have received this note, "We are requesting the testimony of Marvin Spruill." In North Carolina *we don't have the capability of real-time transcripts so we cannot provide you with that.* You are to rely on your recollection of the evidence that you have heard in your deliberations. That's my instruction to you. Okay. Thank you. [Emphasis added.]

When the trial court gives no reason for a ruling that must be discretionary, we presume on appeal that the court exercised its discretion. *Johnson*, 346 N.C. at 126, 484 S.E.2d at 376. "However, where the statements of the trial court show that the trial court did not exercise discretion, as is evident in the present case, the presumption is overcome, and the denial is deemed erroneous." *Id.* The trial court's statement "we don't have the capability . . . so we cannot provide you with that" overcomes the presumption the court exercised its discretion.

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. *Barrow*, 350 N.C. at 646, 517 S.E.2d at 378. Because "[a] court does not exercise its discretion when it believes it has no discretion," *State v. Maness*, 363 N.C. 261, 278, 677 S.E.2d 796, 807 (2009) (citations omitted), *cert. denied*, —— U.S. ——, 130 S. Ct. 2349 (2010), a response indicating the inability to provide a transcript constitutes erroneous failure to exercise discretion.

This Court has examined exchanges nearly identical to the exchange in this case and concluded that the trial court did not properly exercise its discretion in denying the jury's request to review the transcript. Those cases compel our decision in the present case. For example, the trial court did not exercise discretion when it responded: "[W]hat [the court reporter is] taking down has not yet been transcribed. And the Court doesn't have the ability to now present to you the transcription of what was said during the course of the trial. . . . It will be your responsibility and obligation to use your independent recollection of what those witnesses testified . . . ." *Barrow*, 350 N.C. at 647, 517 S.E.2d at 378 (emphasis omitted). Similarly, we held that the trial court did not exercise discretion when it said: "I'll have to give you this instruction. There is no transcript at this point. You and the other jurors will have to take your recollection of the evidence as you recall it and as you can agree upon that recollection in your deliberations." *Ashe*, 314 N.C. at 33, 331 S.E.2d at 656; *see also State v. Lang*, 301 N.C. 508, 510-11, 272 S.E.2d 123, 125 (1980); *Ford*, 297 N.C. at 30, 252 S.E.2d at 718. These cases demonstrate the well-settled rule that a trial court does not exercise its discretion when, as evidenced by its response, it believes it cannot comply with the jury's transcript request. In cases such as these, in which the trial court's statement indicates its belief that it does not have discretion to grant the jury's request to review evidence, the court's additional instruction that the jurors rely on their memory will not render

the response discretionary. Therefore, the trial court in the instant case violated N.C.G.S. § 15A-1233(a) by failing to exercise its discretion, and thus the error is preserved by operation of law for appellate review. *See Ashe*, 314 N.C. at 40, 331 S.E.2d at 659.

We pause to provide guidance to trial court judges to ensure compliance with N.C.G.S. § 15A-1233(a). The trial court must exercise its discretion to determine whether, "under the facts of th[e] case," the transcript should be made available to the jury. *Lang*, 301 N.C. at 511, 272 S.E.2d at 125. But the trial court is not required to state a reason for denying access to the transcript. The trial judge may simply say, "In the exercise of my discretion, I deny the request," and instruct the jury to rely on its recollection of the trial testimony. *See* 1 Super. Court Subcomm., Bench Book Comm. & N.C. Conf. of Super. Court Judges, *North Carolina Trial Judges' Bench Book* § III, ch. 38, at 2 (Inst. of Gov't, Chapel Hill, N.C., 3d ed. 1999).

Having determined that there was error and that defendant's failure to object at trial did not bar appellate review, we now consider whether the trial court's failure to exercise its discretion was prejudicial. *See Lang*, 301 N.C. at 510, 272 S.E.2d at 125. Defendant 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). He must 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." N.C.G.S. § 15A-1443(a).

Defendant argues that "[t]he jury's review of Fireman Spruill's testimony could have reasonably resulted in not guilty verdicts for Mr. Starr on one or more of the guilty verdicts of the four firemen." Defendant has not carried his burden of proving that the error was prejudicial. He does not explain how the review of Spruill's testimony would have created a reasonable possibility that a different result would have been reached at his trial. The jury had the opportunity to see and hear Spruill's testimony at trial, *see State v. Covington*, 290 N.C. 313, 344, 226 S.E.2d 629, 649-50 (1976), and the testimony was not confusing or contradicted, *see Johnson*, 346 N.C. at 126, 484 S.E.2d at 377. Further, Spruill's testimony was not " 'material to the determination of defendant's guilt or innocence.' " *Id.* (quoting *Lang*, 301 N.C. at 511, 272 S.E.2d at 125). Specifically, the requested testimony was incriminating to defendant and came from a witness for the prosecution, unlike alibi testimony or other testimony that would tend to benefit a defendant. *See State v. Hudson*, 331 N.C. 122,

144-45, 415 S.E.2d 732, 744 (1992), *cert. denied*, 506 U.S. 1055, 113 S. Ct. 983 (1993); *Lang*, 301 N.C. at 511, 272 S.E.2d at 125. In addition, Spruill's testimony was not "the only evidence directly linking defendant to the alleged crimes." *Johnson*, 346 N.C. at 126, 484 S.E.2d at 377. Rather, three other witnesses gave testimony that corroborated Spruill's testimony. Defendant thus has not demonstrated a reasonable possibility that a different result would have been reached at his trial had the error not been committed. Accordingly, we modify and affirm the decision of the Court of Appeals.

MODIFIED AND AFFIRMED.

KAREN B. ORR AND MICHAEL TREXLER v. RONALD D. CALVERT

No. 242A11

(Filed 9 December 2011)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, —– N.C. App. ——, 713 S.E.2d 39 (2011), affirming a judgment entered on 17 December 2009 by Judge Laura J. Bridges in Superior Court, Henderson County, granting defendant's motion for directed verdict. Heard in the Supreme Court on 15 November 2011.

Falls & Veach, by John B. Veach III, for plaintiff-appellants.

Karolyi-Reynolds, PLLC, by Ronald W. Karolyi, for defendant-appellee.

PER CURIAM.

For the reasons stated in the dissenting opinion, the decision of the Court of Appeals is reversed. This case is remanded to the Court of Appeals for further remand to Superior Court, Henderson County, for proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

STATE OF NORTH CAROLINA v. MICHAEL DUSTIN SLAUGHTER

No. 258A11

(Filed 9 December 2011)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, —— N.C. App. ——, 710 S.E.2d 377 (2011), finding no error in judgments entered on 17 March 2010 by Judge W. Erwin Spainhour in Superior Court, Lincoln County. Heard in the Supreme Court 15 November 2011.

Roy Cooper, Attorney General, by Kathleen N. Bolton, Assistant Attorney General, for the State.

David M. Black for defendant-appellant.

PER CURIAM.

Reversed for the reasons stated in the dissenting opinion of the Court of Appeals.

REVERSED.

CROSLAND ARDREY WOODS, LLC v. BEAZER HOMES CORPORATION

No. 419PA10

(Filed 9 December 2011)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous, unpublished decision of the Court of Appeals, —— N.C. App. ——, 698 S.E.2d 769 (2010), affirming a judgment and order granting a permanent injunction entered on 10 March 2009 by Judge Robert P. Johnston in Superior Court, Mecklenburg County. On 10 March 2011, the Supreme Court allowed plaintiff's conditional petition for discretionary review of additional issues. Heard in the Supreme Court on 14 November 2011.

Parker Poe Adams & Bernstein LLP, by John W. Francisco, for plaintiff-appellee.

Williams Mullen, by John D. Burns, for defendant-appellant.

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

IN RE J.D.B.

[365 N.C. 323 (2011)]

In the Matter of: J.D.B.	)	ORDER

No. 190A09

ORDER

In light of the decision of the Supreme Court of the United States in *J.D.B. v. North Carolina*, 564 U.S. —— (2011), *rev'g sub nom. In re J.D.B.*, 363 N.C. 664 (2009), we vacate the order of the District Court, Orange County, denying J.D.B.'s motion to suppress and remand this case for reconsideration of that motion, applying the test as articulated by the Supreme Court of the United States. J.D.B.'s Motion To Set Briefing Schedule filed in this Court on 25 July 2011 is dismissed as moot.

By Order of the Court in Conference, this 25th day of August, 2011.

s/Jackson, J.
For the Court

STATE v. SURRATT

[365 N.C. 324 (2011)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	ORDER
	)	
HEATHER R. SURRATT	)	

No. 466PA11

ORDER

The stay issued on 31 October 2011 is dissolved. The State's petition for writ of supersedeas is denied. The State's petition for discretionary review is allowed for the limited purpose of vacating the opinion of the Court of Appeals and remanding the case to the Court of Appeals with instructions to consider defendant's remaining issues. This Order is issued without prejudice to defendant's right thereafter to file a Motion for Appropriate Relief in the trial division raising the issue of ineffective assistance of counsel. Defendant's motion to deem response to State's petition for discretionary review timely filed is allowed. Defendant's conditional petition for discretionary review is dismissed as moot.

By order of the Court in Conference, this 8th day of December 2011.

s/Jackson, J.
For the Court

STATE v. WHITEHEAD

[365 N.C. 325 (2011)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	ORDER
	)	
AERIC L. WHITEHEAD aka ERIC LAMONT WHITEHEAD	)	

No. 279PA11

AMENDED ORDER

The State's Petition for Writ of Supersedeas is allowed. The State's Petition for Writ of Certiorari is allowed as to the following issue: "Did the Superior Court err by modifying the sentence it previously had imposed on defendant pursuant to the Fair Sentencing Act?"

By order of the Court in Conference, this 6th day of October, 2011.

s/Jackson, J.
For the Court

STATE OF NORTH CAROLINA	)	
	)	
v.	)	ORDER
	)	
NATHAN DARNELL WILLIAMSON	)	
	)	

No. 425A10

ORDER

This case has come before this Court on the basis of a dissenting opinion in the Court of Appeals in which both the majority and dissent address the significance of the trial court's denial of defendant's Motion for Appropriate Relief without entering a written order memorializing that decision. *State v. Williamson*, —— N.C. App. ——, 698 S.E.2d 727 (2010). During the course of our review, it came to the attention of this Court that a written order actually was entered by the trial court on or about 29 June 2009 (copy attached to this Order), the existence of which apparently was not known to appellate counsel.

Now, therefore, this Court, on its own motion, ORDERS that the 7 September 2010 decision of the Court of Appeals is VACATED and REMANDS this matter to the Court of Appeals, so that it may determine:

1. Whether to amend the record on appeal under the North Carolina Rules of Appellate Procedure to permit consideration of the attached order;

2. Whether to order new briefs and/or oral arguments in light of its ruling on item 1 above;

3. Whether to address defendant's issues on the merits; and

4. Whether to enter any other or further relief as it may deem appropriate.

By order of this Court in Conference, this 8th day of December, 2011.

s/Jackson, J.
For the Court

STATE OF NORTH CAROLINA	)	
	)	
v.	)	ORDER
	)	
CHRISTOPHER JAMES WOODWARD	)	

No. 183PA11

ORDER

Upon consideration of the petition filed on the 13th of May 2011 by Defendant in this matter for discretionary review of the decision of the North Carolina 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:

"Allowed per Special Order: Did the Trial Court commit Reversible Error by Holding Defendant's Trial with Defendant clothed in Prison Garb?

By order of the Court in conference, this the 25th of August 2011."

s/Jackson, J.
For the Court

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

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001A92-2	State v. Renwick Gibbs	Def's *Pro Se* Request for Production of Document and/or Judgment Commuting Death Sentence	Dismissed as Moot
017P11	Sean Haugh and Russell Capps v. County of Durham, Durham County Board of Commissioners, and Nitronex Corporation	1. Plaintiff-Appellants' PDR Under N.C.G.S. § 7A-31 (COA09-167) 2. Def's (County of Durham) Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 2. Dismissed as Moot **Jackson, J., Recused**
022A99-3	State v. George Elton Hinnant	Def's *Pro Se* PWC to Review Order of Superior Court of Wake County	Dismissed
022A02-2	State v. Marcus Douglas Jones	1. Def's Motion for Stay of Proceedings 2. Def's Motion in the Alternative for an Extension of Time to File PWC	1. Denied **07/29/11** 2. Allowed **07/29/11**
031P05-2	State v. Jerry Delane Jenkins	Def's *Pro Se* Motion for PDR (COAP11-465)	Dismissed
031P11-2	State v. Julius Kevin Edwards	1. Def's *Pro Se* Motion for NOA (COAP11-307) 2. Def's *Pro Se* PWC to Review the Order of COA	1. Dismissed 2. Dismissed
034P08-4	Alfred Abdo, Jr., and Abdo Demolition & Property Restoration v. The Hon. Dennis J. Winner and Steven D. Cogburn, Successor to Robert H. Christie, Jr.	1. Plt's *Pro Se* PWC to Review Order of the COA (COAP10-755) 2. Plt's *Pro Se* Motion to Proceed *In Forma Pauperis*	1. Denied 2. Allowed
037P11	Frances Huffman, Robert D. Kennedy, Marilyn Dawn Kidd, Thomas P. Marsh, Frankie McCaskill, Deborah K. Rogers, and Sharon P. Scott, Employees v. Moore County, Employer; Sedgwick of the Carolinas, Inc., Carrier	Plts' PDR Under N.C.G.S. § 7A-31 (COA09-1324)	Denied **Jackson, J., Recused**

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045P11	Norris Dillahunt, Jr. and Josietta Dillahunt v. First Mount Vernon Industrial Loan Association, Prodev XXII, LLC, The Shoaf Law Firm, P.A., Labrador Financial Services, Kim Richardson, James Bostic, Jason Gold and Jonathan Friesen, in his capacity as Trustee	Plts' PDR Under N.C.G.S. § 7A-31 (COA10-13)	Denied **Jackson, J., Recused**
047P09-2	State v. Keith D. Wilson	1. Def's *Pro Se* Motion for NOA (COAP10-375) 2. Def's *Pro Se* Motion for PDR	1. Dismissed 2. Dismissed
047P11	Redale Barbour v. Wells Fargo Bank, N.A., et al.	Plt's *Pro Se* Motion for PDR (COAP11-248)	Denied
049P11	Gates Four Homeowners Ass'n, Inc., A North Carolina Non-Profit Corporation, et al. v. City of Fayetteville	1. Petitioner's PDR Under N.C.G.S. § 7A-31 (COA10-60) 2. Respondent's Conditional PDR	1. Denied 2. Dismissed as Moot **Jackson, J., Recused**
059P97-5	State v. Ardie Defronso Nolon	1. Def's *Pro Se* Motion for Discretionary Review (P10-621) 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
067P11	State v. Carlos Rozeles Hernandez, aka Adam Gusman, aka Carlos R. Hernandez, aka Carlos Rozalas Hernandez	1. Def's Motion to Deem PDR Timely Filed (COA10-178) 2. Def's PWC to Review Decision of COA	1. Denied **02/16/11** 2. Denied

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

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077P11	Mona Cousart, Individually and as the Guardian for Minor Carmen Cousart; and Cameron Cousart, v. The Charlotte-Mecklenburg Hospital Authority, Carolinas Physicians Network, Inc., Charlotte Obstetrics and Gynecologic Associates, P.A., Jointly and Severally	Plts' PDR Under N.C.G.S. § 7A-31 (COA09-477)	Denied
079P11	State v. Michael Felton Hosch, Jr.	Def's *Pro Se* PWC to Review Decision of COA (COA09-583)	Denied
081P11	State v. Franklin Floyd	1. Def's NOA Based Upon a Constitutional Question (COA09-1132) 2. Def's PDR Under N.C.G.S. § 7A-31	1. Dismissed *Ex Mero Motu* 2. Denied
084P11	State v. Lindsey Elbert Morgan	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA10-727)	Denied
094A11	State v. Roger Gene Moore	Def's Motion to Supplement Record On Appeal	Allowed
095P11	State v. Ernest Jawern Wright	State's Motion to Substitute Counsel	Dismissed as Moot
099P11	State v. Billy J.W. Ross, Jr.	Def's *Pro Se* Motion for PDR (COA10-391)	Denied **Jackson, J., Recused**
102A11	State v. Timothy Hartford, Jr.	1. Def's Motion for Appropriate Relief Pursuant to the Racial Justice Act 2. Def's Motion to Rule Forsyth County the Proper Venue 3. Def's Motion to Stay Appellate Proceedings 4. Def's Motion for Discovery	1. Dismissed Without Prejudice 2. Dismissed 3. Allowed 4. Dismissed

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110P11	Rebecca Kennedy and Charles L. Kennedy, Co-Administrators of the Estate of Emily Elizabeth May v. Danielle Polumbo, Brandi Reaves, Carolina Hospitality of Florida Inc., d/b/a Carolina Hospitality, Inc., Fayetteville Miyabi, Inc., ACS State and Local Solutions, Inc., and The City of Fayetteville, North Carolina	1. Plt's (Charles L. Kennedy) *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA10-389, COA10-586) 2. Defs' (ACS State and Local Solutions, Inc.) Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 2. Dismissed as Moot
111P11	Fred Wally, Lavon Benton, Randall Benton, Don Crowe, George Martocchio v. City of Kannapolis	Plts' PDR Under N.C.G.S. § 7A-31 (COA09-1080)	Allowed
115P11	State v. Timothy Tramel Vaughn	1. Def's NOA Based Upon a Constitutional Question (COA10-110) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. —— 2. Denied 3. Allowed
120P10-2	State v. Kevin Lewis Jackson	1. Def's *Pro Se* Motion for NOA (COAP11-425) 2. Def's *Pro Se* Motion for PDR	1. Dismissed 2. Dismissed
120P10-3	State v. Kevin Lewis Jackson	1. Def's *Pro Se* Motion for NOA (COA11-748) 2. Def's *Pro Se* Motion for PDR	1. Dismissed 2. Dismissed
125P11	Joseph Michael Griffith v. North Carolina Department of Correction and Alvin W. Keller, Jr.	Plt's *Pro Se* PWC to Review Decision of COA (COA10-1043)	Denied **Jackson, J., Recused**
129P04-4	State v. Carl Edward Lyons	1. Def's *Pro Se* PWC to Review Order of COA (COAP11-397) 2. Def's *Pro Se* Motion for Request for Writ of Supervisory Control 3. Def's *Pro Se* Petition for *Writ of Habeas Corpus*	1. Denied **08/08/11** 2. Dismissed **08/08/11** 3. Denied **08/08/11**

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130P11	State v. Scottie A. Menser	1. Def's NOA Based Upon a Constitutional Question (COA10-424) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Deem Response to PDR Timely Filed 4. State's Motion to Dismiss Appeal	1. —— 2. Denied 3. Allowed 4. Allowed
132P11-4	State v. Gregory Lynn Gordon	Def's Motion to Remove from Office, Willfully, Neglect and Refusing to Discharge any of the Duties of his Office (sic) (COAP11-153)	Dismissed
141P11	State v. Timothy Lamont Uzzelle	Def's PDR Under N.C.G.S. § 7A-31 (COA10-600)	Denied
145P08-2	State v. Thaddius Raefield Wright	1. Def's PDR Under N.C.G.S. § 7A-31 (COA10-794) 2. Def's Motion to Amend PDR	1. Denied 2. Allowed
146P11	In re: Redale Barbour	Plt's *Pro Se* Motion for PDR (COAP11-169)	Dismissed
148PA11	In the Matter of: M.I.W.	1. Respondent Father's PWC to Review Decision of COA (COA10-105) 2. Respondent Father's Motion in the Alternative for Leave to File *Amicus* Brief	1. Allowed **07/18/11** 2. Dismissed as Moot **07/18/11**
158P11	Joseph Michael Griffith v. N.C. Dept. of Correction, Theodis Beck, and Boyd Bennett	1. Plt's *Pro Se* NOA Based Upon a Constitutional Question (COA10-1157) 2. Plt's *Pro Se* PDR Under N.C.G.S. § 7A-31 3. Def's Motion to Dismiss Appeal	1. —— 2. Denied 3. Allowed **Jackson, J., Recused**
162P11	Lazona Gale Spears, Employee, v. Betsy Johnson Memorial Hospital, Employer, N.C. Guaranty Association, Successor to Reliance Insurance Company, Carrier	1. Plt's *Pro Se* Motion for Rehearing Conference of Denial of PDR 2. Def's Motion for Sanctions	1. Denied 2. Denied
164P11	State v. Gary Lamont Hayes, II	Def's PDR Under N.C.G.S. § 7A-31 (COA10-656)	Denied

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169P11	Hest Technologies, Inc. and International Internet Technologies, LLC v. State of North Carolina, *ex rel.*; Beverly Perdue, in her official capacity; N.C. Dept. of Crime Control and Public Safety; Secretary of Crime Control and Public Safety Reuben Young, in his official capacity, Alcohol Law Enforcement Division; Director of Alcohol Law Enforcement Division John Ledford, in his official capacity	1. Def's PDR Prior to Determination by COA 2. Plt's Cross-PDR Prior to Determination by COA	1. Denied **06/15/11** 2. Denied **06/28/11**
170P11	Sandhill Amusements, Inc.; Carolina Industrial Supplies; J&F Amusements, Inc.; J&J Vending, Inc.; Matthews Vending Co.; Patton Brothers, Inc.; Trent Brothers Music Co.; S&S Music Co., Inc.; and Old North State Amusements, Inc. v. State of North Carolina; Governor Beverly Perdue, in her official capacity; North Carolina Dept. of Crime Control and Public Safety; Secretary of Crime Control and Public Safety Bryan E. Beatty, in his official capacity; Alcohol Law Enforcement Division; Director of Alcohol Law Enforcement Division William Chandler, in his official capacity	Defs' PDR Under N.C.G.S. § 7A-31 Prior to Determination by COA	Denied

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172P11	State v. Kelvin Errol Smith	Def's PDR Under N.C.G.S. § 7A-31 (COA10-998)	Denied
173P11	State v. Monty Wood Poteat	Def's PDR Under N.C.G.S. § 7A-31 (COA10-934)	Denied
174P08-2	City of Asheville, a North Carolina Municipal Corporation v. Gabriel Adrian Ferrari and Livia Ferrari	Def's *Pro Se* Motion for Appeal for Restoration of Justice in this Case	Dismissed
174P11	State v. Cesar Adrian Flores-Chavez	Def's *Pro Se* PWC to Review Decision of COA (COA05-1222)	Dismissed **Hudson, J., Recused**
176P11	State v. Floyd Calvin Cody	Def's PDR Under N.C.G.S. § 7A-31 (COA10-961)	Denied
178P06-2	State v. Anthony Devon Herring	1. Def's *Pro Se* PWC to Review Order of Superior Court of Wake County 2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis* 3. Def's *Pro Se* Motion to Appoint Counsel	1. Dismissed 2. Allowed 3. Dismissed as Moot
181P11	State v. Bobby Ray Bordeaux, Jr.	1. Def's NOA Based Upon a Constitutional Question (COA10-712) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. —— 2. Denied 3. Allowed
183P11	State v. Christopher James Woodard	Def's PDR Under N.C.G.S. § 7A-31 (COA10-1172)	Allowed per Special Order Page 327: "Did the Trial Court Commit Reversible Error by Holding Def's trial with Defendant Clothed in Prison Garb?"
184P11	Ronnie N. Mungo-Bey v. Sheriff Chip Bailey, et al.	1. Plt's *Pro Se* Motion for NOA (COAP11-374) 2. Plt's *Pro Se* PDR Under N.C.G.S. § 7A-31 3. Plt's *Pro Se* Motion to Proceed *In Forma Pauperis*	1. Dismissed 2. Dismissed 3. Allowed

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190A09	In the Matter of: J.D.B.	Juvenile-Appellant's Motion to Set Briefing Schedule	Dismissed as Moot per Special Order Page 323
191P11	State v. Robert Frank Debiase	1. State's Motion for Temporary Stay (COA10-113) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **05/23/11**; Dissolved the Stay **08/25/11** 2. Denied 3. Denied
193P11	State v. Edwin Pagan	Def's *Pro Se* PWC to Review Order of COA (COAP09-873)	Dismissed
194P11	Thomas M. Urquhart, Jr., Administrator of the Estate of Betsy Allen Derr Urquhart, Deceased v. East Carolina School of Medicine	Plt's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA10-1255)	Denied
195P11	State v. Samuel Kris Hunt	1. State's Motion for Temporary Stay (COA10-666) 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 **05/24/11** 2. Allowed 3. Allowed 4. Denied
196P11	Gary Lawrence Walker v. Town of Stoneville, North Carolina	1. Def's PDR Under N.C.G.S. § 7A-31 (COA10-278) 2. Def's Motion to Voluntarily Withdraw PDR	1. —— 2. Allowed
197P11	State v. Sara Marie Singleton and Latesha Joy Fuller	Def's (Singleton) PDR Under N.C.G.S. § 7A-31 (COA10-1010)	Denied

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

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200P11	State v. Elder G. Cortez and Richard L. Lowry, Larry D. Atkinson, and Tony L. Barnes, Sureties	1. Sureties' Motion for Temporary Stay (COA10-474) 2. Sureties' Petition for *Writ of Supersedeas* 3. Sureties' PDR Under N.C.G.S. § 7A-31 4. Sureties' PWC to Review Decision of COA 5. Sureties' Motion to Amend PDR 6. Sureties' Motion to Amend PWC to Review Decision of COA	1. Allowed **05/26/11**; Dissolved the Stay **06/15/11** 2. Denied **06/15/11** 3. Denied **06/15/11** 4. Denied **06/15/11** 5. Dismissed as Moot 6. Dismissed as Moot
201P11	State v. Rono Darnell Dunn	Def's PDR Under N.C.G.S. § 7A-31 (COA10-543)	Denied
202P11	Terry Cawthorn, Employee v. Mission Hospital, Inc., Self-Insured Employer	1. Def's Motion for Temporary Stay (COA10-748) 2. Def's Petition for *Writ of Supersedeas* 3. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed **05/25/11**; Dissolved the Stay **08/25/11** 2. Denied 3. Denied
203P11	Kenneth Heatherly, Employee v. The Hollingsworth Company, Inc., Employer and Stonewood Insurance Company, Carrier	1. Defs' Motion for Temporary Stay (COA10-994) 2. Defs' Petition for *Writ of Supersedeas* 3. Defs' PDR Under N.C.G.S. § 7A-31	1. Allowed **05/25/11**; Dissolved the Stay **08/22/11** 2. Denied **08/22/11** 3. Denied **08/22/11**
204P11	Wendy Shackleton, as the Executrix of the Estate of Brenda P. Gainey, Deceased, and as the Executrix of the Estate of Leward Benmack Gainey, Deceased v. Southern Flooring & Acoustical Company, Employer and USF&G Kemper Insurance Company, Carrier	Defs' PDR Under N.C.G.S. § 7A-31 (COA10-734)	Denied

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206P11	In the Matter of the Estate of Daisy L. Militana, Deceased	Caveator's PDR Under N.C.G.S. § 7A-31 (COA10-880)	Denied
210P11	Kizzy L. Hunter v. R. Steve Bowden and Lawyers Mutual Liability Insurance Kizzy L. Hunter v. Jarvis T. Harris and Lawyers Mutual Liability Insurance	Plt's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA10-1391) (COA10-1392)	Denied **Jackson, J., Recused**
211P11	State v. Terry J. Burgess, aka Terry Joel Cooper Burgess	Def's PWC to Review Decision of COA (COA05-1529)	Denied
212P11	State v. Truevillon White	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA10-949)	Denied
215P11-2	Alfonzo Meeks v. N.C. Dept. of Correction, et al.	Plt's *Pro Se* Motion of Appeal from Motion *Ex Mero Motu* (COAP11-360)	Dismissed
215P11-3	Alfonzo Meeks v. N.C. Dept. of Correction, et al.	Plt's *Pro Se* Motion to Transfer of a Cause (COAP11-360)	Dismissed
217P11	State v. John Roscoe Nolen	1. Def's Petition for *Writ of Supersedeas* (COA10-518) 2. Def's PWC to Review Decision of COA	1. Denied 2. Denied
218A11	State v. Henry Eugene Brown	1. Def's NOA (Dissent) (COA09-1693) 2. Def's PDR Under N.C.G.S. § 7A-31	1. — 2. Allowed
219P11	Jacqueline Reid, Employee v. Hospira, Inc., Employer, Self-Insured, Gallagher Bassett Services, Inc., Administrator	Plt's PWC to Review Decision of COA (COA10-895)	Denied
220P11	State v. Christopher Dennie Ellerbe	Def's *Pro Se* PWC to Review the Decision of COA (COA09-729)	Dismissed
221P11	State v. Vincente Aviles-Negron	Def's *Pro Se* Motion for NOA (COAP11-362)	Dismissed

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222P11	Matthew Douglas Stinchcomb v. Presbyterian Medical Care Corp., The Presbyterian Orthopaedic Hospital, LLC, Novant Health, Inc., Novant Health Southern Piedmont Region, LLC, Orthocarolina, P.A., Charlotte Orthopedic Specialists, P.A., Craig D. Brigham, M.D., Lorraine Williams, L.P.N., Tonya Davis, R.N., Kittisha a/k/a Kitty Mills, R.N., Page Landrum, R.N., Kathryn Baxter, R.N., and Maura Huffman, R.N.	Plt's PDR Under N.C.G.S. § 7A-31 (COA10-478, COA10-843)	Denied
223P11	State v. Leonard Anthony Camarata	Def's PDR Under N.C.G.S. § 7A-31 (COA10-853)	Denied
224A11	State v. Curtis Edwin Leyshon	1. Def's *Pro Se* NOA Based Upon a Constitutional Question (COA10-1144) 2. State's Motion to Dismiss Appeal	1. —— 2. Allowed
226P11	Eddie L. Holden, Employee v. Brickey Acoustical, Inc., Employer, and State Farm Fire and Casualty Company, Carrier	Plt's PDR Under N.C.G.S. § 7A-31 (COA10-901)	Denied
228P11	State v. Debra Madeo Clark	Def's PDR Under N.C.G.S. § 7A-31 (COA10-980)	Denied
229P06-4	State v. Robert Wayne Smith	Def's *Pro Se* Petition for *Writ of Mandamus*	Denied
230P11	State v. Darryl Wilkes	Def's PDR Under N.C.G.S. § 7A-31 (COA10-765)	Denied
232P11	State v. Don Stevenson Wallace	Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA (COAP11-396)	Denied
233P11	Ryan E. Huston v. Klaryssa L. Huston	Def's PDR Under N.C.G.S. § 7A-31 (COA10-941)	Denied

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234P11	State v. Deangelo Donnell Jacobs	Def's PWC to Review Decision of COA (COA10-416)	Denied **Jackson, J., Recused**
235P11	In the Matter of: J.R.V.	Respondent's PDR Under N.C.G.S. § 7A-31 (COA10-1116)	Allowed
236P11	State v. Walton Gillikin, Sr.	Def's PDR Under N.C.G.S. § 7A-31 (COA10-1226)	Denied
238P11	State v. O'Marr S. Reid	1. Def's *Pro Se* Motion for NOA (COAP11-130, P11-525) 2. Def's *Pro Se* Motion for Petition for Collateral Discretionary Review 3. Def's *Pro Se* Motion for Petition to Appeal as Indigent	1. Dismissed 2. Dismissed 3. Allowed **Hudson, J., Recused**
239P11	State v. Jesus Alcocer Rangel	Def's *Pro Se* Motion for PDR (COAP10-640)	Dismissed
240P11	State v. Michael Angelo Smith	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA10-1131)	Denied
241P09-2	State v. William Edward McKoy	1. Def's *Pro Se* PWC to Review the Order of Wake County Superior Court 2. Def's *Pro Se* Motion for Review of Direct Appeal 3. Def's *Pro Se* Motion to Proceed *In Forma Pauperis* 4. Def's *Pro Se* Motion to Appoint Counsel	1. Dismissed 2. Dismissed 3. Allowed 4. Dismissed as Moot **Jackson, J., Recused**
243P11	State v. Preston Maurice McCrimmon	Def's PDR Under N.C.G.S. § 7A-31 (COA10-494)	Denied
244P11	State v. Bruce Lamont Gorham	Def's PDR Under N.C.G.S. § 7A-31 (COA10-673)	Denied
245P11	State v. Michael Chad Deaton	Def's PDR Under N.C.G.S. § 7A-31 (COA10-1079)	Denied
247P11	State v. Arnold Arnaz Johnson	Def's *Pro Se* PDR Under N.C.G.S. § 7A-15 (COA10-642)	Denied
248P11	State v. Kenneth Mark Hartley	Def's PDR Under N.C.G.S. § 7A-31 (COA10-964)	Denied

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249P11	State v. Bobby R. Grady	Def's *Pro Se* Petition for *Writ of Mandamus*	Dismissed
250P08-4	State v. Gregory Robinson, Jr.	1. Def's *Pro Se* Motion for NOA (COAP10-142) 2. Def's *Pro Se* PWC to Review Order of NOA	1. Dismissed 2. Denied
250P11	State v. Larry Dean Lowry	1. Def's *Pro Se* PWC to Review Decision of COA (COA10-165) 2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis*	1. Denied 2. Allowed **Jackson, J., Recused**
251P11	State v. Jackie Sanders	Def's *Pro Se* Motion for PDR (COAP11-326)	Dismissed
252P11	State v. Jasen Derrick Johnson	Def's *Pro Se* PWC to Review Order of COA (COAP11-344)	Dismissed
253P11	Earl J. Smith v. TD Ameritrade, Inc., Brian Fehr, and Donna Givner	Plt's PDR Under N.C.G.S. § 7A-31 (COA10-1221)	Denied
254P11	Wake Radiology Services, LLC, d/b/a/ Wake Radiology Northwest Raleigh Office v. North Carolina Department of Health and Human Services, Division of Health Service Regulation, Certificate of Need Section and Pinnacle Health Services of N.C., LLC, d/b/a/ Raleigh Radiology at Cedarhurst, Intervenor	Plt's PDR Under N.C.G.S. § 7A-31 (COA10-933)	Denied
255P11	State v. William Damian Scott	Def's PDR Under N.C.G.S. § 7A-31 (COA10-780)	Denied
257P11	State v. Rodney Lloyd Parker	1. Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA10-1015) 2. Def's *Pro Se* Motion to Appoint Counsel	1. Denied 2. Dismissed as Moot

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261A11	Roger Stevenson v. North Carolina Department of Correction	1. Plt's *Pro Se* NOA Based Upon a Constitutional Question 2. State's Motion to Dismiss Appeal	1. —— 2. Allowed **Jackson, J., Recused**
264P11	State v. Raquon Laricky Crawford	Def's PWC to Review Order of COA (COA11-397)	Denied
265P11	State v. Malik Alijuan Crawford	1. Def's *Pro Se* NOA (COAP11-406) 2. Def's *Pro Se* Motion for Enlargement of Time	1. Dismissed 2. Dismissed as Moot
266P11	Douglas Lee Husketh, Jr. v. N.C. Department of Correction	Def's *Pro Se* PWC to Review the Order of COA (COAP11-48)	Denied
269P11	Variety Wholesalers, Inc. v. Salem Logistics Traffic Services, LLC, Salem Logistics, Inc, Salem Logistics Transport Services, LLC, Winston Transportation Management, LLC, Overbrook Leasing, LLC, Salem Logistics Transport Finance, LLC, David E. Eshelman, and Ark Royal Capital, LLC	1. Plt's Motion for Temporary Stay (COA10-1285) 2. Plt's Petition for *Writ of Supersedeas* 3. Plt's PDR Under N.C.G.S. § 7A-31 4. Def's (Ark Royal Capital, LLC) Motion to Reconsider Motion for Temporary Stay and Petition for *Writ of Supersedeas*	1. Allowed **07/1/11** 2. Allowed 3. Allowed 4. Denied
270P11	State v. Carl Davis Vaughn	1. Def's *Pro Se* PWC to Review Order of COA (COAP11-317) 2. Def's *Pro Se* Motion for Relief Under the *All Writs* Act	1. Dismissed 2. Denied
271P11	State v. Kelvin Washington	1. Def's *Pro Se* Motion for PDR Under N.C.G.S. § 7A-31 (COAP11-452) 2. Def's *Pro Se* Motion to Appoint Counsel	1. Dismissed 2. Dismissed as Moot
272P11	State v. Kenneth W. Ray	1. Def's *Pro Se* PWC to Review the Order of COA (COAP11-175) 2. Def's *Pro Se* Motion to Appoint Counsel	1. Dismissed 2. Dismissed as Moot

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273P11	State v. Anthony Junior Barnhill	1. Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA10-1000) 2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis*	1. Denied 2. Allowed
274P11	State v. Jorge Galeas, Jr.	Defs' *Pro Se* Motion for PDR (COAP11-423)	Dismissed
276P11	State v. Michael Earl Rogers-Bey	Def's *Pro Se* Petition for *Writ of Mandamus*	Denied **07/07/11**
277P11	State v. Kenneth Graham Stanley	1. Def's *Pro Se* Motion for PDR (COA09-958) 2. Def's *Pro Se* Motion to Appoint Counsel	1. Denied 2.Dismissed as Moot
278P11	Clorey Eugene France v. Det. Sgt. Kevin Pfister, Cabarrus County Sheriff's Department, and The County of Cabarrus	1. Plt's *Pro Se* Motion for Arrest in Judgment and Review of Order of Dismissal (COAP11-552) 2. Plt's *Pro Se* Motion to Proceed *In Forma Pauperis*	1. Denied 2. Allowed
279P11	State v. Aeric L. Whitehead, aka Eric Lamont Whitehead	1. State's Motion for Temporary Stay 2. State's Petition for *Writ of Supersedeas*	1. Allowed **07/11/11** 2.
280P11	State v. Luis Berber Martinez	1. State's Motion for Temporary Stay (COA10-885) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **07/11/11** 2. 3.
281P11	State v. Christon Eugene Tucker	Def's PDR Under N.C.G.S. § 7A-31 (COA10-938)	Denied
283P11	In the Matter of: P.D.R., L.S.R., J.K.R., Minor Children	1. Petitioner's PDR Under N.C.G.S. § 7A-31 (COA10-1519) 2. Respondent-Mother's Conditional PDR Under N.C.G.S. § 7A-31	1. Allowed 2. Allowed
288P11	State v. Barry Eugene Taylor	Def's PDR Under N.C.G.S. § 7A-31 (COA10-551)	Denied
290P11	State v. Isaac Hutchinson Birch	1. Def's *Pro Se* Motion for NOA (COA11-299) 2. State's Motion to Dismiss Appeal	1. —— 2. Allowed

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291P08-2	State v. Bryan Steven Myers	Def's *Pro Se* PWC to Review Order of COA (COAP08-394)	Dismissed
292P11	State v. Adrian O'Bryan Sanders	1. Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA10-1289) 2. Def's *Pro Se* Motion to Appoint Counsel	1. Denied 2. Dismissed as Moot
294P11	State v. Derald Dean Hafner	Def's *Pro Se* Motion for Petition for *Writ of Error Coram Vobis*	Dismissed
296P11	State v. George Kenneth Folk	1. Def's NOA Based Upon a Constitutional Question (COA10-769) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. —— 2. Denied 3. Allowed
297P11	State v. Harvey Oates	Def's *Pro Se* Petition for *Writ of Mandamus*	Denied
298P11	State v. Melvin Gene Ferguson, Jr.	1. Def's NOA Based Upon a Constitutional Question (COA09-1507) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. —— 2. Denied 3. Allowed
299P10-2	State v. Michael Wayne Mabe	1. Def's *Pro Se* Motion for Request for Review of Constitutional Issues (COAP11-199) 2. Def's *Pro Se* PWC to Review Order of COA	1. Dismissed 2. Dismissed **Jackson, J., Recused**
304P11	State v. James Anderson-El	Def's *Pro Se* Petition for *Writ of Mandamus* or Prohibition	Denied
311A11	State v. Patrick Jerome Blue	1. Def's NOA Based Upon a Constitutional Question (COA10-1100) 2. State's Motion to Dismiss Appeal	1. —— 2. Allowed
312P11	State v. Damien Kaseem Stanford	1. Def's NOA Based Upon a Constitutional Question (COA10-1506) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. —— 2. Denied 3. Allowed
313P11	State v. Michael Christopher Thompson	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA10-1376)	Denied

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314P11	Kane Snyder v. Alaina Levane Giordano	1. Def's Motion for Temporary Stay (COAP11-520) 2. Def's Petition for *Writ of Supersedeas*	1. Allowed **07/27/11**; Dissolved the Stay **08/04/11** 2. Denied **08/04/11**
317P11	Gaines and Company, Inc. v. Wendell Falls Residential, LLC, Wake County, a Subdivision of the State of North Carolina, and Wake County Board of Education	Plt's PDR Under N.C.G.S. § 7A-31 (COA10-760)	Denied
318P11	State v. Raphael M. Rogers	Def's *Pro Se* Petition for *Writ of Habeas Corpus* (COAP11-624)	Denied **07/29/11**
319P11	John Edward Kuplen v. John C. Martin, in his capacity as Chief Judge of N.C. Court of Appeals, and John Connell, in his capacity as Clerk of N.C. Court of Appeals	Petitioner's *Pro Se* Petition for *Writ of Mandamus*	Denied
323A92-6	State v. Charles Alonzo Tunstall-Bey	Def's *Pro Se* Motion for NOA	Dismissed
324P11	State v. Mark Daniel Stephens	Def's *Pro Se* Petition for *Habeas Corpus* (COAP10-663)	Denied **08/02/11**
327P11	State v. Travis O'Brian Black	Def's *Pro Se* Motion for Appropriate Relief (COA09-351)	Dismissed **Jackson, J., Recused**
329P11	State v. Mario Eduardo Ortiz-Zape	1. State's Motion for Temporary Stay (COA10-1307) 2. State's Petition for *Writ of Supersedeas* 3. State's NOA Based Upon a Constitutional Question 4. State's Petition in the Alternative for Discretionary Review Under N.C.G.S. § 7A-31	1. Allowed **08/03/11** 2. 3. 4.

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332A11	In the Matter of: T.A.S.	1. Petitioner's (State of N.C.) Motion for Temporary Stay (COA10-275) 2. Petitioner's (State of N.C.) Petition for *Writ of Supersedeas*	1. Allowed **08/08/11** 2. Allowed **08/08/11**
345P11	State v. Darnell Queen-Bey	Def's *Pro Se* Motion for Request for Review by the Supreme Court (COAP11-458)	Dismissed
351P11	Sandra Yost, as Trustee and Beneficiary of the Research Center Trust and Catherine Caldwell, Vickie King, and Leslee Kulba, as Trustees of the Research Center Trust; Dynamic Systems, Inc., Intervenor, v. Robin Yost and Susan Yost, Individually and in their capacities as Trustees and Trust Protectors of the Research Center Trust	1. Plts' Motion for Temporary Stay (COA10-957) 2. Plts' Petition for *Writ of Supersedeas*	1. Allowed **08/19/11** 2.
354P11	State v. Bryant Lamont Boyd	1. State's Motion for Temporary Stay (COA10-1072) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **08/22/11** 2. 3.
381P00-3	State v. Jerold Alan Harris	Def's *Pro Se* PWC to Review Order of COA (COAP11-403)	Dismissed
405P06-2	Pam Gentry, Administratrix of the Estate of Joey Michael Quesenberry v. Big Creek Underground Utilities, Inc. and Isurity, Inc.	Plt's PDR Under N.C.G.S. § 7A-31 (COA10-550)	Denied
412A93-5	State v. Johnny Ray Daughtry	1. Def's Petition for *Writ of Mandamus* 2. Def's PWC to Review Order of Superior Court of Johnston County	1. Denied 2. Allowed for Limited Purpose of Ordering an Evidentiary Hearing as to MAR2

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439P10	State v. Clifton Lee Starling	1. Def's NOA Based Upon a Constitutional Question (COA09-1703) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. —— 2. Denied 3. Allowed
447A08-2	Andrea Gregory, Employee v. W.A. Brown & Son, Employer, PMA Insurance Co., Carrier	1. Defs' Motion for Temporary Stay (COA10-1521) 2. Defs' Petition for *Writ of Supersedeas* 3. Defs' PDR Under N.C.G.S. § 7A-31	1. Allowed **07/12/11** 2. 3. **Jackson, J., Recused**
479PA10	State v. Elijah Omar Nabors	State's Motion to Substitute Counsel	Allowed **08/22/11**
497P10	State v. Jovar Lamar Ross	Def's PDR Under N.C.G.S. § 7A-31 (COA09-1021)	Denied
509P10	Rose Hunter, Administrator of the Estate of Aundrea Tashae Hunter v. Transylvania County of Social Services; County of Transylvania, North Carolina; D'Andre Curry; Carson Griffin; and Norida Moody	Petitioner's PDR Under N.C.G.S. § 7A-31 (COA10-288)	Denied
565P05-2	State v. Tyrone Maurice Batts	Def's *Pro Se* Motion for Arrested Judgment (COAP07-383)	Dismissed **Jackson, J., Recused**
604P03-2	State v. Robert Allen Sartori	Def's *Pro Se* PWC to Review the Order of the COA (COAP10-839)	Dismissed

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022A02-2	State v. Marcus Douglas Jones	Attorney DeAngelus Motion to Withdraw and Authorize IDS to Appoint Substitute Counsel	Allowed **09/12/11**
033A11	State v. Omar Sidy Mbacke	State's Motion for Supplemental Briefing	Denied **09/12/11**
053P09-2	Carroll Douglas Smith v. Melissa Bernard Smith	Plt's PDR Under N.C.G.S. § 7A-31 (COA10-1420)	Denied **Jackson, J., Recused**
054P11	Ralph Ashley, et al. v. City of Lexington, a North Carolina Municipality	Petitioner-Appellants' PDR Under N.C.G.S. § 7A-31 (COA10-314)	Denied
090P07-2	State v. Lindo Nickerson	1. Def's *Pro Se* Petition for *Writ of Mandamus* 2. Def's *Pro Se* Motion to Appoint Counsel 3. Def's *Pro Se* Motion for Extension of Time	1. Dismissed as Moot 2. Dismissed as Moot 3. Allowed **Jackson, J., Recused**
132P11-5	State v. Gregory Lynn Gordon	1. Def's *Pro Se* Motion for *Writ of Mandamus* and/or Direct Appeal 2. Def's *Pro Se* Petition for *Writ of Habeas Corpus*	1. Denied **09/30/11** 2. Denied **09/30/11**
138P11	Linda S. Lucas v. R.K. Lock & Associates, an Illinois General Partnership dba Credit Collections Defense Network or CCDN; Federal Debt Relief System, a California General Partnership; Robert K. Lock, Esq.; Colleen Lock; Philip M. Manger, Esq.; and Mark A. Cella	Plt's PDR Under N.C.G.S. § 7A-31 (COA10-874)	Denied

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139P11	William G. Harrison, Sr., for Himself and On Behalf of All Others Similarly Situated v. Aegis Corporation, a Missouri Corporation; Debt Jurisprudence, Inc., a Missouri Corporation; R.K. Lock & Associates, an Illinois General Partnership dba Credit Collections Defense Network or CCDN; Robert K. Lock, Esq.; Colleen Lock; Philip M. Manger, Esq.; M. David Kramer; Marcia M. Murphy; and Tracy Webster	Plt's PDR Under N.C.G.S. § 7A-31 (COA10-875)	Denied
140P11	Cathy Horton Hunt v. R.K. Lock & Associates, an Illinois General Partnership dba Credit Collections Defense Network or CCDN; Robert K. Lock, Esq.; Colleen Lock; Philip M. Manger, Esq.; Tracy Webster; and Lawgistix, LLC, a Florida Limited Liability Company	Plt's PDR Under N.C.G.S. § 7A-31 (COA10-891)	Denied
153P11	CRLP Durham, LP v. Durham City/County Board of Adjustment and Ellis Road, LLC	Plt's PDR Under N.C.G.S. § 7A-31 (COA10-120)	Denied
185P11-2	State v. Ronnie Oliver	Def's *Pro Se* Motion to Request Production of Finding of Facts and Conclusions of Law—Response (COA10-431)	Dismissed

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225P11	Latrecia Treadway v. Susanna Krammer Diez; Gene Lummus; Gene Lummus Harley Davidson, Inc.; Mike Calloway, individually, and officially; John Doe, individually and officially; County of Buncombe; Buncombe County Sheriff's Department Hulin K. Treadway v. Susanna Krammer Diez; Gene Lummus; Gene Lummus Harley Davidson, Inc.; Mike Calloway, individually, and officially; John Doe, individually and officially; County of Buncombe; Buncombe County Sheriff's Department	Plts' PDR Under N.C.G.S. § 7A-31 (COA10-887)	Denied **Jackson, J., Recused**
227P11	Gerharda H. Sanchez v. Town of Beaufort, Beaufort Board of Adjustment, Beaufort Historic Preservation Commission, and Douglas E. Smith	1. Petitioner's PDR Under N.C.G.S. § 7A-31 (COA10-750) 2. Respondent's (Douglas E. Smith) Conditional PDR Under N.C.G.S. § 7A-31 3. Respondent's (Town of Beaufort) Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 2. Dismissed as Moot 3. Dismissed as Moot
237P11	State v. George Junior Hayden	1. State's Motion for Temporary Stay (COA10-1306) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR 4. Def's Motion for Reconsideration (COA10-1306) 5. Def's Motion in the Alternative to Expedite Review (COA10-1306)	1. Allowed **06/14/11**; Dissolved the Stay **10/06/11** 2. Denied 3. Denied 4. Denied **06/20/11** 5. Dismissed as Moot

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241P11	State v. Delton Maynor	1. Def's NOA Based Upon a Constitutional Question (COA10-945) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. —— 2. Denied 3. Allowed
242P07-2	State v. Yilien Osnarque	Def's *Pro Se* Motion for Alternative *Writ* (COAP10-684)	Denied
246P11	In the Matter of: C.L.C.	Respondent-Father's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COAP10-1396)	Denied
256P11	State v. Wendell Dontay Herron	1. Def's PDR Under N.C.G.S. § 7A-31 (COA10-1360) 2. Def's Motion for Temporary Stay 3. Def's Petition for *Writ of Supersedeas*	1. Denied 2. Allowed **06/27/11**; Dissolved the Stay **10/06/11** 3. Denied
259P11	State v. Emmanuel Ngene	1. Def's PDR Under N.C.G.S. § 7A-31 (COA10-546) 2. State's Motion to Deem Response Timely Filed	1. Denied 2. Allowed
263P11	State v. Tracy Keith Riddick	1. Def's NOA Based Upon a Constitutional Question (COA10-1448) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. —— 2. Denied 3. Allowed
279P11	State v. Aeric L. Whitehead, aka Eric Lamont Whitehead	1. State's Motion for Temporary Stay 2. State's Petition for *Writ of Supersedeas* 3. State's PWC to Review the Order of the Superior Court of Nash County	1. Allowed **07/11/11** 2. Allowed—See Special Order Page 325 3. Allowed—See Special Order Page 325
286P11	State v. John House	State's PDR Under N.C.G.S. § 7A-31 (COA10-1071)	Denied
291P11	State v. David Morris Souther	1. Def's PDR Under N.C.G.S. § 7A-31 (COA10-1235) 2. State's Motion to Dismiss Appeal	1. Denied 2. Dismissed as Moot
293P11	State v. Reginald Lewis Pratt	Def's PDR Under N.C.G.S. § 7A-31 (COA10-1583)	Denied

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295P11	State v. Keith Antione Carter	1. Def's NOA Based Upon a Constitutional Question (COA10-974) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss	1. —— 2. Denied 3. Allowed
301A11	State v. Tony Allen Herrin	1. Def's NOA Based Upon a Constitutional Question (COA10-1446) 2. State's Motion to Dismiss Appeal	1. —— 2. Allowed
302P11	State v. Nicolas Edward Tucci-Casselli	1. Def's NOA Based Upon a Constitutional Question (COA10-825) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. —— 2. Denied 3. Allowed
306P11	State v. Michael Lee Wright, Jr.	Def's PDR Under N.C.G.S. § 7A-31 (COA10-1251)	Denied
315P11	In the Matter of the Foreclosure of the Deed of Trust of Ormsby King Hackley, III, Grantor	1. Respondent's PDR Under N.C.G.S. § 7A-31 (COA10-757) 2. Petitioner's Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 2. Dismissed as Moot
316P11	John Thompson, Employee v. STS Holdings, Inc., Employer and Wausau Insurance Companies, Carrier	Plt's PDR Under N.C.G.S. § 7A-31 (COA10-581)	Denied
320P11	Mary Gray, Widow of David D. Gray, Deceased Employee v. United Parcel Service, Inc., Employer, Liberty Mutual Insurance Company, Carrier	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA10-754) 2. Plt's PWC to Review Decision of COA	1. Denied 2. Denied
323A92-7	State v. Charles Alonzo Tunstall-Bey	Def's Motion for NOA Pursuant to N.C.G.S. § 7A-30 (1)	Dismissed
325P11	State v. Terry Adonis Baldwin	1. Def's NOA Based Upon a Constitutional Question (COA10-1373) 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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326P11	State v. Antonio Medrano Ortiz	1. Def's *Pro Se* PWC to Review Order of COA (COAP11-431) 2. Def's *Pro Se* Motion for PDR Under N.C.G.S. § 7A-31	1. Dismissed 2. Dismissed
327PA10	State v. Robert Lee Pastuer	Def-Appellee's Motion to Take Judicial Notice of Map	Denied **09/06/11**
333P11	State v. Robert Lee Earl Joe	State's PDR Under N.C.G.S. § 7A-31 (COA10-1037)	Allowed
336P11	State v. John Thomas Nackab	1. Def's NOA Based Upon a Constitutional Question (COA10-1444) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. —— 2. Denied 3. Allowed
337P11	Demetrius Antwan Johnson v. Sherry Sheron Johnson	Def's PDR Under N.C.G.S. § 7A-31 (COA11-41)	Denied
338P11	State v. Luis Castellanos Gomez	Def's *Pro Se* Motion for PDR (COA10-151)	Denied
339P11	Debra McKoy, as Administratrix of the Estate of Arthur G. McKoy, deceased v. Charles R. Beasley, M.D., and The Lumberton Medical Clinic, P.A.	1. Plt's NOA Based Upon a Constitutional Question (COA09-1315) 2. Plt's PDR Under N.C.G.S. § 7A-31	1. Dismissed *Ex Mero Motu* 2. Denied **Hudson, J., Recused**
340P11	State v. Jimmy Wayne Banks	Def's PDR Under N.C.G.S. § 7A-31 (COA10-935)	Denied
342A11	State v. Adrian Dominique Bratton	1. Def's NOA Based Upon a Constitutional Question (COA10-1431) 2. State's Motion to Dismiss Appeal	1. —— 2. Allowed
348P11	In the Matter of: Jeremy M. Smith v. Lafayette Hall, et al.	Plt's *Pro Se* Motion for Presentment/Notice of Dishonor/Protest Under Section 3-501 [1] of the Uniform Commercial Code	Dismissed
350P11	State v. Victor Lee Turner	1. Def's *Pro Se* PWC to Review Order of Superior Court of Gaston County 2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis*	1. Dismissed 2. Allowed

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351P11	Sandra Yost, as Trustee and Beneficiary of the Research Center Trust and Catherine Caldwell, Vickie King, and Leslee Kulba, as Trustees of the Research Center Trust; Dynamic Systems, Inc., Intervenor, v. Robin Yost and Susan Yost, Individually and in their capacities as Trustees and Trust Protectors of the Research Center Trust	1. Plts' Motion for Temporary Stay (COA10-957) 2. Plts' Petition for *Writ of Supersedeas* 3. Plts' PDR Under N.C.G.S. § 7A-31 4. Plts' and Intervenor-Plaintiff's Motion to Amend Petition for *Writ of Supersedeas*	1. Allowed **08/19/11**; Dissolved the Stay **10/06/11** 2. Denied 3. Denied 4. Allowed
353P11	State v. Thomas Cleveland Trammell	1. Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA10-1606) 2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis*	1. Denied 2. Allowed
359P11	Bobby E. McKinnon v. CV Industries, Inc.	Plt's PDR Under N.C.G.S. § 7A-31 (COA10-1105)	Denied
360P11	State v. Toby Leonard	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA10-1387)	Denied
362P11	Jimmy Harston v. Lyndo Tippett, N.C. Secretary of Transportation	Petitioner's PDR Under N.C.G.S. § 7A-31 (COA10-840)	Denied
367P11	Nanette Herbert, Administrator of the Estate of Shirley L. Sykes v. Kay Harrison Marcaccio and John Douglas Marcaccio	Plt's PDR Under N.C.G.S. § 7A-31 (COA10-876)	Denied
370P11	State v. Michael Levonne Grier	Def's PDR Under N.C.G.S. § 7A-31 (COA10-1267)	Denied
371A11	State v. Kim Antonio Griffin	1. Def's *Pro Se* NOA Based Upon a Constitutional Question (COA10-1274) 2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis* 3. Def's *Pro Se* Motion to Appoint Counsel	1. Dismissed *Ex Mero Motu* 2. Allowed 3. Dismissed as Moot

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372P11	Michael Moorefield Architects, PC v. Carvin Stevens	Def's *Pro Se* PWC to Review Order of Superior Court of New Hanover County	Dismissed
373P11	Tamida Wynn, Employee v. United Health Services / Two Rivers Health-Trent Campus, Employer and The Phoenix Insurance Company, Carrier	Defs' Motion for Temporary Stay (COA10-991)	Allowed **09/02/11**
375P11	State v. Lee Centelle Richardson	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA10-1575)	Denied
388P11	State v. James Charles Woodard	Def's PDR Under N.C.G.S. § 7A-31 (COA10-1078)	Denied
392P11	State v. David A. Bowie	Def's *Pro Se* Petition for *Writ of Habeas Corpus*	Denied **09/12/11**
393P11	State v. David Dale Ramey	1. Def's NOA Based Upon a Constitutional Question (COA10-1197) 2. Def's PDR Under N.C.G.S. § 7A-31 3. Def's Motion to Appoint Counsel	1. Dismissed *Ex Mero Motu* 2. Denied 3. Dismissed as Moot
399P11	State v. Nathaniel Goode	1. Def's *Pro Se* PWC to Review Order of COA (COAP10-635) 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
400P09-2	State v. Juan Cabrera Flores	Def's *Pro Se* PWC to Review Order of Superior Court of Wake County	Dismissed
404P11	State v. Raymundo Antonia Castaneda	1. Def's NOA Based Upon a Constitutional Question (COA11-7) 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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408P11	James Pressley Torrence, Sr., Employee v. Aeroquip n.k.a. Eaton Corp., Employer, Self-Insured (Sedgwick CMS, Third-Party Administrator)	Defs' Motion for Temporary Stay (COA10-1279)	Allowed **09/20/11**
415P11	Correna C. Howe v. Bradley Earl Howe	1. Def's *Pro Se* NOA Based Upon a Constitutional Question (COA10-1230) 2. Def's *Pro Se* PDR Under N.C.G.S. § 7A-31	1. Dismissed *Ex Mero Motu* 2. Denied
466P04-2	State v. Michael Oren Davis	Def's *Pro Se* PWC to Review the Order of COA (COAP11-262)	Dismissed
581P04-5	State v. Darrick Lamont King	1. Def's *Pro Se* Motion for NOA (COAP11-724) 2. Def's *Pro Se* Motion for Relief From Judgment (COAP11-724)	1. Dismissed *Ex Mero Motu* 2. Dismissed

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034P08-5	Alfred Abdo, Jr., and Abdo Demolition & Property Restoration v. M.B. Kahn Construction Co., St. Paul Surety and St. Paul Fire & Marine Insurance Co.	1. Plt's *Pro Se* Petition for *Writ of Mandamus* 2. Motion for Response in Opposition to Defendant-Appellee's Response to Plt's Petition for *Writ of Mandamus*	1. Denied 2. Denied
038P10-2	John Fletcher Church v. Jean Marie Church (now Decker)	Plt's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA10-993)	Denied
038P10-3	John Fletcher Church v. Jean Marie Decker (formerly Church)	1. Plt's *Pro Se* NOA Based Upon a Constitutional Question (COA10-1422, 10-1502) 2. Def's Motion to Dismiss Appeal	1. —— 2. Allowed
090P07-3	State v. Lindo Nickerson	1. Def's *Pro Se* Motion for NOA (COAP09-825) 2. Def's *Pro Se* PWC to Review the Order of the COA 3. Def's *Pro Se* Motion to Proceed *In Forma Pauperis* 4. Def's *Pro Se* Motion to Appoint Counsel	1. Dismissed *Ex Mero Motu* 2. Dismissed 3. Allowed 4. Dismissed as Moot **Jackson, J., Recused**
168P09-7	State v. Clyde Kirby Whitley	1. Def's *Pro Se* Motion for NOA (COAP11-794) 2. Def's *Pro Se* PWC to Review Order of COA 3. Def's *Pro Se* Motion to Proceed *In Forma Pauperis* 4. Def's *Pro Se* Motion to Appoint Counsel	1. Dismissed *Ex Mero Motu* 2. Dismissed 3. Allowed 4. Dismissed as Moot
192P11	Sana Kindley Watson v. Kenneth Price, M.D. and Regional Neurosurgery PLLC	Plt's PDR Under N.C.G.S. § 7A-31 (COA10-1112)	Denied

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199P11	Constandinos Pete Nikopoulos v. Ted Michael Haigler and City of Locust, a North Carolina Municipal Corporation	Plt's PDR Under N.C.G.S. § 7A-31 (COA10-616)	Denied
205P11	Piraino Brothers, LLC v. Atlantic Financial Group, Inc.; McKee Estates, LLC; Darrell Avery, II; Jeffrey L. Avery; Robert N. Burris; Burris, MacMillan, Pearce & Burris, PLLC; David Baker; and Baker & Baker, PLLC	Plt's PDR Under N.C.G.S. § 7A-31 (COA10-831)	Denied **Martin, J., Recused**
207P05-3	State v. John Philmore Carpenter	1. Def's *Pro Se* PWC to Review Order of Superior Court of Richmond 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
214P11	State v. Patrick S. Figured	Def's PWC to Review Decision of COA (9315SC539)	Denied
222P04-3	State v. Salramon Gonzales aka Alex Ramirez	1. Def's *Pro Se* PWC to Review Order of Superior Court of Harnett 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
229P11	State v. Furman Lester Mills	Def's PDR Under N.C.G.S. § 7A-31 (COA10-820)	Denied

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231P11	Estate of Erick Dominic Williams, by and through Easter Williams Overton, Personal Representative v. Pasquotank County Parks and Recreation Department and Pasquotank County	1. Def's PDR Under N.C.G.S. § 7A-31 (COA10-491)	1. Allowed
		2. N.C. Assoc. of EMS Administrators' Motion for Leave to File *Amicus* Brief	2. Allowed
		3. N.C. School Boards Association's Motion for Leave to File *Amicus* Brief	3. Allowed
		4. Board of Commissioners of New Hanover County's Motion for Leave to File *Amicus* Brief	4. Allowed
		5. Buncombe County's Motion for Leave to File *Amicus* Brief	5. Allowed
		6. Haywood County's Motion for Leave to File *Amicus* Brief	6. Allowed
		7. N.C. League of Municipalities' Motion for Leave to File *Amicus* Brief	7. Allowed
		8. Wake County's Motion for Leave to File *Amicus* Brief	8. Allowed
		9. N.C. Association of Chiefs of Police's Motion for Leave to File *Amicus* Brief	9. Allowed
		10. N.C. Sheriffs' Association's Motion for Leave to File *Amicus* Brief	10. Allowed
		11. N.C. Association of County Commissioners' Motion for Leave to File *Amicus* Brief	11. Allowed
267A11	State v. Stephen Monroe Buckner	1. Def's Motion for Stay of Appeal Pending Disposition of Motion for Appropriate Relief Under the North Carolina Racial Justice Act	1. Allowed **09/16/11**
		2. Def's Motion for Appropriate Relief Pursuant to the Racial Justice Act	2. Dismissed Without Prejudice
		3. Def's Motion for Discovery of Information Relevant Under the North Carolina Racial Justice Act	3. Dismissed Without Prejudice
269PA09-2	Travis T. Bumpers and Troy Elliott, on Behalf of Themselves and All Others Similarly Situated v. Community Bank of Northern Virginia	1. Def's Motion for Temporary Stay (COA08-1135-2)	1. Allowed **09/30/11**
		2. Def's Petition for *Writ of Supersedeas*	2.
		3. Def's PDR Under N.C.G.S. § 7A-31	3.
		4. Plts' Motion to Dissolve Temporary Stay	4. Denied **10/13/11**

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280P11	State v. Luis Berber Martinez	1. State's Motion for Temporary Stay (COA10-885) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **07/11/11**; Dissolved the Stay **11/09/11** 2. Denied 3. Denied
282P11	State v. Kevin Marshall Stepp	Def's PDR Under N.C.G.S. § 7A-31 (COA10-867)	Denied
284P11	State v. Quincy Teeyon Ketter	Def's PDR Under N.C.G.S. § 7A-31 (COA10-1006)	Denied
285P11	Tammy Allison, Employee v. Wal-Mart Stores, Self-Insured Employer (Claims Management, Inc., Third-Party Administrator)	1. Defs' Motion for Temporary Stay (COA10-1023) 2. Defs' Petition for *Writ of Supersedeas* 3. Defs' PDR Under N.C.G.S. § 7A-31	1. Allowed **07/12/11**; Dissolved the Stay **11/09/11** 2. Denied 3. Denied
289P11	Royal Palms MHP, LLC, E. Alan Rusher, Robert D. Ellyson and wife, Deborah K. Ellyson, and Walter D. Harris, III, and wife, Diane E. Harris v. City of Wilmington, a North Carolina Municipality	1. Petitioners' PDR Under N.C.G.S. § 7A-31 (COA10-1259) 2. Respondent's Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 2. Dismissed as Moot
303P11	Wake Forest Golf & Country Club, Inc. v. Town of Wake Forest, Vivian A. Jones, in Her Official Capacity as Mayor, Chris Kaeberlein, Anne Hines, Frank Drake, Pete Thibodeau, Margaret Stinnett, in Their Official Capacities as Members of the Wake Forest Board of Commissioners	1. Plt's NOA Based Upon a Constitutional Question (COA10-972) 2. Plt's PDR Under N.C.G.S. § 7A-31 3. Defs' Motion to Dismiss Appeal	1. —— 2. Denied 3. Allowed

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308P11	Michael R. Lee, Husband; Matthew R. Lee, Adult Child; and Melinda R. Lee, Adult Child, of Mary Ann Lee, Deceased Employee v. City Cab of Tarboro, Employer, Travelers Insurance Company, Carrier	Plts' PDR Under N.C.G.S. § 7A-31 (COA10-1017)	Denied
309P11	Songwooyarn Trading Company, Ltd. v. Sox Eleven, Inc. and Ung Chul Ahn, Defendants and Third-Party Plaintiffs v. Jae Cheol Song, Third-Party Defendant	Def's (Ung Chul Ahn) PDR Under N.C.G.S. § 7A-31 (COA10-939)	Denied
310P11	State v. Kevin Ernest Lamb	Def's PDR Under N.C.G.S. § 7A-31 (COA11-89)	Denied
321P11	State v. Jerel Davis	Def's PDR Under N.C.G.S. § 7A-31 (COA10-1156)	Denied
322P11	State v. Terry Antonio Stover	1. Def's *Pro Se* PWC to Review Decision of COA (COA10-1126) 2. Def's *Pro Se* Motion to Proceed as Indigent 3. Def's *Pro Se* Motion to Appoint Counsel 4. Def's *Pro Se* Motion to Require Attorney General to Respond to this Petition	1. Denied 2. Allowed 3. Dismissed as Moot 4. Denied
323P11	State v. Ricky Dean Norman	Def's PDR Under N.C.G.S. § 7A-31 (COA10-1108)	Denied
328A11	State v. Tony Savalis Summers	1. Def's Motion for Appropriate Relief Pursuant to The Racial Justice Act 2. Def's Motion to Rule the Guilford County Superior Court Proper Venue 3. Def's Motion to Stay Appellate Proceedings Until Guilford County Considers and Rules Upon Previously-Filed Motion	1. Dismissed Without Prejudice 2. Dismissed 3. Allowed
334P11	State v. Jeffrey Curtis Embler	Def's PDR Under N.C.G.S. § 7A-31 (COA10-717)	Denied

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341P11	State v. Wallace Reynold Bass, Jr.	1. Def's PWC to Review the Decision of the COA (COA09-1434) 2. State's Motion to Withdraw as Counsel and to Substitute Counsel	1. Denied 2. Allowed **Jackson, J., Recused**
343P11	State v. Wayne Carrouthers	Def's PDR Under N.C.G.S. § 7A-31 (COA10-1470)	Denied **Jackson, J., Recused**
346P11	In Re: Appeal of Civil Penalty: Don Liebes, Gate City Billiards Country Club v. Guilford County Dept of Public Health	Plts' PDR Under N.C.G.S. § 7A-31 (COA10-979)	Denied
349P11	State v. Levon Todd	1. Def's *Pro Se* Motion for PDR (COAP11-568) 2. Def's *Pro Se* Motion to Appoint Counsel 3. Def's *Pro Se* Motion to Proceed *In Forma Pauperis*	1. Dismissed 2. Dismissed as Moot 3. Allowed
352P11	In the Matter of the Estate of Ervin Guy Reeder, Deceased	Petitioner's PDR Under N.C.G.S. § 7A-31 (COA10-618)	Denied
364P11	State v. Alvaro Rafael Castillo	Def's PDR Under N.C.G.S. § 7A-31 (COA10-814)	Denied
365P11	State v. Timothy Darnell Cherry	Def's PDR Under N.C.G.S. § 7A-31 (COA10-988)	Denied
368P11	State v. Dennis Pope	Def's PDR Under N.C.G.S. § 7A-31 (COA10-932)	Denied
373P11	Tamida Wynn, Employee v. United Health Services / Two Rivers Health-Trent Campus, Employer and The Phoenix Insurance Company, Carrier	Defs' Motion for Temporary Stay (COA10-991)	Allowed **09/02/11**
374P11	State v. Dennis Lee Best	Def's PDR Under N.C.G.S. § 7A-31 (COA10-1264)	Denied
376A11	State v. Charles David Becton	Def's *Pro Se* NOA Based Upon a Constitutional Question (COA10-1359)	Dismissed *Ex Mero Motu*

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376A11-2	State v. Charles David Becton	Def's *Pro Se* Petition for *Writ of Habeas Corpus* (COA10-1359)	Denied **10/25/11**
377P11	State v. Kenis Ray Johnson	Def's PDR Under N.C.G.S. § 7A-31 (COA10-1410)	Denied
382PA09-2	State v. Jihad Rashid Melvin	1. Def's NOA Based Upon a Constitutional Question (COA09-62-2) 2. Def's PDR Under N.C.G.S. § 7A-31	1. Dismissed *Ex Mero Motu* 2. Denied
383P11	Mark E. Capps and wife, Paula L. Capps, Robert B. Dawson, Floyd D. Loftin, Jr. and wife, Kathy T. Loftin, Mamie S. O'Neal, Stewart W. Smith and wife, Eva H. Smith, and Michael J. Ward and wife, Linda H. Ward v. City of Kinston	1. Petitioners' Motion for Temporary Stay (COA10-1477) 2. Petitioners' Petition for *Writ of Supersedeas* 3. Petitioners' PDR Under N.C.G.S. § 7A-31 (COA10-1477)	1. Allowed **09/06/11**; Dissolved the Stay **11/09/11** 2. Dissolved **11/09/11** 3. Denied
384A11	State v. Norma Angelica Williams	1. Def's Motion for Temporary Stay (COA10-738) 2. Def's Petition for *Writ of Supersedeas*	1. Allowed **09/07/11** 2. Allowed
389P11	State v. George Brian Williams	Def's PDR Under N.C.G.S. § 7A-31 (COA10-1482)	Denied
394P11	Robert Ray and Kimberly Ray v. Gary Wayne Greer, MD and Catawba Valley Emergency Physicians, PA	Plt-Appellants' PWC from Decision of COA (COA10-767)	Denied
396P11	State v. Robert Junior Marshall	Def's *Pro Se* PWC to Review the Order of Davidson County Superior Court	Denied
400P11	Town of Matthews, a North Carolina Municipal Corporation v. Lester E. Wright and His Wife, Virginia J. Wright	Plt's PDR Under N.C.G.S. § 7A-31 (COA11-68)	Denied **Jackson, J., Recused**
402P11	State v. Sylvester Eugene Harding	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA11-161)	Denied
406P11	State v. Nicholas Lee Lofton	Def's PDR Under N.C.G.S. § 7A-31 (COA10-1291)	Denied

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408P11	James Pressley Torrence, Sr., Employee v. Aeroquip n.k.a. Eaton Corp., Employer, Self-Insured (Sedgwick CMS, Third-Party Administrator)	1. Defs' Motion for Temporary Stay (COA10-1279) 2. Defs' Petition for *Writ of Supersedeas* 3. Defs' PWC to Review the Decision of the COA 4. Defs' PDR Under N.C.G.S. § 7A-31	1. Allowed **09/20/11** Dissolved the Stay **11/09/11** 2. Denied 3. Denied 4. Denied
414P11	State v. Freeman L. Rogers, Jr.	Def's *Pro Se* Motion for NOA (COAP11-451)	Dismissed
416P11	State v. Richard Beverly Martin, Jr.	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA10-1284)	Denied
417P11	Charles Alonzo Tunstall-Bey v. Frank W. Balance, Jr., et al.	Petitioner's Motion for NOA Pursuant to N.C.G.S. § 7A-32 (B) (COAP11-237)	Dismissed
418P11	State v. Andre Jovon Robinson	Def's PDR Under N.C.G.S. § 7A-31 (COA10-1099)	Denied
419P11	In the Matter of the Foreclosure of a Deed of Trust from CTC Brick Landing, LLC, to GBTC, Inc., Trustee, Dated July 20, 2007, Recorded in Book 2645, Page 1256, Brunswick County Registry	1. Appellants' (CTC Brick Landing, LLC, Kent W. Colton, Kathryn Colton, C. Kent Conine, and Meg Conine) Motion for Temporary Stay (COA11-579) 2. Appellants' (CTC Brick Landing, LLC, et al.) Petition for *Writ of Supersedeas* 3. Appellants' (CTC Brick Landing, LLC, et al.) PWC to Review Order of COA	1. Allowed **10/05/11**; Dissolved the Stay **11/09/11** 2. Denied 3. Denied
420P11	State v. Edward Eugene Poole, Jr.	1. State's Motion for Temporary Stay (COA11-21) 2. State's Petition for *Writ of Supersedeas* 3. State's NOA Based Upon a Constitutional Question 4. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **10/07/11** 2. 3. 4.
422P11	State v. Eunessa Suzanne Lawson	Def's PDR Under N.C.G.S. § 7A-31 (COA11-206)	Denied
424P11	State v. Anthony J. Ward	1. Def's *Pro Se* PWC to Review the Order of the COA (COAP11-718) 2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis* 3. Def's *Pro Se* Motion to Appoint Counsel	1. Denied 2. Allowed 3. Dismissed as Moot

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425P11	State v. Jacques Craig Floyd	1. Def's PDR Under N.C.G.S. § 7A-31 (COA11-175) 2. Def's Motion to Proceed *In Forma Pauperis* 3. Def's Motion to Appoint Counsel	1. Denied 2. Allowed 3. Dismissed as Moot
428P11	State v. Genise Sampson	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA11-62)	Denied
434P11	Michael E. Britt, Sr. and Jheys C. Britt v. Larry Denning	Def's PWC to Review Order of the COA (COA11-533)	Denied
435P11	State v. Dwante Antwan Barnes and Ronnie Leon Brooks, Jr.	Def's (Dwante Antwan Barnes) PDR Under N.C.G.S. § 7A-31 (COA10-1244)	Denied
439A11	Denise H. Barton v. John S. Barton	Def's *Pro Se* NOA Based Upon a Constitutional Question (COA10-1160)	Dismissed *Ex Mero Motu*
441P04-6	State v. Jeremiah Royster	1. Def's *Pro Se* PWC to Review the Order of the COA (COAP11-376) 2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis* 3. Def's *Pro Se* Motion to Appoint Counsel 4. Def's *Pro Se* Motion to Dismiss PWC Without Prejudice	1. —— 2. Allowed 3. Dismissed as Moot 4. Allowed
447PA09-2	William L. Underwood v. Teresa W. Underwood	Def's Petition for Rehearing Under N.C.R. App. P. 31	Denied **10/11/11**
447P11	Mishew E. Smith and Husband Robert N. Edwards, and Alton B. Smith, Jr. v. County of Durham	Plts' PDR Under N.C.G.S. § 7A-31 (COA10-1500)	Denied **Martin, J., Recused**
449P11	Charles Everette Hinton v. Daniel E. Bailey, Sheriff, et al.	Petitioner's *Pro Se* Petition for *Writ of Habeas Corpus*	Denied **10/18/11**
450P11	State v. Tobias Lamario McNeil	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA11-103)	Denied

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452P11	State v. James Harold Freeman	1. Def's *Pro Se* PWC to Review Order of Superior Court of Robeson County 2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis* 3. Def's *Pro Se* Motion to Appoint Counsel	1. Dismissed 2. Allowed 3. Dismissed as Moot
454P11	State v. Justin Seamster	1. State's Motion for Temporary Stay (COA11-1170) 2. State's Petition for *Writ of Supersedeas*	1. Allowed **10/21/11** 2.
466P11	State v. Heather R. Surratt	1. State's Motion for Temporary Stay (COA11-239) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **10/31/11** 2. 3.
472P11	State v. Timothy Alfred Sweat	1. State's Motion for Temporary Stay (COA11-57) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **11/07/11** 2. 3.
476P11	Donald E. Sellers, Employee v. FMC Corporation, Employer; National Union Fire Insurance Company and Insurance Company of the State of Pennsylvania, Carriers	Defs' Motion for Temporary Stay (COA11-12)	Allowed **11/07/11**
598P02-4	Boyce & Isley, PLLC, Eugene Boyce, R. Daniel Boyce, Philip R. Isley, and Laura B. Isley v. Roy A. Cooper, III, The Cooper Committee, Julia White, Stephen Bryant, and Kristi Hyman	1. Defendants' PDR Under N.C.G.S. § 7A-31 (COA10-243) 2. North Carolina Press Foundation, Inc.'s Motion for Leave to File *Amicus* Brief 3. Defs' Motion to Strike 4. Defs' Motion for Sanctions 5. Defs' Motion to Seal	1. Denied 2. Dismissed as Moot 3. Denied 4. Denied 5. Denied **Parker, C.J., Timmons-Goodson, J., and Hudson, J., Recused**

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022A02-2	State v. Marcus Douglas Jones	1. Def's Motion for Stay of Proceeding 2. Def's Motion in the Alternative for Extension of Time to File PWC	1. Denied **11/23/11** 2. Allowed **11/23/11**
114A10	State v. Kenneth Bernard Davis	1. Def's NOA Based Upon a Constitutional Question (COA09-278) 2. State's Motion to Dismiss Appeal 3. Def's *Pro Se* Motion to File Motion for Appropriate Relief Pursuant to the All Writs Act 4. Counsel for Def's Motion to Withdraw 5. Def's *Pro Se* Motion for Appellant Brief of Amended Appeal from Mecklenburg County Superior Court 6. Def's *Pro Se* Motion for Termination of Counsel and Reappointment of Defense Appellate Counsel	1. 2. Allowed 3. Dismissed **12/15/10** 4. Dismissed as Moot 5. Dismissed as Moot 6. Dismissed as Moot
132P11-6	State v. Gregory Lynn Gordon	Def's *Pro Se* Petition for *Writ of Habeas Corpus*	Denied **12/06/11**
180P11	Anne Marie Long v. Gateway Communities, LLC (f/k/a Gateway Homes, LLC), Douglas R. Levin, Vernon L. Faircloth, John A. Ashworth, IV, B & G Realty Company (f/k/a Brown & Glenn Realty), and Brown & Glenn Realty Co., Inc.	Plt's PDR Under N.C.G.S. § 7A-31 (COA10-599)	Denied
188P08-2	State v. Michael Lamont Speller	1. Def's *Pro Se* PWC to Review Order of COA (COAP11-217) 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 **Hudson, J., Recused**

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213PA10	Jerry W. Conner, James A. Campbell, James Edward Thomas, Marcus Robinson, and Archie Lee Billings v. Council of State of North Carolina	Petitioners' Petition for Rehearing	Denied
262P11	State Farm Mutual Automotive Insurance Company v. Norberto Bustos-Ramirez, Augustine M. Perez, and the Estate of Sergio Umberto Morales Arriaga	Def's (Estate of Arriaga) PDR Under N.C.G.S. § 7A-31 (COA10-1087)	Denied
307P11	Laboratory Corporation of America Holdings, Dianon Systems, Inc. v. Cindy Caccuro and Lakewood Pathology Associates, Inc. d/b/a Plus Diagnostics	1. Def's (Cindy Caccuro) NOA Based Upon a Constitutional Question (COA10-877) 2. Def's (Cindy Caccuro) PDR Under N.C.G.S. § 7A-31 3. Motion for William G. Miossi to Appear *Pro Hac Vice* 4. Plts' Motion to Dismiss Appeal	1. —— 2. Denied 3. Allowed 4. Allowed
335P11	State v. George Kevin Faison	Def's PDR Under N.C.G.S. § 7A-31 (COA10-1236)	Denied
355P11	Wachovia Bank National Association and Preserve Holdings, LLC, as Substituted Successor Plaintiff v. Superior Construction Corporation, George Rountree, III, Receiver for Intracoastal Living, LLC, Western Surety Company and Coastal Sash & Door	Plt's (Preserve Holdings, LLC) PDR Under N.C.G.S. § 7A-31 (COA10-1158)	Denied
373P11	Tamida Wynn, Employee v. United Health Services / Two Rivers Health-Trent Campus, Employer and The Phoenix Insurance Company, Carrier	Defs' Motion for Temporary Stay (COA10-991)	Allowed **09/02/11**

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8 DECEMBER 2011

390P11	Beroth Oil Company, Paula and Kenneth Smith, Barbara Clapp, Pamela Moore Crockett, W.R. Moore, N&G Properties, Inc., and Elton V. Koonce v. North Carolina Department of Transportation	Plts' PDR Prior to Decision of COA (COA11-1012)	Denied
395P11	Scott Sigmon v. Perry Johnston and Professional Vending Services, Inc.	Def's PDR Under N.C.G.S. § 7A-31 (COA10-1276)	Denied
395P11-2	Scott Sigmon v. Perry Johnston and Professional Vending Services, Inc.	Plt's PDR Under N.C.G.S. § 7A-31 (COA10-1276)	Denied
398P11	In the Matter of: J.C.	1. Respondent's PDR Under N.C.G.S. § 7A-31 (COA11-111) 2. Respondent's Motion to Withdraw PDR	1. —— 2. Allowed
405P11	State v. Nicholas Jermaine Steele	Def's PDR Under N.C.G.S. § 7A-31 (COA10-1405)	Denied
413P11	State v. Antonio Larod Bell	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA11-40)	Denied
427P11	State v. Freddie Robinson	1. Def's *Pro Se* Motion for the Appointment of Counsel (COA10-1560) 2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis*	1. Denied 2. Allowed
431P11	State v. Deante Octario Howard	Def's PDR Under N.C.G.S. § 7A-31 (COA10-1273)	Denied
433P11	State v. Jeffrey Scott Speaks	1. Def's NOA Based Upon a Constitutional Question (COA11-86) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. —— 2. Denied 3. Allowed

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

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440P11	K2 Asia Ventures, Ben C. Broocks, and James G. J. Crow v. Robert Trota, Veronica Trota, Joselito Saludo, Carolyn T. Saludo, Roland V. Garcia, Christina T. Garcia, Jim Fuentebella, Mavis Fuentebella, Sharon Fuentebella, Max's Baclaran, Inc., Chickens R Us, Inc., Max's Makati, Inc., Max's Ermita, Inc., Max's of Manila, Inc., The Real American Doughnut Company, Inc., Trofi Ventures, Inc., Ruby Investment Company Holdings, Inc., Krispy Kreme Doughnut Corporation, and Krispy Kreme Doughnuts, Inc.	1. Defs' (Veronica Trota, Joselito Saludo, Roland V. Garcia, Mavis Fuentebella, Max's Baclaran, Inc., Chickens R Us, Inc., Max's Makati, Inc., Max's Ermita, Inc., The Real American Doughnut Company, Inc., Max's of Manila, Inc., Trofi Ventures, Inc., Ruby Investment Company Holdings, Inc., Krispy Kreme Doughnut Corporation, and Krispy Kreme Doughnuts, Inc.) PDR Under N.C.G.S. § 7A-31 (COA10-1065) 2. Motion for Admission of Christopher V. Goodpastor *Pro Hac Vice*	1. Denied 2. Allowed
442P11	Joseph Carsanaro v. John Trevor Colvin	Def's PDR Under N.C.G.S. § 7A-31 (COA11-43)	Denied
443A11	Janet E. Moore v. Daniel H. Proper, Shaun O'Hearn, Dr. Shaun O'Hearn, DDS, P.A., and Affordable Care, Inc.	1. Defs' NOA Based Upon a Dissent (COA10-1475) 2. Defs' PDR as to Additional Issues	1. —— 2. Allowed
445P11	State v. Freddie Towia Wood	1. Def's NOA Based Upon a Constitutional Question (COA10-372) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. —— 2. Denied 3. Allowed
447A08-2	Andrea Gregory, Employee v. W.A. Brown & Sons, Employer, PMA Insurance Co., Carrier	1. Defs' Motion for Temporary Stay (COA10-1521) 2. Defs' Petition for *Writ of Supersedeas* 3. Defs' PDR Under N.C.G.S. § 7A-31	1. Allowed **07/12/11;** Dissolved the Stay **11/16/11** 2. Denied 3. Denied **Jackson, J., Recused**

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448P11	Jermaine Parson v. Oasis Legal Finance, LLC, Jeff Baloun, and Gary Chodes	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA10-1414) 2. Defs' Motion to Strike 3. Plt's Motion to Withdraw PDR	1. —— 2. Dismissed as Moot 3. Allowed
451P11	State v. Martez L. Sherrod	Def's *Pro Se* Motion for NOA (COAP11-717)	Dismissed
458P11	State v. Anthony Townsend	Def's *Pro Se* PWC to Review the Order of Cumberland County Superior Court	Denied **Jackson, J., Recused**
461P11	State v. Aaron Jerome Wright	Def's PDR Under N.C.G.S. § 7A-31 (COA11-105)	Denied
462P11	In the Matter of: D.F.M., Jr. and D.F.M., III	1. Respondent-Parents' PDR Under N.C.G.S. § 7A-31 (COA11-380) 2. Respondent-Parents' Motion to Amend PDR	1. Denied 2. Allowed
465P11	State v. Alex Jerome Trogdon	Def's PDR Under N.C.G.S. § 7A-31 (COA10-1344)	Denied
466P11	State v. Heather R. Surratt	1. State's Motion for Temporary Stay (COA11-239) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31 4. Def's Motion to Deem Response to State's PDR Timely Filed 5. Def's Conditional PDR Under N.C.G.S. § 7A-31	1. Allowed **10/31/11**; Dissolved the Stay **12/08/11—** See Special Order Page 324 2. See Special Order Page 324 3. See Special Order Page 324 4. See Special Order Page 324 5. See Special Order Page 324
468P11	State v. Yuakin Dywan Tucker	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA11-154)	Denied
469P11	In the Matter of: C.S.R., Jr., N.J.R., N.F.R.	Respondent-Father's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA11-684)	Denied

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

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472A11	State v. Timothy Alfred Sweat	1. State's Motion for Temporary Stay (COA11-57) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31 4. Def's NOA Based Upon a Dissent	1. Allowed **11/07/11** 2. Allowed 3. Allowed 4. ——
473P11	George E. Butler II v. The Hammocks, LLC, a North Carolina Limited Liability Company; The Hammocks Association, Inc., a North Carolina Non-Profit Corporation; and Bald Head Island Limited, LLC, a Texas Limited Liability Company	Plt's *Pro Se* PWC to Review Order of COA (COA11-493)	Denied **Hudson, J., Recused**
474P11	State v. Charles Vincent Hayes	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA11-122)	Denied
476P11	Donald E. Sellers, Employee v. FMC Corporation, Employer; National Union Fire Insurance Company and Insurance Company of the State of Pennsylvania, Carriers	Defs' Motion for Temporary Stay (COA11-12)	Allowed **11/07/11**
481P11	State v. Jason Randall Sledge	Def's PDR Under N.C.G.S. § 7A-31 (COA10-1261)	Denied
482P11	State v. Christopher Michael Sims	Def's PDR Under N.C.G.S. § 7A-31 (COA11-187)	Denied
483P11	State v. Mark Wade Gentry	Def's *Pro Se* Motion for PDR (COAP11-877)	Dismissed
484P11	State v. Coatney Randall Williams	Def's PDR Under N.C.G.S. § 7A-31 (COA11-319)	Denied
485P11	State v. Rashad Donte Jordan	1. Def's NOA Based Upon a Constitutional Question (COA10-1432) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. —— 2. Denied 3. Allowed

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

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486P10-2	Phyllis Dianne Smith, on Behalf of Herself and All Others Similarly Situated v. Teachers' and State Employees' Retirement System, a Corporation; Board of Trustees of the Teachers' and State Employees' Retirement System, a Body Politic and Corporate; Department of State Treasurer, Retirement Systems Division; Janet Cowell, Treasurer of State of N.C. and Chairman of the Board of Trustees Teachers' and State Employees' Retirement System of N.C. (in Her Individual and Official Capacities); and The State of North Carolina	Plt's PDR Under N.C.G.S. § 7A-31 (COA10-1242)	Denied
495P11	Kristie Lea Williams v. James Marion Chaney	1. Plt's *Pro Se* Motion for Temporary Stay (COA11-164) 2. Plt's *Pro Se* Petition for *Writ of Supersedeas* 3. Plt's *Pro Se* PWC to Review Decision of COA 4. Plt's *Pro Se* Motion to Proceed *In Forma Pauperis*	1. Allowed **11/16/11**; Dissolved the Stay **11/18/11**; Allowed by Special Order **11/18/11**; Dissolved the Stay **12/08/11** 2. Denied 3. Denied 4. Allowed
497P11	State v. Shelton Gladney	Def's *Pro Se* Motion for PDR (COAP11-801)	Dismissed
498P11	State v. David Toler	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA11-5)	Denied

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

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499P11	State v. Kareem S. Herrera	1. Def's *Pro Se* PWC to Review Order of COA (COAP11-628) 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
503P11	State v. Charles Bruce Phillips	Def's *Pro Se* Motion for PDR (COAP11-87)	Dismissed
516P11	State v. Donte M. Hardy	1. Def's *Pro Se* PWC to Review Order of COA (COAP11-907) 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
522A11	Walter Sutton Baysden v. State of North Carolina	1. State's Motion for Temporary Stay 2. State's Petition for *Writ of Supersedeas*	1. Allowed **12/02/11** 2. Allowed **12/02/11**
523A11	State v. Megan Sue Otto	1. State's Motion for Temporary Stay 2. State's Petition for *Writ of Supersedeas*	1. Allowed **12/02/11** 2. Allowed **12/02/11**

IN THE MATTER OF: M.I.W.

No. 148PA11

(Filed 27 January 2012)

Appeal and Error— juvenile matters—jurisdiction pending appeal

In a holding limited to the Juvenile Code, the trial court had subject matter jurisdiction to terminate parental rights where the motion to terminate was filed while an appeal was pending from a disposition giving custody to DSS, but the trial court acted on the motion to terminate only after the mandate resolving the appeal had been issued. N.C.G.S. § 7B-1003 prohibited only the exercise of jurisdiction before the mandate; issuance of the mandate by the appellate court returned the power to exercise subject matter jurisdiction to the trial court.

Justice EDMUNDS dissenting.

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

Justice TIMMONS-GOODSON dissenting.

On writ of certiorari pursuant to N.C.G.S. § 7A-32(b) of a unanimous, unpublished decision of the Court of Appeals, —— N.C. App. ——, 708 S.E.2d 216 (2011), affirming an order terminating parental rights entered on 11 June 2010 by Judge Resson O. Faircloth in District Court, Harnett County. Heard in the Supreme Court on 14 November 2011.

Duncan B. McCormick and E. Marshall Woodall for petitioner-appellee Harnett County Department of Social Services.

Robin E. Strickland for respondent-appellant mother.

Ryan McKaig for respondent-appellant father.

Pamela Newell, Guardian ad Litem Appellate Counsel, on behalf of the minor child-appellee.

NEWBY, Justice.

This case asks whether, under the Juvenile Code, a trial court has subject matter jurisdiction to terminate parental rights when the motion to terminate was filed while an appeal in the case was pending but the court acted on the motion only after the mandate resolving the appeal

had been issued. We hold that N.C.G.S. § 7B-1003 prohibits only the exercise of jurisdiction before issuance of the mandate and that issuance of the mandate by the appellate court returns the power to exercise subject matter jurisdiction to the trial court. Because the trial court here did not exercise jurisdiction before the mandate's issuance, we affirm the decision of the Court of Appeals upholding the termination of respondents' parental rights.

Respondents are parents of a three-year-old juvenile, M.I.W., born on 16 February 2008. Respondent father was incarcerated on drug charges at the time of M.I.W.'s birth and has had very little involvement in M.I.W.'s life. Respondent father was previously incarcerated for indecent liberties with a minor and has been charged with numerous other crimes including statutory rape, contributing to the delinquency of a minor, violation of a domestic violence protective order, and assault on a female. Respondent mother has a history of drug abuse, including use of methamphetamines, and has serious mental health issues for which she has failed to follow her treatment plan. Her other three children were removed from her custody because of her drug abuse and unaddressed mental illness.

M.I.W. was initially removed from respondent mother's care in September 2008 when he was seven months old. Neighbors contacted police after seeing respondent mother drop M.I.W. several times, and they expressed concern that misuse of medication may have been responsible. M.I.W. was briefly placed with his paternal grandmother, and after she became unable to care for him, he was placed with his paternal uncle. On 15 December 2008, the Harnett County Department of Social Services (DSS) filed a juvenile petition alleging that M.I.W. was a neglected and dependent juvenile and sought an order for nonsecure custody, which the trial court promptly approved. After this filing M.I.W. remained with his uncle until 19 March 2009. On that day M.I.W. was taken to the hospital by social workers after employees at his day care center reported he arrived with bruises on his face, neck, forehead, back of the head, upper arms, and back. M.I.W. also had an open, infected wound on his ear. The physician's notes state that it looked like M.I.W.'s fingernails had been pulled out, and an examination revealed that M.I.W. was dehydrated and underweight and had two healing fractured ribs. Medical records indicate that these injuries were "diagnostic of child physical abuse" and were "not consistent with accidental injuries" but were "consistent with traumatic, abusive injures [sic]." After leaving the hospital, M.I.W. was placed in foster care, where he is currently thriving.

A disposition hearing was held on 27 March 2009, followed by permanency planning hearings on 24 April and 8 May 2009. On 8 May 2009, the trial court entered its disposition order awarding full custody of M.I.W. to petitioner DSS. The permanent plan for M.I.W. was determined to be adoption. On 10 and 11 June 2009, respondents filed separate appeals.

While respondents' appeals of the disposition order were pending, DSS filed a motion in the cause to terminate respondents' parental rights on 2 July 2009. Respondent mother moved to dismiss the motion to terminate on 29 September 2009, alleging a lack of subject matter jurisdiction, and respondent father moved for the same on 12 March 2010. During the pendency of the appeal, the trial court continued the hearing on the motion to terminate twice, noting the necessity of a continuance because of the constraints of N.C.G.S. § 7B-1003(b)(1).

The Court of Appeals affirmed the trial court's disposition order on 2 February 2010, thereby resolving the appeal, and the mandate issued on 22 February 2010. On 12 March 2010, the trial court denied respondents' motions to dismiss the termination motion, and the court held termination hearings on 12 March, 9 April, and 30 April 2010. On 11 June 2010, the trial court terminated respondents' parental rights to M.I.W.

Respondent mother appealed the termination on 1 July 2010, followed by respondent father on 12 July 2010. The Court of Appeals affirmed, holding that, although the termination motion was filed by DSS during the pendency of the appeal from the disposition order, the trial court had subject matter jurisdiction over the motion. *In re M.I.W.*, —— N.C. App. ——, 708 S.E.2d 216, 2011 WL 340537, at *2 (2011) (unpublished). The court concluded: "A trial court does not violate N.C. Gen. Stat. § 7B-1003 when it holds the hearing on the [motion] to terminate parental rights after this Court's mandate has issued." *Id.* Respondents sought review, and we allowed their petitions for writ of certiorari on the issue of subject matter jurisdiction. *In re M.I.W.*, —— N.C. ——, 710 S.E.2d 5 (2011); *id.*, —— N.C. ——, 711 S.E.2d 434 (2011).

The primary question presented is whether, under the Juvenile Code, the trial court had subject matter jurisdiction when it granted the motion to terminate respondents' parental rights. Respondents argue that N.C.G.S. § 7B-1003 removes the trial court's jurisdiction such that filing a termination of parental rights (TPR) motion while an appeal is pending is a nullity, as are subsequent actions pursuant to that motion. DSS argues that the statute prevents the trial court only from acting on a termination motion while an appeal is pending, not from acting on a

motion that was filed during pendency of an appeal once the appeal has been resolved.

As a preliminary matter, it is crucial to understand the basis for the trial court's subject matter jurisdiction in TPR cases. "In matters arising under the Juvenile Code, the court's subject matter jurisdiction is established by statute." *In re K.J.L.*, 363 N.C. 343, 345, 677 S.E.2d 835, 837 (2009). When subject matter jurisdiction is a statutory creation, the General Assembly can, within the bounds of the Constitution, set whatever limits it wishes on the possession or exercise of that jurisdiction, including limits on jurisdiction during a pending appeal. *See In re T.R.P.*, 360 N.C. 588, 590, 636 S.E.2d 787, 790 (2006). The General Assembly has employed that authority here in enacting N.C.G.S. § 7B-1003.

Generally, N.C.G.S. § 1-294 operates to stay further proceedings in the trial court upon perfection of an appeal. N.C.G.S. § 1-294 (2011) ("When an appeal is perfected . . . it stays all further proceedings in the court below upon the judgment appealed from, or upon the matter embraced therein . . . ."); *see also Veazey v. City of Durham*, 231 N.C. 357, 363, 57 S.E.2d 377, 382 (1950); *Pruett v. Charlotte Power Co.*, 167 N.C. 598, 600, 83 S.E. 830, 830 (1914) ("[A]n appeal . . . operates as a stay of proceedings" and "the court below is without power to hear and determine questions involved in an appeal pending in the [appellate court]."). When a specific statute addresses jurisdiction during an appeal, however, that statute controls over the general rule. *See In re R.T.W.*, 359 N.C. 539, 550, 614 S.E.2d 489, 496 (2005), *superseded on other grounds by statute*, Act of Aug. 23, 2005, ch. 398, sec. 12, 2005 N.C. Sess. Laws 1455, 1460-61 (amending various provisions of the Juvenile Code)).

Given the unique nature of the Juvenile Code, with its overarching focus on the best interest of the child, it is not surprising that the General Assembly recognized that the needs of the child may change while legal proceedings are pending on appeal. *See id.* at 551, 614 S.E.2d at 496 ("Applied to appeals in child custody cases, however, N.C.G.S. § 1-294 would leave trial courts powerless to modify custodial arrangements *in response to changed circumstances and the child's best interests*." (emphasis added)); *see also In re K.L.*, 196 N.C. App. 272, 278, 674 S.E.2d 789, 793 (2009). Because the General Assembly enacted N.C.G.S. § 7B-1003 in recognition of the need for a modified approach in juvenile cases, that statute controls over N.C.G.S. § 1-294, and any limits placed on the possession and exercise of jurisdiction by the trial court while an appeal is pending will come from N.C.G.S. § 7B-1003,

rather than the general rule. Consequently, our holding is limited to matters arising under the Juvenile Code.

An earlier case from this Court held that "a trial court retains jurisdiction to enter an order terminating parental rights while a custody order in the same case is pending appellate review." *In re R.T.W.*, 359 N.C. at 540, 614 S.E.2d at 490. We concluded that a trial court could hold termination hearings and enter a termination order while an appeal was pending, thereby "render[ing] the pending appeal moot." *Id.* at 553, 614 S.E.2d at 498. In reaching that conclusion we relied on our finding that the version of N.C.G.S. § 7B-1003 then governing jurisdiction during appeals "nowhere reference[d] orders terminating parental rights." *Id.* at 550, 614 S.E.2d at 496. The General Assembly amended N.C.G.S. § 7B-1003 in 2005, and it now states in relevant part:

> Pending disposition of an appeal, unless directed otherwise by an appellate court or subsection (c) of this section applies, the trial court shall:
>
> (1) Continue to exercise jurisdiction and conduct hearings under this Subchapter with the exception of Article 11 of the General Statutes; and
>
> (2) Enter orders affecting the custody or placement of the juvenile as the court finds to be in the best interests of the juvenile.

N.C.G.S. § 7B-1003(b) (2012). Article 11 of Chapter 7B of the General Statutes governs termination of parental rights, so N.C.G.S. § 7B-1003 now facially addresses that process. In light of this change, we must determine what the General Assembly meant to prohibit by referencing Article 11 of the Juvenile Code.

When interpreting a statute, the Court must first look to legislative intent. *In re D.S.*, 364 N.C. 184, 187, 694 S.E.2d 758, 760 (2010) (citing *Shelton v. Morehead Mem'l Hosp.*, 318 N.C. 76, 81-82, 347 S.E.2d 824, 828 (1986)). To determine the intent of the legislature, we start with the language of the statute itself. *Fowler v. Valencourt*, 334 N.C. 345, 348, 435 S.E.2d 530, 532 (1993) (citing *Elec. Supply Co. of Durham v. Swain Elec. Co.*, 328 N.C. 651, 656, 403 S.E.2d 291, 294 (1991)). If the language used is unambiguous, the Court will give the plain and ordinary meaning to the words in the statute. *Id.* (citing *State ex. rel. Utils. Comm'n v. Edmisten*, 291 N.C. 451, 465, 232 S.E.2d 184, 192 (1977)).

Here the relevant statutory language unambiguously prohibits the trial court from doing only two things regarding termination proceedings

while an appeal is pending: exercising jurisdiction and conducting hearings. *See Alberti v. Mfd. Homes, Inc.*, 329 N.C. 727, 732, 407 S.E.2d 819, 822 (1991) ("[A] statute's expression of specific exceptions implies the exclusion of other exceptions." (citation omitted)). Because the trial court did not conduct hearings while the appeal was pending, the only issue here is whether the trial court otherwise exercised jurisdiction during that time period.

The plain and ordinary meaning of "exercise" is "[t]o make use of [or] to put into action." *Black's Law Dictionary* 654 (9th ed. 2009). "Jurisdiction," as it relates to subject matter, is defined as "[a] court's power to decide a case or issue a decree." *Id.* at 927; *see also In re T.R.P.*, 360 N.C. at 590, 636 S.E.2d at 790 (describing subject matter jurisdiction as "the power to pass on the merits of the case" (citation and quotation marks omitted)). Taken together, then, the phrase "exercise jurisdiction" refers to a court's use of its power to decide the merits of a case or issue a decree. Exercising jurisdiction, in the context of the Juvenile Code, requires putting the court's jurisdiction into action by holding hearings, entering substantive orders or decrees, or making substantive decisions on the issues before it. In contrast, having jurisdiction is simply a state of being that requires, and in some cases allows, no substantive action from the court. *See Jerson v. Jerson*, 68 N.C. App. 738, 740, 315 S.E.2d 522, 523 (1984) (stating that in the child custody context, "even when the district court *has jurisdiction* . . . , it *has no authority to exercise its jurisdiction* without making findings of fact which support the conclusion that such exercise is required in the interest of the child . . . ." (emphasis added)). By its own plain language, N.C.G.S. § 7B-1003 does not state that the trial court lacks jurisdiction over TPR proceedings during pendency of an appeal, but instead specifies that a trial court may not "exercise" the jurisdiction it has until the appeal is resolved and the mandate has issued.

By choosing to prohibit exercising jurisdiction, rather than stating that the trial court is divested of jurisdiction, the General Assembly has signaled that the subject matter jurisdiction of the trial court is not removed. *See Alberti*, 329 N.C. at 732, 407 S.E.2d at 822. This is consistent with other distinctions in the Juvenile Code between exercising and having jurisdiction. *See, e.g.*, N.C.G.S. § 7B-1101 (2011) ("[B]efore exercising jurisdiction under this Article, the court shall find that it has jurisdiction to make a child-custody determination . . . ."); *accord Ferrell v. Express Check Advance of SC LLC*, 591 F.3d 698, 704 (4th Cir. 2010) ("[D]ifferent words used in the same statute should be assigned different meanings . . . ."); *see also In re K.J.L.*, 363 N.C. at

347-48, 677 S.E.2d at 838 (distinguishing between certain points at which the court has jurisdiction and actually exercising that jurisdiction); *In re T.S.*, 178 N.C. App. 110, 115, 631 S.E.2d 19, 23 (stating that setting a case for hearing and sending notice of the hearing to the respondent does not "constitute[ ] the exercise of jurisdiction" and is distinct from actually holding the hearing, which is the exercise of jurisdiction), *disc. rev. denied*, 360 N.C. 647, 637 S.E.2d 218 (2006), *aff'd per curiam*, 361 N.C. 231, 641 S.E.2d 302 (2007).

Under the Juvenile Code so long as a trial court does not exercise its jurisdiction until after the mandate resolving the appeal has issued, that court may act on a termination motion filed during the appeal's pendency.[1] In this case the trial court acted within the bounds of N.C.G.S. § 7B-1003 because it did not exercise jurisdiction over the termination motion until 12 March 2010, over two weeks after the mandate issued, when it denied respondents' motions to dismiss the termination motion, held the first termination hearing, and began the process of terminating respondents' parental rights.[2] Further, in this case the court did not exercise jurisdiction until after the end of the fifteen-day period in which respondents could have filed a petition for discretionary

1. Though not binding on this Court, two Court of Appeals panels have interpreted N.C.G.S. § 7B-1003 to limit the trial court's power to make substantive changes to parental rights while an appeal is pending, rather than to limit the court's possession of jurisdiction or the parties' ability to act. *See In re N.F.*, 200 N.C. App. 617, 687 S.E.2d 710, 2009 WL 3583819, at *2 (2009) (unpublished) (holding that the trial court acted inconsistently with N.C.G.S. § 7B-1003 by holding hearings on a termination of parental rights petition not because DSS filed the petition during pendency of the appeal but because the hearings were held before the mandate issued); *In re K.L.*, 196 N.C. App. at 277, 279, 674 S.E.2d at 793, 794 (stating that N.C.G.S. § 7B-1003 "sets out the trial court's *authority to enter orders* pending appeal" and "provid[es] that the trial court lacks jurisdiction to *conduct TPR proceedings* following an appeal" (emphasis added)). Similarly, in *In re P.P.*, 183 N.C. App. 423, 426, 645 S.E.2d 398, 400 (2007), the Court of Appeals noted that N.C.G.S. § 7B-1003 would not be violated when "the hearing on the petitions [to terminate] occurred after [the Court of Appeals'] mandate had issued" unless the results in that hearing were contrary to the result of the Court of Appeals' mandate. Though the ultimate petition for termination was filed after the mandate issued in *In re P.P.*, the court's statement appears to be more broadly applicable to the meaning of N.C.G.S. § 7B-1003. That the General Assembly has failed to amend N.C.G.S. § 7B-1003 to state otherwise since these interpretations were issued may be taken as further evidence that the legislature intended only to limit the exercise of jurisdiction by the trial court pending appeal. *See Young v. Woodall*, 343 N.C. 459, 462-63, 471 S.E.2d 357, 359 (1996) ("The failure of a legislature to amend a statute which has been interpreted by a court is some evidence that the legislature approves of the court's interpretation.").

2. The trial court did enter two orders continuing the motion to terminate until after the appeal was resolved. These nonsubstantive orders were entered only to preserve the TPR filing DSS was allowed to make until the court was able to exercise

review. N.C. R. App. P. 15(b). No stay was requested or issued to prevent enforcement of the Court of Appeals' decision.

This interpretation is consistent with the central purpose of the Juvenile Code. *See Elec. Supply Co.*, 328 N.C. at 656, 403 S.E.2d at 294 ("In matters of statutory construction, our primary task is to ensure that the purpose of the legislature . . . is accomplished." (citation omitted)). Interpretations of the Code are guided by "the fundamental principle underlying North Carolina's approach to controversies involving child neglect and custody[—]that the best interest of the child is the polar star." *In re Montgomery*, 311 N.C. 101, 109, 316 S.E.2d 246, 251 (1984). The Code itself reflects this goal in its statement of purpose by requiring that its provisions "be interpreted and construed so as . . . [t]o provide standards . . . for ensuring that the best interests of the juvenile are of paramount consideration by the court." N.C.G.S. § 7B-100 (2011). Our holding serves that purpose by minimizing procedural delay that interferes with addressing the needs of the child when that delay is unnecessary to protect the rights of parents.

In particular, our decision today is consistent with the obligations placed on DSS by the Juvenile Code. N.C.G.S. § 7B-907(e) states that whenever "a proceeding to terminate the parental rights of the juvenile's parents is necessary in order to perfect the permanent plan for the juvenile," DSS shall file a proceeding[3] "to terminate parental

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jurisdiction again. This was not an exercise of jurisdiction in violation of the statute because it had no substantive effect on respondents' parental rights, and these procedural orders are not challenged here. *Cf. In re T.S.*, 178 N.C. App. at 115, 631 S.E.2d at 23 (concluding that noticing a matter for hearing in and of itself does not "constitute[ ] the exercise of jurisdiction").

3. For the purposes of this holding, it is immaterial whether the TPR proceedings are begun by a petition or a motion in the cause. The first requirement placed on the trial court, in the case of a TPR petition, is to issue a summons to respondents. N.C.G.S. § 7B-1106(a) (2011). We have previously stated the issuance of a summons in a juvenile case is not an exercise of jurisdiction but "apprises the necessary parties that the trial court's subject matter jurisdiction has been invoked [by the pleadings] and that the court *intends to exercise jurisdiction* over the case." *In re K.J.L.*, 363 N.C. at 347, 677 S.E.2d at 838 (emphasis added). Therefore, the court will not exercise jurisdiction here in violation of N.C.G.S. § 7B-1003 by issuing the summons, but will instead indicate its intention to proceed when it is able. Likewise, providing notice to the respondent when TPR proceedings are initiated by a motion in the cause does not require the court to exercise jurisdiction because N.C.G.S. § 7B-1106.1 places no burden on the court, instead requiring that notice be given by the movant. Thus, whether the TPR proceeding begins with a petition or a motion in the cause, the parties will receive notice without any exercise of jurisdiction by the trial court. Once notice has been given, all further requirements of Article 11 will be tolled until the power to exercise jurisdiction is returned to the trial court.

rights within 60 calendar days from the date of the permanency planning hearing unless the court makes written findings why" that cannot be accomplished. *Id.* § 7B-907(e) (2011). Here, because the last permanency planning hearing was held on 8 May 2009, the statute intended that DSS would file a TPR motion within sixty calendar days after that date, which it did.

Importantly, our interpretation of N.C.G.S. § 7B-1003 does not allow form to be elevated over substance. It is undisputed that the trial court would have had jurisdiction to terminate respondents' parental rights if the motion to terminate had been filed before the notice of appeal was filed. The notice of appeal would simply prevent the trial court from exercising jurisdiction during the pendency of the appeal. Once the appeal was decided the trial court could then exercise jurisdiction. In light of this, it would be incongruous for the mere timing of the TPR filing to determine whether the trial court has subject matter jurisdiction. The language of N.C.G.S. § 7B-1003 prevents such an illogical result by suspending only the exercise—not the possession—of jurisdiction while an appeal is pending.

Within the statutory scheme of the Juvenile Code, the trial court did not act without subject matter jurisdiction when it granted petitioner's motion to terminate respondents' parental rights. The trial court had jurisdiction at the time it acted because N.C.G.S. § 7B-1003 did not remove its jurisdiction during the appeal of the disposition order, but only limited its exercise during that interval. Because the trial court did not exercise jurisdiction during the pendency of the appeal, but waited to do so only after the Court of Appeals' mandate issued, the trial court did not violate N.C.G.S. § 7B-1003. Accordingly, as to the issue before us on certiorari, we affirm the decision of the Court of Appeals.

If the name or identity of the parent whose rights are to be terminated is unknown, N.C.G.S. § 7B-1105 requires the trial court to hold a hearing to identify that parent. N.C.G.S. § 7B-1003 suspends that very act while an appeal is pending, however. This Court has long recognized the principle that statutes dealing with the same subject matter must be construed in *pari materia* and reconciled, if possible. *See, e.g.*, *Elec. Supply Co.*, 328 N.C. at 656, 403 S.E.2d at 294 (citing *Great S. Media, Inc. v. McDowell Cnty.*, 304 N.C. 427, 430-31, 284 S.E.2d 457, 461 (1981)). Applying that principle here leads us to conclude that even though N.C.G.S. § 7B-1105 requires the trial court to exercise jurisdiction by conducting a hearing within ten days after a triggering event, the time period set forth in that statute must be tolled if the statute is to be construed in conformity and reconciled with N.C.G.S. § 7B-1003. In contrast, the same analysis does not apply to the time limit mandated in N.C.G.S. § 7B-907(e) because that statute requires that the described action be taken by a party, not by the trial court. This statutory framework does not deprive the parent of notice because after the tolling period ends, the procedure set out in N.C.G.S. § 7B-1105 would be followed before terminating parental rights.

AFFIRMED.

Justice EDMUNDS dissenting.

I believe that the General Assembly intended to remove completely a trial court's subject matter jurisdiction over termination of parental rights (TPR) matters while an appeal in the underlying case involving the juvenile is pending, and that the pertinent statutes reflect that intent. Because the trial court here issued its order terminating respondents' parental rights in response to a TPR motion that was not filed until *after* respondent parents filed an appeal of the trial court's underlying custody order in the case, I would hold the TPR order is void for lack of subject matter jurisdiction and would reverse the Court of Appeals.

"When interpreting a statute, we ascertain the intent of the legislature, first by applying the statute's language and, if necessary, considering its legislative history and the circumstances of its enactment." *Shaw v. U.S. Airways, Inc.*, 362 N.C. 457, 460, 665 S.E.2d 449, 451 (2008) (citations omitted). When the statutory language is ambiguous, we consider legislative history and the circumstances surrounding enactment of the statute. *See id.*

The majority argues that section 7B-1003(b) is unambiguous and its meaning plain, thereby avoiding the need to consider the relevant legislative history. From this plain meaning analysis, the majority creates an expansive notion of jurisdiction by using a dictionary definition of the word "exercise" to adopt a two-tier concept of subject matter jurisdiction in which a trial court may "have" jurisdiction to accept a motion in the cause or a petition that initiates a TPR action and to issue "non-substantive" orders such as continuances, but may not "exercise" jurisdiction to take other actions. Thus, a trial court may acquire and have a form of dormant jurisdiction that blossoms into full jurisdiction only upon issuance of the mandate of the Court of Appeals. The majority cites no binding precedent for this notion and I can find none. I believe that this interpretation is inconsistent with the intent of the General Assembly and that the majority's dichotomy could have unforeseen and unforeseeable consequences to the jurisprudence of North Carolina.

While I believe the phrase "exercise jurisdiction" in section 7B-1003(b) is at least arguably ambiguous, I also believe the circumstances surrounding the 2005 amendments to that statute demonstrate that the General Assembly intended to abrogate completely a trial court's jurisdiction over TPR matters during the pendency of an appeal, thus resolving any ambiguities. Prior to the amendments, this Court faced a similar

question relating to child custody. *In re R.T.W.*, 359 N.C. 539, 542, 614 S.E.2d 489, 491 (2005). In *R.T.W.*, the trial court had entered a custody review order that the respondent parent appealed to the Court of Appeals. *Id.* at 541, 614 S.E.2d at 490. While the appeal of the custody review order was pending, the county DSS moved to terminate the respondent's parental rights and the trial court entered a termination order before the Court of Appeals issued its decision. *Id.* at 541, 614 S.E.2d at 490-91. The Court of Appeals vacated the termination order, ruling that the trial court lacked jurisdiction to terminate parental rights while the appeal of the custody review order was pending. *Id.* at 541, 614 S.E.2d at 491.

This Court reversed. *Id.* at 540, 614 S.E.2d at 490. After reviewing the statutes then in effect, this Court stated that "we hold a trial court retains jurisdiction to terminate parental rights during the pendency of a custody order appeal in the same case," *id.* at 553, 614 S.E.2d at 498, and, more broadly, that "[w]e hold the pending appeal of a custody order does not deprive a trial court of jurisdiction over termination proceedings," *id.* at 542, 614 S.E.2d at 491. Our opinion was issued on 1 July 2005.

The General Assembly's reaction was swift and its intent plain. Effective 1 October 2005, the General Assembly amended Article 10 (Modification and Enforcement of Dispositional Orders; Appeals) and Article 11 (Termination of Parental Rights) of Chapter 7B to revoke a trial court's jurisdiction over TPR matters generally during the pendency of an appeal. Act of Aug. 23, 2005, ch. 398, 2005 N.C. Sess. Laws 1455. Before the amendments, Articles 10 and 11 contained their own sections governing a trial court's continuing power to act regarding dispositional orders (Article 10) and TPR matters (Article 11) while appeals of those matters were pending in the appellate division. N.C.G.S. §§ 7B-1003, -1101, -1113 (2003). If the legislature simply wanted to deny a trial court the power to "exercise jurisdiction" to terminate parental rights during the pendency of an appeal, as the majority suggests, it could have accomplished this result easily by amending the relevant sections of Articles 10 and 11. Instead, the General Assembly repealed section 7B-1113 outright while modifying the jurisdictional section in Article 10, section 7B-1003, to provide that, while a trial court could continue to exercise jurisdiction and hold hearings in matters concerning abuse, neglect, and dependency during the pendency of an appeal, the court was prohibited from taking action under Article 11. *Id.* § 7B-1003 (2009).

In addition, section 7B-1003(b)(2) preserves a trial court's ability to issue orders related to a juvenile's custody or placement so long as the order is in the juvenile's best interests, an authority trial courts already had prior to the 2005 amendments. While the 2005 amendments prevent trial courts from exercising their Article 11 jurisdiction during an appeal, the provisions of section 7B-1003(b)(2) ensure that a trial court can still issue orders related to the safety and best interests of the child even when acting under Article 11. By including subdivision (b)(2) in section 7B-1003, the General Assembly thus made allowance for this Court's concern in *R.T.W.* that divesting a trial court of jurisdiction would allow a parent to file serial appeals and stymie the statutory provisions which protect the best interests of the child. *See In re R.T.W.*, 359 N.C. at 552, 614 S.E.2d at 497.

In my view, the General Assembly's wholesale reworking of the applicable statutes, undertaken in response to our holding in *R.T.W.*, manifests an intent to remove in all respects a trial court's jurisdiction over TPR matters during the pendency of an appeal. Not only is this reading of section 7B-1003(b) consistent with the language of the statute and the events surrounding its modification, it acknowledges the General Assembly's prerogative to amend statutes in response to decisions of this Court. *See*, *e.g.*, *Rosero v. Blake*, 357 N.C. 193, 199-205, 581 S.E.2d 41, 45-48 (2003) (describing the legislative reaction to this Court's opinion in *Jolly v. Queen*, 264 N.C. 711, 142 S.E.2d 592 (1965)), *cert. denied*, 540 U.S. 1177, 124 S. Ct. 1407, 158 L. Ed. 2d 78 (2004).

The implications of the majority's analysis are uncertain, and many unanswered questions remain in the field of juvenile law. For example, the majority opinion suggests that notice may be issued upon the filing of a TPR petition or motion in the cause while an appeal is pending. Will notice have to be reissued once the appellate court issues its mandate? If a respondent loses the appeal of a custody order in the Court of Appeals in a split decision and appeals as a matter of right to this Court, will the TPR action proceed in the trial court in the interval after the Court of Appeals issues its mandate and before the notice of appeal of right is filed? What "nonsubstantive" orders can the trial court issue during the pendency of the appeal, and what "substantive" orders are forbidden?

In contrast, I believe that an interpretation of the statute to the effect that a trial court's subject matter jurisdiction could not be invoked during the pendency of an appeal would be consistent with the intent of the General Assembly while avoiding the uncertainties raised

by the majority's holding. Indeed, the only purported glitch in such an interpretation, noted by petitioners in their briefs, is resolved in the statutes. Petitioners contend that a complete removal of jurisdiction from a trial court during the pendency of an appeal would force a DSS to ignore the requirement in section 7B-907(e) that the DSS director file a TPR petition within sixty days of a permanency planning hearing if termination is part of the permanent plan. However, section 7B-907(e) also allows a trial court to extend the sixty-day time period after it makes written findings explaining the delay. In such a case, the DSS director need only request that the trial court issue a written finding that, because of the pending appeal, the petition cannot be filed within the sixty days required by section 7B-907(e). The trial court's action then falls outside the jurisdictional scope of Article 11 and thus is permitted by section 7B-1003.

Finally, while the majority limits its holding to matters arising under the Juvenile Code, I fear that its view of bifurcated jurisdiction may bleed into discussions of jurisdiction outside the context of TPR proceedings.

This case has lingered and I do not doubt the need for a rapid resolution. Nevertheless, this Court should not tinker unnecessarily with the mechanism of subject matter jurisdiction, nor should we disregard the unmistakable intent of the General Assembly. I respectfully dissent.

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

Justice TIMMONS-GOODSON dissenting.

I agree fully with Justice Edmunds's well-reasoned dissent. I write separately out of concern that the majority rewrites several significant provisions of the Juvenile Code in an attempt to reconcile its interpretation of section 7B-1003. In so doing the majority raises more questions than it answers and does nothing to expedite termination proceedings in the best interest of the child.

The majority goes to great lengths to justify its conclusion that by using the phrase "exercise jurisdiction" in N.C.G.S. § 7B-1003, the legislature unambiguously intended to create a two-tier notion of subject matter jurisdiction. In that statute the legislature prohibited the trial court from "exercising jurisdiction" over termination of parental rights ("TPR") cases during pendency of an appeal of a custody order. N.C.G.S. § 7B-1003 (2011). This novel notion of subject matter jurisdiction, which Justice Edmunds aptly critiques, conflicts with several statutes. For

example, under our General Statutes, upon the filing of a TPR motion or petition pending appeal of a custody order, the respondent must file an answer within thirty days, *id.* §§ 7B-1106, -1106.1 (2011), and the trial court must hold a TPR hearing within ninety days, *id.* § 7B-1109(a) (2011). Under the majority's view, how can the trial court hold TPR hearings within ninety days of the filing of a TPR motion or petition during pendency of an appeal when section 7B 1003(b) expressly prohibits the holding of hearings during that time? Further, how will a parent know that the Department of Social Services ("DSS") has filed a petition to terminate parental rights when the trial court cannot exercise its jurisdiction by issuing a summons to the parent? *In re J.T.*, 363 N.C. 1, 672 S.E.2d 17 (2009) (holding that issuance of a summons is an exercise of jurisdiction).

In an attempt to resolve these and other questions—questions that arise only because of the majority's interpretation of section 7B-1003—the majority rewrites several essential statutes. Buried in the fine print of footnote three, the majority makes the extraordinary assertion that by using the word "exercise" in section 7B 1003, the legislature intended that "all further requirements of Article 11 will be tolled until the power to exercise jurisdiction is returned to the trial court."

The consequences of this broad declaration are significant. First, the majority tolls the thirty-day answer periods required by sections 7B-1106 and 1106.1 until issuance of the Court of Appeals' mandate. Second, the majority tolls the requirement of section 7B-1109(a) that the trial court conduct a TPR hearing within ninety days of a TPR filing. Third, the majority tolls the requirement of section 7B-1105 that the trial court hold a hearing within ten days to determine the name or identity of a parent whose rights are to be terminated. The legislature gives no indication that it intended the requirements of these four statutes to be tolled. Moreover, if the legislature desired the sweeping result that "all . . . requirements of Article 11" be tolled until issuance of the Court of Appeals' mandate, the legislature would have said so expressly. It is the role of the legislative branch, not the judicial branch, to revise statutes.

The majority opinion raises additional questions about elements critical to the administration of fair and orderly termination proceedings. The majority asserts in footnote three that a summons is not an exercise of jurisdiction and in doing so ignores our holding to the contrary just two years ago. *In re J.T.*, 363 N.C. at 4-5, 672 S.E.2d at 19. In *In re J.T.*, authored by Justice Newby, we determined that the issuance of a summons constitutes an invocation of subject matter jurisdiction in TPR cases. *Id.* at 4, 672 S.E.2d at 19 ("[T]he trial court's

subject matter jurisdiction was properly invoked upon the issuance of a summons."). Short of reversing *In re J.T.*, I do not see how the majority could contend that issuance of a summons is anything other than an exercise of jurisdiction. At a minimum, the majority must address *In re J.T.*

Another unanswered question is how, once the Court of Appeals' mandate has issued, a parent is to be informed that the tolled thirty-day response clock has restarted. No provision of the Juvenile Code speaks to this situation because it was created today by the majority. Surely a parent's due process rights ensure that she will receive some sort of notice informing her that she can file an answer. If this notice comes in the form of a post-mandate summons, then does the response clock start upon issuance of the mandate or upon delivery of that summons? Further, if a post-mandate summons is to be issued, what information must it contain?

The foregoing problems and uncertainty created by the majority's holding underscore the importance of leaving for the legislature the task of revising interlaced statutes that comprise a holistic statutory framework. This is not the role of the judicial branch.

Ironically, the holding of the majority does not ensure that TPR hearings will occur sooner after resolution of a custody appeal than if the Court had held that a TPR filing does exercise the jurisdiction of the trial court. Under the majority view, a hearing will occur no sooner than thirty days after issuance of the Court of Appeals' mandate because of respondent's thirty-day answer period. N.C.G.S. §§ 7B 1106, -1106.1. Under my view—that a TPR filing invokes the trial court's jurisdiction and is not permitted until issuance of the Court of Appeals' mandate—the hearing timeline is the same. DSS could file its TPR petition or motion on the day the mandate issues and the trial court could schedule a hearing for when the thirty-day response period ends. Thus, the majority's view does not benefit the juvenile by shortening the duration of the TPR process.

In my view, section 7B-1003 prohibits the filing of a TPR motion or petition during pendency of a custody appeal. Once the Court of Appeals' mandate for the custody appeal issues, all of the statutory timelines proceed as written, without modification. Section 7B-907(e) requires DSS to file a petition within sixty days "from the date of the permanency planning hearing," but carves out an exception: the trial court can "make[ ] written findings why the petition cannot be filed

within 60 days." *Id.* § 7B-907(e) (2011). Thus, if a custody order is appealed, the legislature allows the trial court to issue a written order exempting DSS from the sixty-day requirement. The trial court would then specify that DSS must file its TPR petition or motion within sixty days of issuance of the mandate. *Id.* This interpretation of section 7B-1003 is consistent with the existing provisions of the Juvenile Code and thus is preferable to the majority's view. Unlike today's holding, my view requires no judicial exercise of the legislative pen and maintains the current balance of protecting parental and juvenile rights. At the same time, it serves the best interests of the child.

IN THE MATTER OF THE FORECLOSURE OF THE DEED OF TRUST OF VOGLER REALTY, INC., MORTGAGOR-GRANTOR, TO CHARLES N. STEDMAN, TRUSTEE, AND J.B. LEE & COMPANY, A NORTH CAROLINA GENERAL PARTNERSHIP, NOTEHOLDER AS RECORDED IN DEED OF TRUST BOOK 1090, PAGE 338

No. 11A11

(Filed 27 January 2012)

Attorney Fees— foreclosure proceeding—no statutory authority for clerk of superior court to determine reasonableness

The Court of Appeals did not err by concluding that the clerk of superior court did not have the authority to determine the reasonableness of attorney fees that a trustee-attorney in a foreclosure proceeding paid to himself in addition to his trustee's commission absent a viable challenge for breach of fiduciary duty from a creditor with standing. Instead, the clerk's audit under N.C.G.S. § 45-21.33(a) and (b) was a ministerial act that was limited to determining whether the entries in the report reflected the actual receipts and disbursements made by the trustee in the absence of a grant of original jurisdiction to determine additional matters.

Justice NEWBY dissenting.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, —— N.C. App. ——, 703 S.E.2d 159 (2010), vacating an order entered on 4 November 2009 by Judge Ronald L. Stephens in Superior Court, Alamance County. Heard in the Supreme Court on 6 September 2011.

Bell, Davis & Pitt, P.A., by Michael D. Phillips and Michael A. Myers, for petitioner-appellant CommunityOne Bank, N.A.

Stedman Law, by Charles N. Stedman, pro se, for Trustee-appellee.

JACKSON, Justice.

In this appeal we consider whether the clerk of superior court has the authority to determine the reasonableness of attorney's fees that a trustee-attorney in a foreclosure proceeding pays to himself in addition to his trustee's commission. Because we hold that the clerk of superior court lacks this authority, we affirm.

On 26 June 1997, Vogler Realty, Inc. ("debtor") executed a promissory note payable to J.B. Lee & Company ("creditor") in the principal amount of $250,000.00. The promissory note was secured by a duly recorded deed of trust on commercial real estate owned by debtor. The deed of trust named Charles N. Stedman, a licensed attorney, as trustee. The deed of trust included a power of sale and provided for the payment of "reasonable" attorney's fees as a cost thereof, stating in pertinent part: "The Trustee shall be authorized to retain an attorney to represent him in [foreclosure] proceedings. The proceeds of the Sale shall after the Trustee retains his commission, together with reasonable attorneys [sic] fees incurred by the Trustee in such proceeding, be applied to the costs of sale . . . ." The property also was encumbered by Robert J. Wishart as the second priority lienholder, CommunityOne Bank, N.A. as the third priority lienholder, and Fidelity Bank as the fourth priority lienholder.

Debtor defaulted on its obligations pursuant to the promissory note and deed of trust by failing to make payments to creditor after 13 January 2009. Creditor thereafter accelerated the entire outstanding balance owed in accordance with the promissory note and demanded payment in full. On 20 March 2009, Stedman, in his capacity as trustee, filed a petition and notice of hearing on foreclosure in the Superior Court, Alamance County pursuant to the power of sale contained in the deed of trust. The petition stated that Stedman was a neutral party and would not advocate for either debtor or creditor.

At a hearing before the Alamance County Clerk of Court (the "clerk") on 21 April 2009, debtor admitted default and did not contest the foreclosure proceedings. Thereafter, the clerk made the required findings of fact and entered an order authorizing Stedman to proceed with the foreclosure sale. Stedman held the foreclosure sale on 13 May 2009 and subsequently filed a report of sale. Two upset bids were filed after the sale. Debtor's right of redemption expired on 11 June 2009,

after which the final sale was consummated. On 26 June 2009, Stedman submitted the final report and account of foreclosure sale to the clerk for audit and approval in accordance with sections 45-21.31 and 45-21.33 of the North Carolina General Statutes. According to the final report, the final sale generated proceeds totaling $336,262.50.

From the proceeds Stedman, as trustee, paid the costs and expenses of the foreclosure proceeding, including: (1) a trustee's commission of $16,813.12 (5% of the highest upset bid[1] pursuant to section 45-21.15(a) of the North Carolina General Statutes); and (2) a trustee's attorney's fee of $33,573.82 (15% of the outstanding balance on the promissory note). The remaining proceeds were disbursed as follows: (1) $229,762.30 to creditor; (2) $31,685.61 to Wishart; and (3) $22,743.65 to CommunityOne. Fidelity Bank, the fourth priority lienholder, received nothing. The distributions fully satisfied the debts owed to creditor and Wishart, but CommunityOne still was owed a balance of $78,862.60.

On 13 July 2009, CommunityOne filed a motion before the Clerk of Superior Court, Alamance County, objecting to Stedman's disbursement of the proceeds on the basis that Stedman failed to demonstrate any justification for paying himself attorney's fees in addition to his trustee's commission. In response to CommunityOne's motion, Stedman filed an affidavit and itemization showing the services that he performed, his usual hourly rate ($300.00 per hour), and the time he spent working on the foreclosure proceeding (71.8 hours). Based upon the documentation submitted by Stedman, the value of his services amounted to $21,540.00.

On 27 July 2009, following a hearing on CommunityOne's motion, the clerk approved the five percent (5%) trustee's commission, but reduced Stedman's attorney's fees to $4,726.88. Pursuant to the clerk's order, Stedman would receive $21,540.00 total, an amount equal to the total value of his trustee and attorney services according to the statements and figures Stedman provided in his affidavit and itemization. Stedman appealed to the superior court. After holding a hearing on 12 October 2009, the superior court affirmed the clerk's order on 4 November 2009. Stedman appealed to the Court of Appeals.

The Court of Appeals, in a divided opinion, vacated the clerk's and trial court's orders, holding that the clerk lacked the statutory authority to determine the reasonableness of attorney's fees paid in a foreclosure proceeding. *In re Foreclosure of Vogler Realty, Inc.*, —— N.C. App. ——,

1. CommunityOne submitted the first upset bid.

—, 703 S.E.2d 159, 164 (2010). The dissenting opinion argued that section 32-61 of the North Carolina General Statutes authorizes a clerk to determine the reasonableness of attorney's fees that a trustee-attorney seeks to pay to himself in a foreclosure proceeding. *Id.* at —, 703 S.E.2d at 165-68 (Hunter, Jr., Robert N., J., dissenting). CommunityOne filed notice of appeal with this Court based upon the dissent.

CommunityOne argues that section 32-61 of the North Carolina General Statutes authorizes the clerk of superior court to determine the reasonableness of a trustee-attorney's payment of attorney's fees to himself in a foreclosure proceeding. We disagree.

We review matters of statutory interpretation de novo because they present questions of law. *In re Ernst & Young, LLP*, 363 N.C. 612, 616, 684 S.E.2d 151, 154 (2009). "[W]hen the language of a statute is ambiguous, this Court will determine the purpose of the statute and the intent of the legislature in its enactment." *Diaz v. Div. of Soc. Servs.*, 360 N.C. 384, 387, 628 S.E.2d 1, 3 (2006). In these situations, "the history of the legislation may be considered in connection with the object, purpose and language of the statute in order to arrive at its true meaning." *Lithium Corp. of Am. v. Town of Bessemer City*, 261 N.C. 532, 536, 135 S.E.2d 574, 577 (1964). However, "[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*, 360 N.C. at 387, 628 S.E.2d at 3.

Article 6 of Chapter 32 of the North Carolina General Statutes is titled, "Compensation of Trustees and Other Fiduciaries." Section 32-61 states:

> The clerk of superior court may exercise discretion to allow counsel fees to an attorney serving as a fiduciary or trustee (in addition to the compensation allowed to the attorney as a fiduciary or trustee) where the attorney, on behalf of the trust or fiduciary relationship, renders professional services as an attorney that are different from the services normally performed by a fiduciary or trustee and of a type which would reasonably justify the retention of legal counsel by a fiduciary or trustee who is not licensed to practice law.

N.C.G.S. § 32-61 (2009). Both the majority and dissenting opinions in the Court of Appeals refer to section 32-61, and both opine that there is some applicability of this statute to a foreclosure sale. The majority would limit its applicability to a foreclosure sale that is "incomplete and

terminated pursuant to N.C.G.S. § 45-21.20" in reliance on its precedent in *In re Foreclosure of Newcomb*, 112 N.C. App. 67, 72-74, 434 S.E.2d 648, 651-52 (1993). *In re Vogler*, —— N.C. App. at ——, 703 S.E.2d at 163. The dissent would go further, contending that *Newcomb* is not limited to "only those situations in which the foreclosure was arrested by payment of the underlying debt pursuant to N.C.[G.S.] § 45-21.20." *Id.* at ——, 703 S.E.2d at 165 (Hunter, J., dissenting). We reject both propositions. Instead, we read section 32-53(4) as providing that Article 6 applies only to trusts as defined in the North Carolina Uniform Trust Code. *See* N.C.G.S. § 32-53(4) (2009). Chapter 36C, the Uniform Trust Code, expressly excludes from its scope "trusts for the primary purpose of paying debts." *Id.* § 36C-1-102 (2009). Significantly, the Uniform Trust Code states that "[t]he term [trustee] does not include trustees in mortgages and deeds of trust." *Id.* § 36C-1-103(22) (2009). Therefore, section 32-61 does not apply to trustee-attorneys in foreclosure proceedings.

This conclusion also is supported by the legislative history of Article 6. "When interpreting a statute, we ascertain the intent of the legislature, first by applying the statute's language and, if necessary, considering its legislative history and the circumstances of its enactment." *Shaw v. U.S. Airways, Inc.*, 362 N.C. 457, 460, 665 S.E.2d 449, 451 (2008). Although the statute in the instant case is relatively straightforward, there is ample legislative history that also supports our construction of the General Assembly's intention. The bill analysis for Senate Bill 470, the legislation that revised and repealed Article 5 to create Article 6, states that "Senate Bill 470 rewrites the law dealing with the compensation of trustees and other fiduciaries when the terms of certain trusts do not specify the compensation." Staff of N.C. Sen. Comm. on Jud. II, *Summary of S. 470: Compensation of Trustees/Other Fiduciaries*, 2003 Reg. Sess. 1 (Apr. 10, 2003). The bill analysis routinely refers to both trustees and other fiduciaries in the context of "trusts," but never with respect to "deeds of trust" or other instruments. *See id* at 2. (stating, for example, that "G.S. 32-58 would authorize the clerk of court, upon written request by a fiduciary other than the trustee, to determine reasonable compensation for that fiduciary, unless prohibited by *the trust*" (emphasis added)). Moreover, the bill analysis expressly states the legislature's intent that the word "trust" "have the same meaning as it has in Article 3 of Chapter 36A," *id.* at 1, which used substantially the same definition of "trust" that currently is found in the Uniform Trust Code. *Compare* N.C.G.S. § 36A-22.1, *repealed by* Act of July 7, 2005, ch. 192, sec. 1, 2005 N.C. Sess. Laws 345, 345, *with* N.C.G.S. § 36C-1-102 (2009). Construing the language of

Article 6 in conjunction with its legislative history, we believe it is clear that the legislature intended Article 6 to encompass trustees and other fiduciaries only in the context of trusts subject to the North Carolina Uniform Trust Code. Therefore, we conclude that section 32-61 of the North Carolina General Statutes is inapplicable in a foreclosure by power of sale pursuant to a deed of trust.

Instead, our foreclosure statutes, specifically, Article 2A of Chapter 45 of the North Carolina General Statutes, control the case *sub judice*. Section 45-21.31(a) outlines the procedure for distributing the proceeds of a foreclosure sale:

> (a) The proceeds of any sale shall be applied by the person making the sale, in the following order, to the payment of—
>
> (1) Costs and expenses of the sale, including the trustee's commission, if any, and a reasonable auctioneer's fee if such expense has been incurred;
>
> (2) Taxes due and unpaid on the property sold, as provided by G.S. 105-385, unless the notice of sale provided that the property be sold subject to taxes thereon and the property was so sold;
>
> (3) Special assessments, or any installments thereof, against the property sold, which are due and unpaid, as provided by G.S. 105-385, unless the notice of sale provided that the property be sold subject to special assessments thereon and the property was so sold;
>
> (4) The obligation secured by the mortgage, deed of trust or conditional sale contract.

N.C.G.S. § 45-21.31(a) (2009). The costs and expenses listed in items (1), (2), and (3) are not the responsibility of the debtor or creditor, but rather "are simply obligations arising from the foreclosure sale which must be paid by the trustee before the remainder of the proceeds may be distributed." *Merritt v. Edwards Ridge*, 323 N.C. 330, 336, 372 S.E.2d 559, 563 (1988). Although not specifically listed in section 45-21.31(a)(1), a trustee's attorney's fee provided for in the deed of trust is a "cost[ ] and expense[ ] of the sale" and therefore, must be paid by the trustee. *See id.*; N.C.G.S. § 45-21.31(a)(1) (2009). After these proceeds have been distributed, section 45-21.33 mandates a final report of the sale and an audit by the clerk of superior court:

> (a) A person who holds a sale of real property pursuant to a power of sale shall file with the clerk of the superior court . . . a final report and account of his receipts and disbursements . . . .
>
> (b) The clerk shall audit the account and record it.

N.C.G.S. § 45-21.33(a), (b) (2009). Notably, this statute does not authorize the clerk to review the distribution of attorney's fees for reasonableness.

Indeed, we consistently have emphasized that the clerk of superior court has limited jurisdictional authority. "In this State the clerk of superior court is a court of very limited jurisdiction, having only such authority as is given by statute." *Cook v. Bradsher*, 219 N.C. 10, 13, 12 S.E.2d 690, 692 (1941). Thus, generally the clerk "has no common-law jurisdiction, nor does [the clerk] have any equitable jurisdiction." *McCauley v. McCauley*, 122 N.C. 288, 292, 30 S.E. 344, 345 (1898). Consequently, the clerk cannot perform functions involving the exercise of judicial discretion in the absence of statutory authority. *See Dixon v. Osborne*, 201 N.C. 489, 493, 160 S.E. 579, 581 (1931); *see also In re Estate of Parrish*, 143 N.C. App. 244, 251, 547 S.E.2d 74, 78 (stating that an estate proceeding is "not a civil action but a proceeding concerning an estate matter, which [is] exclusively within the purview of the Clerk's jurisdiction, and over which the Superior Court retain[s] appellate, not original jurisdiction"), *disc. review denied*, 354 N.C. 69, 553 S.E.2d 201 (2001).

In other contexts, when the legislature has intended for the clerk to possess discretionary authority over commissions and attorney's fees, it specifically has set forth this authority, prefaced with the use of "may" or "in the discretion of." *See* N.C.G.S. § 35A-1116(a) (2009) (guardianship); N.C.G.S. §§ 28A-23-3, 23-4 (2009) (estates); *see also Wachovia Bank & Trust Co. v. Waddell*, 237 N.C. 342, 345, 347, 75 S.E.2d 151, 153, 154 (1953) (stating that, under our prior estates statute, the allowance of commissions to an executor required the exercise of judicial discretion by the clerk of court). However, such a grant of authority is completely absent in section 45-21.33. *See Boseman v. Jarrell*, 364 N.C. 537, 545, 704 S.E.2d 494, 500 (2010) ("If the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must give the statute its plain and definite meaning, and are without power to interpolate, or superimpose, provisions and limitations not contained therein." (internal quotation marks omitted)). Moreover, the audit itself is ministerial, rather than discretionary in nature, "because the law requires [the clerk] to do [it] without any application or request." *Bryan v. Stewart*, 123 N.C. 92, 97, 31 S.E. 286, 287 (1898); *see*

also State ex. rel. Owens v. Chaplin, 228 N.C. 705, 711, 47 S.E.2d 12, 16 (1948) (describing a ministerial duty as "a simple and definite duty imposed by law regarding which nothing [is] left to [the clerk's] discretion"). "[A] statute clear on its face must be enforced as written." *Bowers v. City of High Point*, 339 N.C. 413, 419-20, 451 S.E.2d 284, 289 (1994). Therefore, during the audit the clerk is not authorized to review the trustee-attorney's payment of attorney's fees to himself for reasonableness, as this action would involve an improper exercise of judicial discretion. Instead, the clerk's audit pursuant to section 45-21.33(a) and (b) is a ministerial act that is limited to determining merely "whether the entries in the report reflect the actual receipts and disbursements made by the trustee" in the absence of a grant of original jurisdiction to determine additional matters. *In re Foreclosure of Webber*, 148 N.C. App. 158, 161, 557 S.E.2d 645, 647 (2001).

As a result, the trustee is responsible for distributing the appropriate amount of attorney's fees in accordance with the provisions of the deed of trust. However, "reasonable" attorney's fees should not be construed to mean the fifteen percent (15%) fee allowed pursuant to section 6-21.2(2) of the North Carolina General Statutes as Stedman argues. *See* N.C.G.S. § 6-21.2(2) (2009) (generally governing the payment of attorney's fees in civil actions and proceedings and authorizing payment of a fifteen percent fee by a debtor to a creditor who collects on the underlying debt through an attorney). Section 6-21.2 is inapplicable to trustee's attorney's fees because the trustee is an agent of both the debtor and the creditor, *Mills v. Mut. Bldg. & Loan Ass'n*, 216 N.C. 664, 669, 6 S.E.2d 549, 552 (1940), and section 6-21.2 governs only attorney's fees for the creditor's attorney. *See* N.C.G.S. § 6-21.2 (2009). Accordingly, if the deed of trust calls for "reasonable" attorney's fees then the trustee should distribute a reasonable amount under the circumstances.

This conclusion is consistent with the purpose underlying deeds of trust. "The object of deeds of trust is, by means of the introduction of trustees as impartial agents of the creditor and debtor alike, to provide a convenient, cheap and speedy mode of satisfying debts on default of payment; to assure fair dealing and eliminate the opportunity for oppression; to remove the necessity of the intervention of the courts; and to facilitate the transfer of the note or notes secured without the necessity for a similar transfer of the security." *Mills*, 216 N.C. at 669, 6 S.E.2d at 552. In the absence of statutory authority, the clerk of court has no role in assessing the reasonableness of attorney's fees.

Moreover, the aggrieved creditor is not left without a remedy, as it may, in appropriate circumstances, bring an action for breach of fiduciary duty against the trustee. *See id.* at 665-66, 6 S.E.2d at 549-50. This Court long has recognized that the trustee of a deed of trust stands in a fiduciary relationship with both the debtor and creditor. *See, e.g.*, *id.* at 669-70, 6 S.E.2d at 552-53; *Gregg v. Williamson*, 246 N.C. 356, 360, 98 S.E.2d 481, 485 (1957) (recognizing that "[t]he trustee must be impartial in the performance of his duties" and cannot "give an unfair advantage to one [party] to the detriment of the other"); *Hinton v. Pritchard*, 120 N.C. 1, 3-4, 26 S.E. 627, 627 (1897). A fiduciary relationship is one in which "there has been a special confidence reposed in [another] who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing confidence." *Abbitt v. Gregory*, 201 N.C. 577, 598, 160 S.E. 896, 906 (1931). In the context of a deed of trust:

> The trustee for sale is bound by his office to bring the estate to a sale under every possible advantage to the debtor as well as to the creditor[,] and he is bound to use not only good faith but also every requisite degree of diligence in conducting the sale and to attend equally to the interest of the debtor and the creditor alike, apprising both of the intention of selling, that each may take the means to procure an advantageous sale. He is charged with the duty of fidelity as well as impartiality, of good faith and every requisite degree of diligence, of making due advertisement and giving due notice. Upon default his duties are rendered responsible, critical and active and he is required to act discreetly, as well as judiciously, in making the best use of the security for the protection of the beneficiaries.

Mills, 216 N.C. at 669, 6 S.E.2d at 552 (internal citations omitted).

However, we observe that prior decisions of this Court have not extended this fiduciary relationship beyond the foreclosing lienholder. *See, e.g.*, *id.* at 669-71, 6 S.E.2d at 552-53; *Hinton*, 120 N.C. at 3, 26 S.E. at 627. As a corollary, a subordinate lienholder in this state is not entitled to notice of a foreclosure by power of sale. *See* N.C.G.S. § 45-21.16(b) (2009) (listing among the parties entitled to notice: (1) "[a]ny person to whom the security interest instrument itself directs notice to be sent in case of default"); (2) "[a]ny person obligated to repay the indebtedness"; and (3) "[e]very record owner of the real estate," which specifically "does not mean or include" any "holder of a . . . lien or security interest in the real property"); *cf. Certain-Teed Prods.*

Corp. v. Sanders, 264 N.C. 234, 241, 141 S.E.2d 329, 334 (1965) (stating that without a valid contract to do so a creditor is not required to give personal notice of a foreclosure by sale to a debtor or to a second priority lienholder); *Thompson v. State*, 223 N.C. 340, 342-44, 26 S.E.2d 902, 903-04 (1943) (holding, under our prior foreclosure statute, that junior lienholders are not interested parties in a proceeding to appoint a substitute trustee). For if the trustee owed a fiduciary duty to the subordinate lienholder, the trustee conceivably would be compelled to give the subordinate lienholder notice of the foreclosure sale so that the subordinate lienholder could enforce its rights. *See* N.C.G.S. § 45-21.16(a) (2009) (requiring a trustee exercising a power of sale to serve each party entitled to notice with a notice that specifies the time and place for a foreclosure hearing). This result is appropriate because it is incumbent upon a subordinate lienholder to contemplate the risk associated with subordinating its right to payment to that of a higher priority lienholder. *See* Patrick K. Hetrick et al., N.C. Real Estate Comm'n, *North Carolina Real Estate Manual* 459 (2008-09 ed. 2008) (stating that "[s]ince a junior mortgage can be satisfied from the proceeds of a sale to foreclose a senior mortgage only after the prior (senior) mortgage has been fully satisfied, a lender taking a junior mortgage as security incurs a greater risk than one who receives a first mortgage"). In addition, the subordinate lienholder is not left without recourse, because it has an adequate means to compensate for this risk by charging a higher interest rate on the debt. *Id.* Therefore, we affirm our previous decisions holding that, in the context of a foreclosure sale, only a foreclosing lienholder may bring a claim for breach of fiduciary duty against the trustee of a deed of trust being foreclosed upon.

In the case *sub judice* the clerk should have limited his audit to determining only "whether the entries in the report reflect[ed] the actual receipts and disbursements made by [Stedman]" pursuant to section 45-21.33 of the North Carolina General Statutes. *In re Webber*, 148 N.C. App. at 161, 557 S.E.2d at 647. The clerk was not authorized to review Stedman's payment of attorney's fees to himself for reasonableness. Therefore, we hold that the clerk exceeded his statutory authority by reducing Stedman's attorney's fees.

As we noted, the proper avenue for an aggrieved creditor to challenge a distribution of attorney's fees in the trustee's final report is not before the clerk, but rather by filing a separate action for breach of fiduciary duty. *See Mills*, 216 N.C. at 665-66, 6 S.E.2d at 549-50. However, as we also have held, in this context only the foreclosing lienholder may bring such a claim. *See, e.g.*, *id.* at 669-71, 6 S.E.2d at 552-53. Therefore,

because CommunityOne is a third priority lienholder, it lacks standing to challenge the distributions in Stedman's final report. Accordingly, we hold that, absent a viable challenge for breach of fiduciary duty from a creditor with standing, Stedman's payment of attorney's fees to himself in addition to a trustee's commission cannot be upset.

We are mindful of the dissent's concerns that we may be left with a "wrong that has no remedy." Nonetheless, we also are mindful of this Court's prior reluctance to wade into matters best left to the legislative process for discussing and determining the best resolution to such a problem. *See State v. Leandro*, 346 N.C. 336, 259, 488 S.E.2d 249, 354-55 (1997). "The legislature, unlike the courts, is not limited to addressing only cases and controversies brought before it by litigants. The legislature can properly conduct public hearings and committee meetings at which it can hear and consider the views of the general public as well as . . . experts and permit the full expression of all points of view as to" the best resolution for the complicated issues that now arise in a multi-creditor real estate market, should it see such a need. *Id.* We therefore affirm the opinion of the Court of Appeals.

AFFIRMED.

Justice NEWBY, dissenting.

Today we are faced with a power of sale trustee-attorney who mistakenly paid himself an attorney's fee based on N.C.G.S. § 6-21.2(2). The question before us is whether there is a judicial role in correcting that error. Though it recognizes that the trustee improperly relied on N.C.G.S. § 6-21.2(2), the majority holds that the clerk of superior court lacks the authority to determine the reasonableness of that fee. The majority's rigid view gives the trustee sole power over the distribution of proceeds in a power of sale foreclosure. Here this position results in a clear wrong that has no remedy, but requires this Court to overlook it nonetheless. Foreclosure by power of sale is a special judicial proceeding in which the clerk has judicial authority. To hold that the clerk nonetheless lacks authority to determine whether proceeds were distributed lawfully and reasonably would ignore the statutory framework under which power of sale foreclosures occur and the clerk's judicial role in that system. This cannot be what the General Assembly intended. Therefore, I respectfully dissent.

In this case the power of sale foreclosure was carried out under a deed of trust that provided for payment of "reasonable" attorney's fees in the event of such foreclosure. After the foreclosure sale the trustee,

who also acted as the trustee's attorney, based on his misunderstanding of the law paid himself an attorney's fee of fifteen percent of the outstanding balance that the first priority creditor was owed on the promissory note. The clerk of superior court, believing he had the judicial power to correct this error, reduced the amount of attorney's fees such that the trustee's total compensation equaled the value of all services he actually performed.

In North Carolina clerks of superior court have no power other than that which is given to them by statute. *In re Locklear*, 314 N.C. 412, 416, 334 S.E.2d 46, 49 (1985). For the reasons stated by the majority, I agree that N.C.G.S. § 32-61 does not give clerks the authority to determine the reasonableness of attorney's fees in these cases. The authority to assess reasonableness can nonetheless be found in our statutes. N.C.G.S. § 7A-40 states that "[t]he clerk of superior court . . . in the exercise of other judicial powers conferred upon him by law in respect of special proceedings . . . is a judicial officer of the Superior Court Division." N.C.G.S. § 7A-40 (2011). This Court has interpreted this statute to "confer[ ] judicial power in special proceedings upon the clerk." *In re Locklear*, 314 N.C. at 416, 334 S.E.2d at 49; *see also In re Estate of Adamee's*, 291 N.C. 386, 396, 230 S.E.2d 541, 548 (1976) (" '[T]he Clerk of Superior Court retains his pre-existing judicial powers in . . . special proceedings . . . as a judicial officer . . . .' " (citation omitted)). Indisputably, a foreclosure by power of sale is a special proceeding. Clerks, then, have judicial power in a power of sale foreclosure proceeding, which includes the power to determine reasonableness of attorney's fees.

Though the majority holds that there is no allowable review of a fee paid under the deed of trust's "reasonable fee" provision, the judicial role of the clerk remains the same in cases in which an instrument provides for reasonable attorney's fees. In such cases, courts of this state will inquire into the reasonableness of fees. *See Nucor Corp. v. Gen. Bearing Corp.*, 333 N.C. 148, 150, 156, 423 S.E.2d 747, 748, 751-52 (1992) (indicating that, had a stock purchase agreement providing for reasonable attorney's fees been governed by N.C.G.S. § 6-21.2, the court nonetheless would have inquired into the reasonableness of the award); *see also West End III Ltd. Partners v. Lamb*, 102 N.C. App. 458, 459-61, 402 S.E.2d 472, 473-74, *disc. rev. denied*, 329 N.C. 506, 407 S.E.2d 857 (1991); *Coastal Prod. Credit Ass'n v. Goodson Farms, Inc.*, 70 N.C. App. 221, 227-29, 319 S.E.2d 650, 655-56, *disc. rev. denied*, 312 N.C. 621, 323 S.E.2d 922 (1984). Therefore, when a deed of trust provides for reasonable attorney's fees in a power of sale foreclosure, the clerk of

court, as the judicial officer in that special proceeding, has the power to determine the reasonableness of the fees awarded.

When attorney's fees are appropriate and the amount is not fixed by instrument, statute, or otherwise, it is within the court's discretion to approve the amount of the fee. *See Owensby v. Owensby*, 312 N.C. 473, 475, 322 S.E.2d 772, 774 (1984); *see also Goodson Farms*, 70 N.C. App. at 227-29, 319 S.E.2d at 655-56. The amount of the fee must be reasonable, *Hood v. Cheshire*, 211 N.C. 103, 105, 189 S.E. 189, 190 (1937), a determination that involves consideration of a number of factors. These factors include, *inter alia*, "the nature and scope of legal services rendered," "the customary fee," and " 'the novelty and difficulty of the questions of law.' " *Owensby*, 312 N.C. at 476-77, 322 S.E.2d at 774. In particular, the courts of this state have repeatedly emphasized that the actual number of hours worked is significant in this analysis. *See id.; Hood*, 211 N.C. at 105, 189 S.E. at 190; *Lamb*, 102 N.C. App. at 461, 402 S.E.2d at 475; *Lowder v. All Star Mills, Inc.*, 82 N.C. App. 470, 478, 346 S.E.2d 695, 700 (1986) ("There are no findings indicating the number of hours reasonably expended . . . . The findings are deficient under [Supreme Court precedent]." (citation omitted)).

In concluding that clerks have a judicial role in determining reasonableness of fees, it is necessary to explain why *In re Foreclosure of Ferrell Brothers Farms, Inc.*, 118 N.C. App. 458, 455 S.E.2d 676 (1995), and *In re Foreclosure of Webber*, 148 N.C. App. 158, 557 S.E.2d 645 (2001), misinterpret N.C.G.S. § 45-21.33. In those cases the Court of Appeals held that under N.C.G.S. § 45-21.33(b), the clerk's "audit" of the final report of sale is limited to "determin[ing] whether the entries in the report reflect the actual receipts and disbursements made by the trustee." *In re Webber*, 148 N.C. App. at 161, 557 S.E.2d at 647; *In re Ferrell Bros. Farms*, 118 N.C. App. at 461, 455 S.E.2d at 678. Here the trustee relies on this statement to argue that the clerk is therefore barred from inquiring into the reasonableness of those entries. The statutory framework under which power of sale foreclosures are carried out demonstrates that this assertion is incorrect.

The General Assembly has provided specific procedures for conducting a power of sale foreclosure. Among these is a provision governing the distribution of sale proceeds. N.C.G.S. § 45-21.31(a) (2011). Under the statute the proceeds must be distributed in a particular order by the trustee, *id.*, and the trustee's commission and attorney's fees are paid out of the proceeds, *id.*; *see also In re Ferrell Bros. Farms*, 118 N.C. App. at 460-61, 455 S.E.2d at 677-78. These disbursements are to be disclosed in the final report of the sale. N.C.G.S. § 45-21.33(a) (2012). To

hold that the clerk's audit power under N.C.G.S. § 45-21.33 extends only to determining whether the entries reflect actual receipts or disbursements means the clerk cannot evaluate the report to determine whether the distributions were made in compliance with the provisions of N.C.G.S. § 45-21.31(a) specifying how sales proceeds are to be distributed. Notwithstanding whether the trustee's misapplication was intentional or negligent, the majority would say there is no power to review the trustee's distribution of proceeds. This holding would seem to give the trustee unrestrained power to violate the statute. We cannot assume that the General Assembly would enact a provision specifying the order of distribution of proceeds in a foreclosure sale without intending that the provision be enforceable by some means—in this case by the judicial officer charged with supervising the sale. *See Hall v. Simmons*, 329 N.C. 779, 784, 407 S.E.2d 816, 818 (1991) (" '[S]ignificance and effect should, if possible, . . . be accorded every part of the act, including every section, paragraph, sentence or clause, phrase, and word.' " (alternations in original) (citation omitted)). I agree with the majority's conclusion that N.C.G.S. §§ 6-21.2(2) and 32-61 do not provide this enforcement mechanism. Nevertheless, the General Assembly has given the clerk a judicial role in special proceedings. The clerk has specific duties under the statutory framework of Chapter 45, as well as the more general supervisory authority awarded by N.C.G.S. § 7A-40.

Here the clerk appropriately acted within his judicial power and properly concluded that the trustee paid himself an unreasonable attorney's fee. The clerk multiplied the 71.8 hours the trustee worked on the matter by the trustee's standard charge for legal services of $300.00 per hour, producing a total of $21,540.00. After approving the trustee's commission of $16,813.12, the clerk reduced the attorney's fee to $4,726.88, recognizing that a reasonable attorney's fee is one that accurately reflects the amount of work performed. This brought the trustee's total fee to $21,540.00, a payment equal to the value of the services he provided.

Because power of sale foreclosures are a special proceeding in which clerks of superior court have judicial power, clerks are authorized to exercise the courts' general power to determine the reasonableness of attorney's fees paid by the trustee-attorney to himself. The analysis of reasonableness properly includes an inquiry into the value of the services actually performed, as the clerk did here. Consequently, I respectfully dissent.

Justices TIMMONS-GOODSON and HUDSON join in this dissenting opinion.

STATE OF NORTH CAROLINA v. OMAR SIDY MBACKE

No. 33A11

(Filed 27 January 2012)

Search and Seizure— search and seizure—search incident to arrest—vehicular search—reasonable belief—additional evidence of offence of arrest

The trial court did not err in a trafficking in cocaine by possession, trafficking in cocaine by transportation, possession with intent to sell and deliver cocaine, and carrying a concealed gun case by applying *Arizona v. Gant*, 556 U.S. 332, and denying defendant's motion for appropriate relief. When investigators have a reasonable and articulable basis to believe that evidence of the offense of arrest might be found in the suspect's vehicle after the occupants have been removed and secured, the investigators are permitted to conduct a search of that vehicle. Defendant's actions the night before he was arrested for the offense of carrying a concealed gun and defendant's furtive behavior when confronted by officers supported a finding that it was reasonable to believe that additional evidence could be found in defendant's vehicle. Accordingly, the police officers' search of defendant's vehicle after defendant had been secured in the back of a police car at the time of the search was permissible under *Gant*.

Justice TIMMONS-GOODSON dissenting.

Appeal pursuant to N.C.G.S. § 7A 30(2) from the decision of a divided panel of the Court of Appeals, —– N.C. App. —–, 703 S.E.2d 823 (2012), reversing an order denying defendant's motion for appropriate relief entered on 16 June 2009 by Judge Ronald E. Spivey in Superior Court, Forsyth County. Heard in the Supreme Court on 6 September 2011.

Roy Cooper, Attorney General, by Martin T. McCracken, Assistant Attorney General, for the State-appellant.

Tin Fulton Walker & Owen, PLLC, by Noell P. Tin and Matthew G. Pruden, for defendant-appellee.

EDMUNDS, Justice.

In this case, we consider whether the search of defendant Omar Sidy Mbacke's automobile following his arrest for carrying a concealed gun violated his Fourth Amendment right against unreasonable

searches and seizures. Because it was reasonable for the arresting officers to believe that they might find evidence of the offense of arrest in defendant's vehicle, we conclude that defendant's rights were not violated. Accordingly, we reverse the Court of Appeals decision and instruct that court to reinstate the trial court's denial of defendant's motion for appropriate relief.

Defendant was indicted for the offenses of trafficking in cocaine by possession, trafficking in cocaine by transportation, possession with intent to sell and deliver cocaine, and carrying a concealed gun. Prior to trial, defendant filed a motion to suppress evidence seized from his vehicle during a search that was conducted only after officers had arrested him and placed him in a police car. The trial court held a hearing on defendant's motion, during which the State presented evidence that on 5 September 2007, Winston-Salem police officers were dispatched to 1412 West Academy Street in response to a 911 call placed by Sala Hall. Hall reported that a black male who was armed with a black handgun, wearing a yellow shirt, and driving a red Ford Escape was parked in his driveway. Hall added that the male had "shot up" his house the previous night. The dispatcher relayed this information to the officers.

Officers Walley and Horsley arrived at the scene at approximately 3:08 p.m., less than six minutes after Hall called 911. They observed a black male (later identified as defendant) who was wearing a yellow shirt and backing a red or maroon Ford Escape out of the driveway at the reported address. The officers exited their patrol cars, drew their service weapons, and moved toward defendant while ordering him to stop his car and put his hands in the air. At about the same time, Officer Woods arrived and blocked the driveway to prevent the Escape's escape.

Defendant initially rested his hands on his vehicle's steering wheel, but then lowered his hands towards his waist. In response, the officers began shouting louder commands to defendant to keep his hands in sight and to exit his vehicle. Defendant raised his hands and stepped out of his car, kicking or bumping the driver's door shut as he emerged. The officers ordered defendant to lie on the ground and then handcuffed him, advising him that while they were not arresting him, they were detaining him because they had received a report that a person matching his description was carrying a weapon. In response to a question from the officers, defendant said that he had a gun in his waistband. Officer Walley lifted defendant's shirt and saw

a black handgun. After Officer Woods retrieved the pistol and rendered it safe, defendant was arrested for the offense of carrying a concealed gun.

The officers secured defendant in the back seat of a patrol car, then returned to defendant's Escape and opened the front door on the driver's side. Officer Horsley immediately saw a white brick wrapped in green plastic protruding from beneath the driver's seat where defendant had been sitting. As Officer Horsley was showing Officer Walley what he had found, defendant slipped one hand out of his handcuffs, reached through the partially opened window of the police car in which he had been placed, and attempted to open the vehicle door using the exterior handle. After resecuring defendant, the officers searched the entirety of his car incident to the arrest but found no other contraband. A field test of powdery material from the white brick was positive for cocaine, and a subsequent analysis by the State Bureau of Investigation laboratory determined that the brick consisted of 993.8 grams of cocaine.

At the conclusion of the suppression hearing, the trial court made oral findings of fact and conclusions of law, then denied defendant's motion to suppress. These findings of fact and conclusions of law were later set out in a written order issued by the court after defendant's trial.

When the case was called for trial, defense counsel confirmed with the trial court that his objection to the trial court's denial of his motion to suppress was on the record. Later that day, defense counsel renewed the motion to suppress, bringing to the court's attention a case that had been issued just that morning by the Supreme Court of the United States, *Arizona v. Gant*, 556 U.S. 332, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009). After some discussion with the trial judge, defense counsel advised the court that he would not ask for a hearing during the trial on the applicability of *Gant*, but instead would pursue that particular issue via a motion for appropriate relief. As a result of defense counsel's decision not to seek an immediate ruling on the effect of *Gant*, the trial court's pretrial denial of defendant's motion to suppress stood unaffected. Defense counsel preserved his objection by objecting during trial when the State elicited testimony from the officers regarding the search and by renewing his motion to suppress at the close of the State's evidence. The objection was overruled and the renewed motion denied.

The jury found defendant guilty of all charges. The trial court sentenced defendant to concurrent terms of 175 to 219 months of imprisonment.

On 1 May 2009, defense counsel timely filed a motion for appropriate relief. In it, defense counsel argued that *Gant* retroactively applied to defendant's case and that the evidence found in the vehicle should be suppressed pursuant to *Gant's* analysis of searches incident to arrest. At a 20 May 2009 hearing, the State presented additional evidence regarding the search. After applying *Gant* to all the evidence presented, the trial court denied the motion for appropriate relief in an order entered on 16 June 2009.

Defendant appealed. Although defendant addressed five assignments of error in his brief, the Court of Appeals observed that defendant's notice of appeal raised only the trial court's denial of his motion for appropriate relief. —— N.C. App. ——, ——, 703 S.E.2d 823, 825 (2012). Accordingly, the Court of Appeals limited its review to that issue. *Id.* at ——, 703 S.E.2d at 825-26.

The Court of Appeals majority reversed the trial court's decision, holding that "it was not 'reasonable to believe [Defendant's] vehicle contain[ed] evidence of the offense' of carrying a concealed weapon." *Id.* at ——, 703 S.E.2d at 830 (alterations in original) (quoting *Gant*, 556 U.S. at ——, 129 S. Ct. at 1723, 173 L. Ed. 2d at 501). The dissenting judge disagreed, arguing that evidence of intent to conceal the weapon, or "indicia of ownership or use of the firearm seized," or both, could have been in the car. *Id.* at ——, 703 S.E.2d at 831 (Stroud, J., dissenting). In addition, the dissenting judge argued that, under the facts presented here, the officers' actions were reasonable. *Id.* at ——, 703 S.E.2d at 831. The State appealed to this Court on the basis of the dissent.

When reviewing a trial court's ruling on a motion for appropriate relief, the appellate court must "determine whether the findings of fact are supported by evidence, whether the findings of fact support the conclusions of law, and whether the conclusions of law support the order entered by the trial court." *State v. Stevens*, 305 N.C. 712, 720, 291 S.E.2d 585, 591 (1982). "If no exceptions are taken to findings of fact [made in a ruling on a motion for appropriate relief], 'such findings are presumed to be supported by competent evidence and are binding on appeal.' " *State v. Baker*, 312 N.C. 34, 37, 320 S.E.2d 670, 673 (1984) (quoting *Schloss v. Jamison*, 258 N.C. 271, 275, 128 S.E.2d 590, 593 (1962)). In such a case, the reviewing court considers only "whether the conclusions of law are supported by the findings, a

question of law fully reviewable on appeal." *State v. Campbell*, 359 N.C. 644, 662, 617 S.E.2d 1, 13 (2005) (citations omitted), *cert. denied*, 547 U.S. 1073, 126 S. Ct. 1773, 164 L. Ed. 2d 523 (2006). Accordingly, because defendant did not assign error to any of the trial court's findings of fact, we review only the trial court's conclusions of law.

Our review necessarily begins with a discussion of *Arizona v. Gant*, in which the Supreme Court considered whether searching an automobile incident to arrest violated the defendant driver's Fourth Amendment rights when he had been arrested for a traffic offense only and had no access to his car at the time of the search. 556 U.S. at ——, 129 S. Ct. at 1714-15, 173 L. Ed. 2d at 491-92. *Gant's* car was not searched until he had been arrested, handcuffed, and locked in the back of a patrol car. *Id.* at ——, 129 S. Ct. at 1715, 173 L. Ed. 2d at 492. Although the officers had no apparent reason to suspect at the time of the search that Gant's vehicle contained any contraband, they found cocaine and a weapon in the car. *Id.* at ——, 129 S. Ct. at 1715, 173 L. Ed. 2d at 492.

The Supreme Court's analysis of the propriety of the search focused on its opinion in *New York v. Belton*, 453 U.S. 454, 101 S. Ct. 2860, 69 L. Ed. 2d 768 (1981), in which the Court held that an officer may search the passenger area of a vehicle incident to the arrest of the driver. *Gant*, 556 U.S. at ——, 129 S. Ct. at 1716-23, 173 L. Ed. 2d at 493-501 (citing *Belton*, 453 U.S. at 460, 101 S. Ct. at 2864, 69 L. Ed. 2d at 774-75). The majority in *Gant* noted that the Court in *Belton* had reasoned that such an approach was consistent with the purposes set out in *Chimel v. California*, 395 U.S. 752, 89 S. Ct. 2034, 23 L. Ed. 2d 685 (1969), of ensuring both police officer safety and the preservation of evidence. *Gant*, 556 U.S. at ——, 129 S. Ct. at 1716-18, 173 L. Ed. 2d at 493-95. However, the Supreme Court observed in *Gant* that many lower courts had interpreted *Belton* expansively "to allow a vehicle search incident to the arrest of a recent occupant even if there is no possibility the arrestee could gain access to the vehicle at the time of the search." *Id.* at ——, 129 S. Ct. at 1718, 173 L. Ed. 2d at 495. The majority in *Gant* concluded that such broad readings undermined *Belton's* and *Chimel's* dual rationales. *Id.* at ——, 129 S. Ct. at 1719, 173 L. Ed. 2d at 496.

The Court repudiated these interpretations and limited *Belton's* application by holding that when a defendant is arrested, the defendant's car can be searched "only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of

the search" or "when it is 'reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.' " *Id.* at ——, 129 S. Ct. at 1719, 173 L. Ed. 2d at 496 (quoting *Thornton v. United States*, 541 U.S. 615, 632, 124 S. Ct. 2127, 2137, 158 L. Ed. 2d 905, 920 (2004) (Scalia & Ginsburg, JJ., concurring in the judgment)).

In its conclusions of law, the trial court here found that "[t]here has been no change in circumstances or in the Law to warrant the Court setting aside its ruling on [defendant's] Pre-trial Motion" because "[t]he main issue of contention in the Pre-trial Motion to Suppress was whether the Winston-Salem Police officers involved had a sufficient articulable and reasonable suspicion to stop the Defendant's vehicle. This issue was not affected by the Supreme Court's ruling in *Arizona v. Gant*." This conclusion by the trial court remains unchallenged.

The trial court then turned its attention to the applicability of *Gant* to defendant's motion for appropriate relief and found that defendant had been secured in a police vehicle and was not within reaching distance of the passenger compartment of his car when officers searched his vehicle. Thus, no search was permitted under the first alternative set out in *Gant*. However, as to *Gant's* second prong, the trial court found that defendant had been arrested for carrying a concealed gun and that the officers had reason to believe that evidence of the offense of arrest, such as "other firearms, gun boxes, holsters, ammunition, spent shell casings and other indicia of ownership of the firearm" "would be located in the interior of the Defendant's vehicle." Concluding that *Gant* did not foreclose the search of a vehicle pursuant to an arrest under those circumstances, the trial court denied the motion.

The Supreme Court subsequently has left no doubt that *Gant* applies to the case at bar because defendant's case was " 'not yet final' " when *Gant* was decided. *Davis v. United States*, 564 U.S. ——, ——, 131 S. Ct. 2419, 2430-31, 180 L. Ed. 2d 285, 298 (2011) (quoting *Griffith v. Kentucky*, 479 U.S. 314, 328, 107 S. Ct. 708, 716, 93 L. Ed. 2d 649, 661 (1987)) (stating that *Gant* applies retroactively to such cases). Accordingly, we must consider whether the trial court properly applied the holding in *Gant* to the evidence at bar when it denied defendant's motion for appropriate relief.

Despite defendant's apparent attempt to escape the police car in which he had been confined, the trial court was correct in finding that *Gant's* first prong did not permit a search because defendant was

neither unsecured nor within reaching distance of the passenger compartment of his car at the time of the search. Our inquiry must then focus on whether it was reasonable for the police to believe that defendant's vehicle might contain evidence of the crime of arrest. *See Gant*, 556 U.S. at ——, ——, 129 S. Ct. at 1714, 1719, 173 L. Ed. 2d at 491, 496-97.

Because the Supreme Court did not define the term "reasonable to believe," some analysis is appropriate to provide guidance to law enforcement personnel who must apply *Gant* in their daily work. Despite the suggestion in *United States v. Williams*, 616 F.3d 760, 764-65 (8th Cir. 2010), *cert. denied*, —— U.S. ——, 131 S. Ct. 1548, 179 L. Ed. 2d 310 (2011), that "probable cause" and "reasonable to believe" are equivalent concepts, we are satisfied that the reasonable to believe standard enunciated in *Gant* establishes a threshold lower than probable cause. *See United States v. Vinton*, 594 F.3d 14, 25 (D.C. Cir.) ("Presumably, the 'reasonable to believe' standard requires less than probable cause, because otherwise *Gant's* evidentiary rationale would merely duplicate the 'automobile exception,' which the Court [in *Gant*] specifically identified as a distinct exception to the warrant requirement."), *cert. denied*, —— U.S. ——, 131 S. Ct. 93, 178 L. Ed. 2d 58 (2010).

Instead, we conclude that the "reasonable to believe" standard set out in *Gant* parallels the objective "reasonable suspicion" standard sufficient to justify a *Terry* stop. *See Terry v. Ohio*, 392 U.S. 1, 21-22, 88 S. Ct. 1868, 1880, 20 L. Ed. 2d 889, 906 (1968). Although the rationales for the two standards differ somewhat, in that *Gant* addresses officer safety and evidence preservation, *Gant*, 556 U.S. at ——, ——, 129 S. Ct. at 1715-16, 1719, 173 L. Ed. 2d at 492-93, 496-97, while *Terry* addresses "effective crime prevention and detection" along with officer and public safety, *Terry*, 392 U.S. at 22-24, 88 S. Ct. at 1880-81, 20 L. Ed. 2d at 906-08, we believe the underlying concept of a reasonable articulable suspicion discussed in *Terry*, *id.* at 21, 88 S. Ct. at 1880, 20 L. Ed. 2d at 906, is readily adaptable to a scenario in which a search of a vehicle is contemplated after the occupants have been arrested and detained. *See also United States v. Place*, 462 U.S. 696, 702, 103 S. Ct. 2637, 2642, 77 L. Ed. 2d 110, 117-18 (1983) (explicitly adopting the "reasonable, articulable suspicion" standard implied in *Terry*). In addition, law enforcement officers and courts have worked with the *Terry* standard for decades, making application of *Gant's* similar objective standard a straightforward matter. Accordingly, we hold that when investigators have a reasonable and articulable basis to believe that evidence of the offense of arrest might be found in a suspect's

vehicle after the occupants have been removed and secured, the investigators are permitted to conduct a search of that vehicle.

Here, defendant was arrested for the offense of carrying a concealed gun. The arrest was based upon defendant's disclosure that the weapon was under his shirt. Other circumstances detailed above, such as the report of defendant's actions the night before and defendant's furtive behavior when confronted by officers, support a finding that it was reasonable to believe additional evidence of the offense of arrest could be found in defendant's vehicle. Accordingly, the search was permissible under *Gant*, and the trial court properly denied defendant's motion for appropriate relief.

Our holding is consistent with the results reached by other courts. Although we are not bound by these cases, we consider their analyses informative. *See State v. Warren*, 252 N.C. 690, 696, 114 S.E.2d 660, 666 (1960) (noting that North Carolina is "not bound by the decisions of the Courts of the other States," but that "overwhelming authority" in favor of a certain interpretation of law is "highly persuasive"). In general, courts examining an offense involving weapons have inferred that the offense, by its nature, ordinarily makes it reasonable to believe the defendant's car will contain evidence of that offense, so that searching a defendant's car incident to an arrest for a weapons offense is almost always consistent with the Fourth Amendment. *See*, *e.g.*, *United States v. Rochelle*, 422 F. App'x 275, 277 (4th Cir.) (unpublished per curiam decision) (finding that officers had reason to believe the defendant's vehicle contained evidence of the offense of arrest, unlawful firearms possession), *cert. denied*, —— U.S. ——, 132 S. Ct. 438, 181 L. Ed. 2d 285 (2012); *Vinton*, 594 F.3d at 25-26 (same after arrest for possession of a prohibited weapon); *United States v. Leak*, No. 3:09-cr-81-W, 2010 WL 1418227, at *5 (W.D.N.C. Apr. 5, 2010) (same after arrest for both driving with a suspended license and carrying a concealed weapon); *United States v. Wade*, No. 09-462, 2010 WL 1254263, at *2-3, *5 (E.D. Pa. Mar. 29, 2010) (finding that the officer had reason to believe the defendant's jacket, which the defendant had left in the car in which he had been riding when the police approached, might contain additional evidence of the offense of arrest, illegal possession of a firearm), *aff'd on other grounds*, —— F. App'x ——, No. 10-3847, 2011 WL 5524995 (3d Cir. Nov. 14, 2011) (unpublished); *People v. Osborne*, 96 Cal. Rptr. 3d 696, 698, 705, 175 Cal. App. 4th 1052, 1056-57, 1065 (concluding that officers had reason to believe the car the defendant appeared to be burglarizing at the time of his apprehension would

contain evidence relating to the offense of arrest, illegal possession of a firearm), *rev. denied*, No. S175724, 2009 Cal. LEXIS 11474 (Oct. 28, 2009). *But see United States v. Brunick*, 374 F. App'x 714, 716 (9th Cir.) (unpublished) (concluding that the defendant's arrest for carrying a concealed weapon, a knife, did not give rise to a reason to believe evidence would be found in the defendant's vehicle because there was no likelihood of finding additional evidence related to the offense for which the defendant was arrested; however, vehicle search allowed under inventory search exception), *cert. denied*, ––– U.S. –––, 131 S. Ct. 355, 178 L. Ed. 2d 230 (2010).

Even though we conclude that the search of defendant's vehicle was constitutionally permissible, we stress that we are not holding that an arrest for carrying a concealed weapon is *ipso facto* an occasion that justifies the search of a vehicle. We believe that the "reasonable to believe" standard required by *Gant* will not routinely be based on the nature or type of the offense of arrest and that the circumstances of each case ordinarily will determine the propriety of any vehicular searches conducted incident to an arrest.

The decision of the Court of Appeals is reversed, and that court is instructed to reinstate the trial court's denial of defendant's motion for appropriate relief.

REVERSED.

Justice TIMMONS-GOODSON dissenting.

Defendant was arrested for carrying a concealed weapon after telling police he had a gun in his waistband. He then was handcuffed and secured in the back of a police car. Next, rather than seek a warrant, law enforcement conducted a warrantless search of defendant's vehicle. The majority condones this search, but I must respectfully dissent. There was no reason to believe defendant's vehicle contained evidence that he was carrying a concealed weapon, and the majority unjustifiably rewrites Fourth Amendment jurisprudence set forth by the Supreme Court of the United States.

Warrantless searches "are *per se* unreasonable under the Fourth Amendment," save a "few specifically established and well-delineated exceptions." *Arizona v. Gant*, 556 U.S. 332, 338, 173 L. Ed. 2d 485, 493 (2009) (citation and quotation marks omitted). In *Gant*, the Supreme Court carved out one such exception, which permits police officers

to search a vehicle incident to a lawful arrest "when it is reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle." *Id.* at 343, 173 L. Ed. 2d at 496 (citation and quotation marks omitted). In the same breath that it declared this exception, the Supreme Court recognized that "[i]n many cases . . . there will be no reasonable basis to believe the vehicle contains relevant evidence." *Id.* (citations omitted). This is one of those "many cases."

At the time police officers searched defendant's vehicle, there was no reason to believe it contained evidence relevant to the crime of arrest—carrying a concealed weapon.[1] First, defendant lowering his hands toward his waist may suggest that defendant had a gun, but this action did not indicate that his vehicle contained evidence of carrying a concealed weapon. After all, if defendant was lowering his hands to hide something, he would be trying to hide his weapon—the weapon he relinquished to police. Similarly, that a 911 caller identified defendant as the man who shot up his house the night before does not suggest that defendant's car contained evidence that he was carrying a concealed weapon. Finally, the majority contends that defendant, by closing his vehicle door, gave the officers reason to believe the automobile contained evidence of the offense of arrest. This reasoning dangerously undermines the right to privacy. On the one hand, if defendant closes the vehicle door when complying with an officer's order to exit the vehicle, then law enforcement, under today's opinion, can search the car. On the other hand, if defendant leaves the door open, officers can conduct a broader plain view search of the passenger compartment. Protecting one's privacy from police searches by closing a vehicle door does not give rise to a reasonable belief to justify a warrantless search.[2]

The majority attempts to mollify concerns about the breadth of today's opinion by stating that the weapons charge does not *ipso facto* justify the warrantless search. But without an explanation of how the facts actually create a reasonable belief that relevant evidence is located in defendant's vehicle, the Court's opinion does exactly what it purports to avoid—permit a warrantless search based

1. North Carolina law generally prohibits the intentional carrying of a concealed handgun off of one's own property. N.C.G.S. § 14-269 (a1) (2011).

2. I also disagree with the majority's suggestion that the Fourth Amendment permits officers to search the passenger compartment of a defendant's vehicle when the secured defendant has an air of "furtiveness" surrounding him. The majority's "furtiveness" argument has no precedent in Fourth Amendment jurisprudence.

upon the nature of the offense.[3] The absence of facts in this case suggesting that defendant's vehicle contained evidence of the crime of arrest signals that the Court will permit the search of an arrestee's vehicle in any concealed weapons case. In my view, the Court reads the *Gant* exception too broadly and allows searches beyond the scope contemplated by the Supreme Court. At the same time, the majority opinion's lack of specificity leaves law enforcement without a clear fact pattern for comparison with other scenarios. Officers, thinking they have complied with this opinion, may conduct vehicle searches only to have the fruits of those searches excluded from trial.

In addition to the majority's misapplication of *Gant* to the facts of this case, I disagree with the majority's decision to equate the "reasonable, articulable suspicion" standard described in *Terry v. Ohio*, 392 U.S. 1, 20 L. Ed. 2d 889 (1968), with the reasonable belief requirement set forth in *Gant*. First, as a threshold matter, the majority fails to establish that the *Gant* phrase "reasonable to believe" needs clarification. The Supreme Court thought this phrase was adequately instructive to law enforcement, and so do I. This phrase is meaningful to judges, lawyers, and police officers alike. As the saying goes, "If it ain't broke, don't fix it."

Second, the Supreme Court was well aware of the *Terry* standard when it authored *Gant* in 2009, yet it chose to adopt a reasonable belief standard, not the "reasonable, articulable suspicion" standard of *Terry*. I would not import *Terry* jurisprudence into the *Gant* analysis without direction from the Supreme Court.

Third, contrary to the assertion by the majority, law enforcement's familiarity with the *Terry* standard will not make the application of *Gant* by law enforcement officers "straightforward." Officers' experience applying *Terry* is irrelevant to answering the question at hand: whether it is reasonable to believe that defendant's vehicle contains evidence of the offense of arrest. Substituting the *Terry* standard confuses the matter by conflating different areas of Fourth Amendment jurisprudence, stop and frisk compared with a search incident to arrest. In short, the majority's substitution of the *Terry* standard for the standard chosen by the Supreme Court in *Gant* introduces confusion with no benefit.

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3. The Court compounds this problem by emphasizing that its opinion is consistent with decisions in other jurisdictions in that "an offense involving weapons . . . , by its nature, ordinarily makes it reasonable to believe that the defendant's car will contain evidence of that offense, so that searching a defendant's car incident to an arrest for a weapons offense is almost always consistent with the Fourth Amendment."

Finally, I also must point out that the majority offers absolutely no authority to support its rewriting of Fourth Amendment jurisprudence. The majority cites to *United States v. Place*, 462 U.S. 696, 702, 77 L. Ed. 2d 110, 117-18 (1983), as support for its proposition that "the underlying concept of a reasonable articulable suspicion discussed in *Terry* . . . is readily adaptable to a scenario in which a search of a vehicle is contemplated after the occupants have been arrested and detained." Place, however, offers no support for this proposition, as it permits dogs to sniff luggage for narcotics and does not address the search of a vehicle incident to arrest. *Id*. at 706, 77 L. Ed. 2d at 120.

Today's opinion is especially troublesome because there was plenty of time to seek a warrant. Defendant was secured, and neither officer safety nor evidence preservation was a concern. Further, there was no reason to believe that defendant's vehicle contained evidence relevant to his arrest for carrying a concealed weapon. As a result, the decision of the majority to rewrite Fourth Amendment jurisprudence set forth by the Supreme Court of the United States is unwarranted and unhelpful. This revision to constitutional law unfortunately diminishes the Fourth Amendment rights guaranteed to our state's citizens with no benefit to the interests of law enforcement.

CHELSEA AMANDA BROOKE COBB, BY AND THROUGH D. RODNEY KIGHT, JR., HER GUARDIAN AD LITEM; AND ROBERT B. COBB, FATHER OF PLAINTIFF, INDIVIDUALLY V. TOWN OF BLOWING ROCK, A MUNICIPAL CORPORATION, AND CITY OF BLOWING ROCK, A MUNICIPAL CORPORATION

No. 300A11

(Filed 27 January 2012)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, —— N.C. App. ——, 713 S.E.2d 732 (2011), finding error in a judgment entered on 17 October 2008 and an order entered on 30 March 2009, both by Judge Anderson D. Cromer in Superior Court, Watauga County, and remanding for a new trial. Heard in the Supreme Court on 11 January 2012.

Brown Moore & Associates, PLLC, by R. Kent Brown, for plaintiff-appellees.

Clawson & Staubes, PLLC, by Andrew J. Santaniello and Summer D. Eudy, for defendant-appellant Town of Blowing Rock.

Poisson, Poisson & Bower, PLLC, by E. Stewart Poisson; and Goldsmith, Goldsmith & Dews, P.A., by Frank Goldsmith, for North Carolina Advocates for Justice, amicus curiae.

PER CURIAM.

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

REVERSED.

STATE OF NORTH CAROLINA v. RAYMOND LORENZO BURKE, JR.

No. 299A11

(Filed 27 January 2012)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, —— N.C. App. ——, 712 S.E.2d 704 (2011), vacating a judgment entered on 24 August 2009 by Judge Theodore S. Royster in Superior Court, Mecklenburg County. Heard in the Supreme Court on 11 January 2012.

Roy Cooper, Attorney General, by Martin T. McCracken, Assistant Attorney General, for the State-appellant.

The Wright Law Firm of Charlotte, PLLC, by Roderick M. Wright, Jr., for defendant-appellee.

PER CURIAM.

AFFIRMED.

IN RE J.R.V.

[365 N.C. 416 (2012)]

IN THE MATTER OF: J.R.V.

No. 235PA11

(Filed 27 January 2012)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, —— N.C. App. ——, 710 S.E.2d 411 (2011), affirming an adjudication order entered on 31 March 2010 by Judge James A. Grogan in District Court, Rockingham County, and a disposition order entered on 29 June 2010 by Judge William F. Southern in District Court, Stokes County. Heard in the Supreme Court on 9 January 2012.

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

Richard Croutharmel for juvenile-appellant.

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

IN THE MATTER OF DISTRICT COURT ADMINISTRATIVE ORDER))) ORDER))

No. 216PA11

(Filed 27 January 2012)

ORDER

On writ of certiorari pursuant to N.C.G.S. § 7A-32(b) to review an administrative order entered on 15 April 2011 by Judge Jerry A. Jolly in District Court, Brunswick County. Heard in the Supreme Court 10 January 2012.

The order of the District Court is vacated in each and every respect. As this Court has noted:

> Even in the name of its inherent power, the judiciary may not arrogate a duty reserved by the constitution exclusively to another body, nor may it violate the constitutional rights of persons brought before its tribunals. Furthermore, doing what is "reasonably necessary for the proper administration of justice" means doing *no more* than is reasonably necessary. The court's exercise of its inherent power must be responsible—even cautious—and in the "spirit of mutual cooperation" among the three branches.
>
> "The very genius of our tripartite Government is based upon the proper exercise of their respective powers together with harmonious cooperation between the three independent Branches."

329 N.C. 84, 99-100, 405 S.E.2d 125, 132-33 (1991) (footnote and internal citations omitted); *see also* N.C. Const. art. IV, § 10 (setting forth the responsibilities and duties of the District Courts); N.C. Const. art. IV, § 18 (setting forth the responsibilities and duties of the District Attorney).

By order of the Court in Conference, this 26th day of January, 2012.

PARKER, C.J., MARTIN, J. and TIMMONS-GOODSON, J. recused.

s/Jackson, J.
For the Court

IN RE: INQUIRY CONCERNING A JUDGE, NO. 08-174 DENISE S. HARTSFIELD, RESPONDENT

No. 453A11

(Filed 9 March 2012)

1. Judges— findings and conclusion of Judicial Standards Commission—traffic court dispositions—adopted

The findings of the Judicial Standards Commission concerning the disposition of traffic court cases by a judge were supported by clear, cogent, and convincing evidence, and the Commission's conclusion that the judge's conduct was willful, violated the Code of Judicial Conduct, and was prejudicial to the administration of justice was adopted by the North Carolina Supreme Court.

2. Judges— suspension without pay—traffic court dispositions—egregious—continued after warning

A judge was suspended for seventy-five days without pay where her conduct in disposing of traffic court cases was egregious and continued after a prior warning by the Judicial Standards Commission, although she cooperated in the Commission's investigation and did not challenge the Commission's findings nor its conclusions.

This matter is before the Court pursuant to N.C.G.S. §§ 7A-376 and -377 upon a recommendation by the Judicial Standards Commission entered 23 September 2011 that respondent Denise S. Hartsfield, a Judge of the General Court of Justice, District Court Division, Judicial District Twenty-One of the State of North Carolina, be suspended for conduct in violation of Canons 1, 2A, 3A(1), 3A(4), and 5F of the North Carolina Code of Judicial Conduct and for willful misconduct in office and conduct prejudicial to the administration of justice that brings the judicial office into disrepute in violation of N.C.G.S. § 7A-376(b). Heard in the Supreme Court on 11 January 2012.

Nancy A. Vecchia, Counsel for the Judicial Standards Commission.

Crumpler Freedman Parker & Witt, by Dudley A. Witt and David B. Freedman, for respondent-appellant.

IN RE HARTSFIELD

[365 N.C. 418 (2012)]

ORDER OF SUSPENSION

As a result of conduct inappropriate to her judicial office, on 23 September 2011, the Judicial Standards Commission (Commission) entered a recommendation that this Court suspend respondent, Denise S. Hartsfield, a Judge of the General Court of Justice, District Court Division, Judicial District Twenty-One, without compensation from the performance of her judicial duties for a suitable period of time. For the reasons that follow, this Court concludes respondent should be suspended without compensation from the performance of her judicial duties for seventy-five days.

On 11 August 2008, Counsel for the Commission notified respondent that the Commission had ordered a formal investigation into her conduct. Respondent learned the Commission would focus its inquiry on the discovery of "82 pink copies of traffic citations and a list of those cases in a vacant judge's chambers that appear to have been handled by [respondent] by moving the citations off their scheduled court dates and adding them to traffic dockets that [respondent] presided over." Counsel informed her that the Commission ordered this investigation after receiving a written complaint from the District Attorney for Prosecutorial District Twenty-One and the Clerk of Superior Court for Forsyth County.

Respondent addressed her conduct in a letter to the Commission dated 16 July 2008 and captioned "Self Report/ Possible Ethical Violation." In this letter respondent generally described two relevant types of conduct. First, respondent informed the Commission that she "may have added seventy plus cases" to her traffic docket in the preceding two years. Respondent asserted that she had done so in response to requests from "public defenders, private attorneys, [and] citizens" for "varied" reasons, including assisting those who missed court dates or aiding individuals in the military. Respondent described her practice in these matters as having "one clerk" add the cases onto her traffic docket "due to his experience in that office." Respondent would then review a defendant's criminal record and "enter judgment, generally continuing judgment, [imposing] a nominal fee with no cost, or . . . only . . . cost with no fine." Second, respondent explained to the Commission that her practice in Driving While License Revoked (DWLR) cases had been to "make sure that there were no alcohol related offenses on the record and either continue judgment and waive cost or allow the defendant to plead not guilty. In a few cases [she] would take a dismissal by the court on [her] own motion." Respondent intimated that she disagreed with the policy

of the District Attorney's Office not to dismiss DWLR charges "even when the defendant appears in open court with a valid NC driver's license." Respondent, however, stated that she discontinued her practice after she learned she did not have "jurisdiction" to handle DWLR cases in this manner.

After the formal investigation, Counsel for the Commission filed a Statement of Charges essentially alleging that respondent engaged in a pattern of conduct in which she or a member of the court staff would add cases to her traffic court docket with the understanding that respondent would enter a favorable judgment in those matters. Counsel asserted that respondent would engage in ex parte communications with defendants appearing before her, including her friends, members of her church, acquaintances, law students, and others, and then enter beneficial judgments for those individuals. Counsel detailed numerous cases in which this conduct allegedly occurred. Counsel charged that respondent undertook these actions without the consent of the District Attorney and did so contrary to "normal court procedures" and our General Statutes.

Respondent answered on 18 April 2011, admitting some of the allegations contained in the Statement of Charges. On 7 September 2011, respondent, her attorneys, and Counsel for the Commission filed numerous stipulations regarding procedural and evidentiary facts. The Commission heard this matter on the same day and on 23 September 2011, entered its recommendation, which contains the following:

STIPULATED EVIDENTIARY FACTS

1. Judge Hartsfield engaged in a pattern of conduct in which she dismissed Driving While License Revoked (DWLR) cases, and other traffic citations, without hearings and without authorization of the prosecuting authority. Judge Hartsfield, in her letter dated July 16, 2008 and received by the Commission on or about July 28, 2008, acknowledged that she had engaged in a practice of dismissing cases without hearings and without the consent of the District Attorney's office.

2. Judge Hartsfield admitted in her letter that it was her practice, in certain non-alcohol related cases, to dismiss the charge of Driving While License Revoked (DWLR) on her own motion without hearing evidence from the District Attorney's office, continue judgment and/or waive costs. Judge Hartsfield, in her letter to the Commission, stated that the District Attorney's policy was not to

dismiss the DWLR charges even after the defendant appeared in open court with a valid license.

3. On August 14, 2008 Judge Hartsfield gave a statement to Special Agent in Charge K. Perry of the State Bureau of Investigation (SBI). When asked whether or not she engaged in a practice of dismissing tickets without hearing evidence from the District Attorney's office, Judge Hartsfield stated she had fundamental and philosophical differences with the Assistant District Attorney handling these traffic matters. Judge Hartsfield stated to Agent Perry during her August 14, 2008 interview that she felt justified in ruling in such a manner because she believed that the District Attorney's policy punished the defendants after they had done what they needed to do to obtain a valid driver's license. For this reason Judge Hartsfield stated she would dismiss, from the bench, the DWLR charge if the defendant did not have any alcohol related offenses.

4. Judge Hartsfield stated during her August 14, 2008 interview with Agent Perry that she later spoke with James Drennan, a professor at the University Of North Carolina School Of Government, who informed her that she did not have jurisdiction to dismiss charges of DWLR in this manner. Judge Hartsfield stated that subsequent to her conversation with [Professor] Drennan, she ceased dismissing DWLR charges. (Brackets in original.)

5. Judge Hartsfield stated in both her July 2008 letter to the Commission and in her August 2008 interview with Special Agent Perry, [that] she engaged in this practice because she disagreed with the District Attorney's policy on handling certain DWLR cases. (Brackets in original.)

6. In her July 16, 2008 letter, Judge Hartsfield stated that for two years prior to the date of her letter she has allowed over seventy cases to be added to her traffic docket. The cases described . . . below[ ] are but a sampling of the cases that were either on Judge Hartsfield's traffic calendar or added to her calendar, wherein she entered favorable dispositions. Judge Hartsfield stated there were multiple reasons as to why the cases were added and multiple sources such as court staff, law enforcement, court employees, defense attorneys and defendants that had requested cases be added to her traffic calendar.

7. During the August 14, 2008 interview with Agent Perry, Judge Hartsfield stated that she was aware of other people

involved in the court system bringing citations to her court or requesting assistance in cases for people they knew. Judge Hartsfield stated the most common reason the matters were added to her court docket was for help with court costs or in getting a prayer for judgment continued. Judge Hartsfield stated to Agent Perry that in order for the cases to be before her the citations had to be moved from one courtroom and added to her traffic court. Judge Hartsfield stated in her July 16, 2008 letter to the Commission it was her usual procedure to ask a particular clerk to add the cases to her docket, due to his experience in that office. Judge Hartsfield stated that once the matters came before her either pursuant to the printed court calendar or added to her traffic calendar, her usual policy was to have the prosecutor look up the criminal record of the defendant, and then she entered judgment, generally continuing judgment with a nominal fine with no costs or by imposing costs with no fine.

8. Judge Hartsfield stated in her July 16, 2008 letter that she would either impose a small fine with no costs or impose no fine but include court costs as part of her judgment.

9. Judge Hartsfield heard traffic tickets and misdemeanor cases without following normal court procedures. Court staff and colleagues were allowed to add cases to her traffic calendar. In addition, Judge Hartsfield allowed people with whom she attended church, law students and acquaintances with whom she came into contact, to give her traffic citations they had received and she would then pass judgment on these matters. These cases were handled by Judge Hartsfield either after direct *ex parte* communications with the defendants seeking assistance with their cases or by implied *ex parte* communications with her co-workers, whereby it was understood these matters were being added to Judge Hartsfield's traffic calendar or brought to her attention in some manner, so she could enter favorable dispositions. Judge Hartsfield stated in her July 16, 2008 letter and in her August 14, 2008 interview with Agent Perry that she knew the matters were brought before her for extra assistance in resolving their cases. Judge Hartsfield stated in her January 21, 2010 interview with Agent Perry that her actions do appear to be "kinda Robin Hoodish".

10. Judge Hartsfield passed judgment on certain traffic tickets and misdemeanor cases in the absence of the defendant and/or without legal counsel on defendant's behalf. N.C.G.S.

§ 15A-1011(a) states in part that a plea may be received only from the defendant in open court or in certain specific instances with written waivers of appearances or written consent to judgments signed by the defendant/respondent.

11. Judge Hartsfield in her January 21, 2010 interview with Agent Perry during the investigation of these matters acknowledged her practice of not requiring mandatory appearances in court for respondents/defendants whose cases were before her for disposition. Judge Hartsfield stated it was her understanding that the law prior to 2007 or 2008 did not require a judge to enter judgments only when the defendant appeared before the court and entered a plea or when a written waiver was provided with legal counsel appearing on the defendant's behalf.

12. In the relevant matters under investigation, a review of the court records revealed that many of the cases were designated as misdemeanor criminal matters with tan shucks and CR numbers assigned to them. These cases require the defendant to appear in court or to have legal counsel appearing on the defendant's behalf. Cases that are designated as infractions may be handled without a court appearance by the respondent, but only after the respondent has signed a waiver of appearance and consent to judgment as charged with payment of fine and costs to the clerk's office or magistrate's office.

13. Of the seventy plus matters that Judge Hartsfield has acknowledged were added to her traffic calendar, many of the court files reflected pleas entered or left blank and verdicts entered in the matter(s) followed by judgment continued, with costs stricken by Judge Hartsfield.

14. A review of the court files indicated that at the time the matters were handled by Judge Hartsfield there were no filings which indicated that the defendants were present in court, had signed and filed waivers of appearances and consent to judgments, or were represented by counsel authorized to enter pleas on their behalf.

15. Judge Hartsfield, in the absence of the defendant, allowed pleas of guilty/responsible to be entered and then as the presiding judge entered judgments in said cases all without a valid assessment of the facts or arguments from the parties.

16. Judge Hartsfield, by handling certain traffic and misdemeanor cases in the manner outlined in paragraphs [22] through

[53], has engaged in a pattern of conduct of practicing law in violation of Canon 5F of the North Carolina Code of Judicial Conduct. (Brackets in original.)

17. In the January 21, 2010 interview with Agent Perry, Judge Hartsfield was asked about when she would require a defendant to appear in court. Judge Hartsfield stated that for non-waivable offenses she would require the defendant to be present. Judge Hartsfield stated it was her understanding that non-waivable offenses included DWI charges, school bus stop sign violations, and speeding tickets in which the person is charged 26 mph over the posted speed limit.

18. Judge Hartsfield stated in her interview with Agent Perry, when asked about her handling of Forsyth County Clerk of Courts File No. to 07 CR 700806, *State of North Carolina v. Edward Levon Lowery, Jr.*, in the absence of the defendant who was charged with speeding 94 mph in a 65 mph zone, that the law prior to 2007 or 2008 would not have required the defendant to appear in court.

19. Judge Hartsfield acknowledges there were times when she took copies of citations from acquaintances, individuals she knew from church and her community and from some of her students at Wake Forest Law School.

20. During her August 14, 2008 interview with Agent Perry, Judge Hartsfield stated that when anyone gave her a copy of their citation, she would tell them to get their court date moved to 1A and she would speak to the Assistant District Attorney and see if she could help them. In addition, respondent stated she had recently read *In re Martin*, and she did not know it was considered *ex parte* communication for her to speak to people about their tickets outside of court.

21. Over the relevant period of time in question Judge Hartsfield continued to enter beneficial judgments to certain defendants/respondents after *ex parte* communications with the defendants/respondents themselves or through implied *ex parte* communications with court staff and co-workers as set forth in the factual allegations in paragraphs [22] through [53] below. (Brackets in original.)

22. On or about June 14, 2007 Forsyth County Clerk of Courts File No. to 07 CR 700806, *State of North Carolina v. Edward*

Levon Lowery, Jr., appeared on the [sic] Judge Hartsfield's traffic calendar. Mr. Lowery was charged with speeding 94 mph in a 65 mph zone in the city of Winston-Salem, North Carolina. Judge Hartsfield, in the absence of the defendant, entered or instructed the clerk to a plea of guilty/responsible, entered a verdict of guilty/responsible and ordered the judgment continued upon payment of the costs. The court record indicated that Judge Hartsfield then struck the payment of costs from the judgment. The court file does not contain any written waiver of appearance or consent to judgment, nor is there any record of an attorney appearing on behalf of Mr. Lowery.

23. Judge Hartsfield does not contest the substance of Mr. Lowery's statement to the SBI nor does she contest the credibility of Mr. Lowery and consents to the admission of his statement as substantive evidence. In a statement to the SBI, Lowery indicated that he did not hire an attorney to assist him with his speeding ticket. He explained he gave his ticket to Judge Hartsfield, and she handled it for him. Lowery came to know Judge Hartsfield during the period of time when he worked at CVS, and Judge Hartsfield picked up medicine for her mother. After Lowery received the ticket, he spoke to Judge Hartsfield about helping him with his speeding ticket as it was his first ticket. He explained that Judge Hartsfield told him not to worry about it since it was his first ticket and he gave her his copy of the ticket. Lowery indicated that he did not offer or give Judge Hartsfield anything to help him with his ticket and she never asked him for anything in return. Lowery does not know what was done with his ticket.

24. Judge Hartsfield, on January 21, 2010 in an interview with Agent Mayes and Agent Perry, stated that she would require a defendant to be in court if they were charged with speeding 26 mph over the posted speed limit. When informed that Mr. Lowery did not appear in court when his matter was disposed of, Judge Hartsfield stated that if it was prior to October 2007 or 2008 the defendant would not have been required to appear in court. Judge Hartsfield stated she had no recollection of Lowery giving his ticket to her while in CVS. Judge Hartsfield admitted she often goes to CVS to pick up medications for her mother. Judge Hartsfield stated that if Lowery was on her calendar or added to the calendar by a clerk, the matter would have been called by the

Assistant District Attorney assigned to court that day. Judge Hartsfield stated she would not have added the matter herself, but would have instructed the clerk to add the matter to the calendar. Judge Hartsfield stated during her January 21, 2010 interview, that if she had been given a ticket by someone, she would tell the person to let her check out their traffic record before she did anything.

The evidentiary stipulations contained in paragraphs 25 through 53 are generally similar to those in paragraphs 22 through 24. They contain representative examples of respondent's conduct in specific cases that support the allegations against her. After the Commission recited the stipulated facts, it made the following additional findings of fact based on evidence presented by Counsel for the Commission and by respondent.

54. During the court week of December 10-14, 2007 Judge Hartsfield dismissed, on her own motion and without the consent of the State, eleven citations in which the defendants had been charged with Driving While License Revoked (DWLR) without permitting the State to offer evidence. Judge Hartsfield entered these dismissals because she disagreed with the policies of the Forsyth County District Attorney with respect to the prosecution of these cases.

55. Over a period of time beginning at least as early as 2007 and continuing until the summer of 2008, Judge Hartsfield was aware of a practice within the Forsyth County District Court by which various persons employed by the County, or by the courts, would take to Julia Frye, a District Court judicial secretary, or to Jason Pollard or Elaine Shannon, deputy clerks employed in the District Court division, traffic citations which had been issued to friends, family members, or acquaintances and request assistance with the disposition of the tickets. The Commission finds that Leon Massey, a maintenance worker for the County, gave Ms. Frye at least one such citation which had been issued to a fellow church member and also gave citations which had been issued to members of Massey's family or co-workers to Jason Pollard. Massey requested Ms. Frye and Mr. Pollard to help these people with their tickets. The Commission also finds that Tanya Fisher, an assistant to the District Court judges, gave Mr. Pollard citations which had been issued to two acquaintances with a request that he assist these persons with their infractions.

56. Upon receiving the citations, Ms. Frye, Ms. Shannon and Mr. Pollard would arrange for the case to be placed on "add-on" calendars for Judge Hartsfield's traffic court dates. Judge Hartsfield then engaged in a pattern and practice of entering dispositions in those misdemeanor criminal offenses and traffic infractions which were placed on her traffic court calendars without complying with the requirements of Articles 57 and 66 of Chapter 15A of the North Carolina General Statutes, and in particular the provisions of N.C. Gen. Stat. §§ 15A-1011(a) and 15A-1114(d). Specifically, Judge Hartsfield would instruct court personnel to enter, on behalf of persons who were not represented by counsel, were not present in court and had not waived their appearance or consented to judgment, pleas of guilty or responsible, after which Judge Hartsfield would enter dispositions based upon such pleas. The Commission finds that Judge Hartsfield was aware that the defendants/respondents were not present in court, and in most instances, was aware of the general circumstances of how the matters came to be placed on her calendar.

57. In her testimony before the Commission, Judge Hartsfield acknowledged, and the Commission finds, that she had engaged in *ex parte* communications with, and personally accepted traffic citations from, members of her church, other acquaintances, or her students at the Wake Forest University Law School with respect to their matters pending before the court, and had taken such citations to the assistant district attorney in the administrative traffic court, known as "1B", with a request for assistance, or, on some occasions, had instructed that these citations be placed on her own docket so that she could enter a disposition continuing prayer for judgment and striking the costs.

58. The Commission finds that Judge Hartsfield accepted a citation from Lonnie Nesmith, an acquaintance from her church, and added it to her calendar and dismissed it.

59. During the period of time relevant to the Statement of Charges filed in this case, Judge Hartsfield entered dispositions in no less than 82 cases in violation of the provisions of N.C. Gen. Stat. §§ 15A-1011(a) and 15A-1114(d).

60. There is no evidence that Judge Hartsfield sought, expected, or received any gift, gratuity, compensation or other personal gain by reason of the acts described above.

61. On 3 October 2006, Judge Hartsfield was privately cautioned by the Judicial Standards Commission for engaging in *ex parte* communications with a person who had a matter before the court and having improperly amended the judgment of another judge in response to that *ex parte* request for assistance. Much of the conduct involved in the Statement of Charges in the present proceeding is substantially similar to that for which Judge Hartsfield was previously cautioned in that it involves acting in a manner contrary to law in response to *ex parte* communications.

62. In engaging in the conduct and committing those acts as hereinabove found by the Commission, Judge Hartsfield acted purposefully and willfully and knew or should reasonably have known that her conduct was contrary to law and to the requirements of the North Carolina Code of Judicial Conduct in the respects alleged in the Statement of Charges.

63. Judge Hartsfield has engaged in the legal profession in various capacities in the Forsyth County community for approximately twenty years, and has served as a District Court Judge for approximately nine years. She has been an active and contributing member of the community, personally and professionally, and except for the conduct giving rise to the 2006 letter of caution and the conduct giving rise to the current Statement of Charges, enjoys a good reputation in the community and as a judge.

After adopting the stipulated facts and making its own additional findings, the Commission concluded that respondent's conduct violates Canons 1, 2A, 3A(1), 3A(4), and 5F of the North Carolina Code of Judicial Conduct, constitutes willful misconduct in office, and is prejudicial to the administration of justice which brings the judicial office into disrepute. The Commission unanimously recommended that respondent be suspended "from the performance of her judicial duties for such period of time and upon such conditions" as this Court deems appropriate.

[1] The Supreme Court "acts as a court of original jurisdiction, rather than in its typical capacity as an appellate court" when reviewing a recommendation from the Commission. *In re Badgett*, 362 N.C. 202, 207, 657 S.E.2d 346, 349 (2008) (citations and quotation marks omitted). Neither the Commission's findings nor its conclusions are binding on this Court. *Id.* at 206, 657 S.E.2d at 349 (citation omitted). We are free to "adopt the Commission's findings of fact if they are supported by clear and convincing evidence, or [we] may make [our] own findings." *Id.*

(citations and quotation marks omitted). Accordingly, the scope of our review of the Commission's recommendation is as follows: "[T]his Court must first determine if the Commission's findings of fact are adequately supported by clear and convincing evidence, and in turn, whether those findings support its conclusions of law." 362 N.C. at 207, 657 S.E.2d at 349.

The Commission found the stipulated facts and its additional findings to be supported by "clear, cogent and convincing evidence." Respondent does not contest the findings made by the Commission. After careful review, we agree that the Commission's findings are supported by clear, cogent, and convincing evidence, and we now adopt them as our own. Furthermore, we agree with the Commission's conclusions that respondent's conduct violates Canons 1, 2A, 3A(1), 3A(4), and 5F of the North Carolina Code of Judicial Conduct, and amounts to willful misconduct in office and conduct prejudicial to the administration of justice which brings the judicial office into disrepute in violation of N.C.G.S. § 7A-376. We note also that respondent does not contest that the Commission's findings support its conclusions of law.

[2] Because respondent has violated several canons of the North Carolina Code of Judicial Conduct and section 7A-376 of our General Statutes, we now consider the discipline to which she will be subjected. In arriving at a disciplinary decision, this Court employs its own judgment and "is unfettered by the Commission's recommendations." *Id.* at 207, 657 S.E.2d at 350 (citation omitted). We may adopt the Commission's recommendation, or we may impose a lesser or more severe sanction. *Id.* The Commission recommended that respondent be suspended from the performance of her judicial duties, but did not offer any recommendation on the term of such suspension or any conditions of it. Respondent does not contest that the Commission's facts and conclusions, which we have made our own, support a disciplinary order but asks that the suspension, if any, be brief.

This Court has only once previously suspended a judge of the General Court of Justice. *See In re Badgett*, 362 N.C. at 365, 657 S.E.2d at 351. In that case we concluded that Judge Mark H. Badgett engaged in "conduct prejudicial to the administration of justice that brings the judicial office into disrepute, willful misconduct, and willful and persistent failure to perform his duties in violation of N.C.G.S. § 7A-376." *Id.* at 207, 657 S.E.2d at 350. We observed that Judge Badgett had given incredible testimony while under oath, made

untruthful comments regarding an investigation, and attempted to use the power of his office to coerce the District Attorney, including while presiding over a session of court. *Id.* at 208-09, 657 S.E.2d at 350-51. We ultimately held that Judge Badgett's "actions constitute an improper or wrongful use of the power of his office acting intentionally or with gross disregard for his conduct and in bad faith." *Id.* at 365, 657 S.E.2d at 351. Given the gravity of Judge Badgett's conduct, this Court censured him and suspended him for sixty days, *id.*, and we later removed him from office, *In re Badgett*, 362 N.C. 482, 491, 666 S.E.2d 743, 749 (2008).

Respondent in the case *sub judice* contends that her conduct does not rise to the level of the "bad faith" or "gross misconduct" present in *In re Badgett*. She argues that her misconduct is similar to the actions seen in *In re Hardy*, 294 N.C. 90, 240 S.E.2d 367 (1978), and *In re Brown*, 351 N.C. 601, 527 S.E.2d 651 (2000). In *In re Hardy* the judge was censured for, *inter alia*, entering several judgments in traffic matters while court was not in session and without the knowledge or consent of the assistant district attorneys prosecuting the cases. 294 N.C. at 92-93, 98, 240 S.E.2d at 369-70, 373. In *In re Brown* the judge was found to have engaged in willful misconduct and conduct prejudicial to the administration of justice that brings the judicial office into disrepute, and he was censured for, *inter alia*, entering several improper judgments in Driving While Impaired cases. 351 N.C. at 605-08, 611, 527 S.E.2d at 654-56, 658. As respondent acknowledges, however, both of these cases were decided before this Court received the authority to suspend a judge as a sanction, when the only options were censure and removal, and therefore, they offer little guidance regarding the appropriate discipline.

We believe the facts of this present matter to be similar to those found in *In re Peoples*, 296 N.C. 109, 250 S.E.2d 890 (1978), *cert. denied*, 442 U.S. 929, 61 L. Ed. 2d 297 (1979). In *In re Peoples* the judge was removed and disqualified from holding further judicial office as a result of a pattern of conduct spanning a number of years in which he, *inter alia*, held pending cases in several special files to dispose of them later in an irregular manner. *Id.* at 156-57, 250 S.E.2d at 917-18. When Judge Linwood T. Peoples's files were discovered, they contained forty-nine cases and had been in existence "for more than three years and probably as long as seven years," during which time " 'cases were disposed of and new ones added.' " *Id.* at 155, 158, 250 S.E.2d at 917-18. We observed that Judge Peoples's conduct "had become well-enough known to his friends and their acquaintances, so

that they did not hesitate to seek his aid when confronted by a traffic ticket for speeding, a warrant for driving drunk, or any infraction by which their drivers license was threatened by either revocation or 'points.' " *Id.* at 158, 250 S.E.2d at 918. Judge Peoples resigned from his position in an attempt to evade the consequences of his actions and declined even to attend the hearing concerning the allegations against him. *Id.* at 112-14, 250 S.E.2d at 894-95. Judge Hartsfield's practice in the matter *sub judice* is similar in duration, volume, and apparent notoriety to that for which Judge Peoples was removed from office.

It is important to note that the discipline imposed in any given case "will be decided upon its own facts." *In re Hardy*, 294 N.C. at 98, 240 S.E.2d at 373. Judge Hartsfield's conduct is egregious. Respondent disposed of at least eighty-two cases in violation of our General Statutes. Her misconduct is similar only to *In re Peoples* in the sheer number of cases involved. *See In re Brown*, 351 N.C. at 605-08, 527 S.E.2d at 654-56 (describing improper conduct in two traffic matters); *In re Hardy*, 294 N.C. at 92-93, 240 S.E.2d at 369-70 (recounting misconduct in five traffic matters). It is reasonable to conclude that the actual number of cases of which respondent has irregularly disposed is much higher, given that she has been a Judge of the General Court of Justice for approximately nine years and the conduct at issue here appears to be, or to have been, her regular practice. Much more troubling than the number of cases involved is that respondent engaged in this pattern of behavior after she was privately cautioned by the Commission in 2006 for substantially similar conduct. As observed by the Commission, respondent charted this course "purposefully and willfully and knew or should reasonably have known that her conduct was contrary to law and to the requirements of the North Carolina Code of Judicial Conduct." She undertook this conduct despite apparently knowing that it is improper, a decision we cannot abide and will not condone. On the other hand, upon learning of the allegations of impropriety against her, respondent immediately explained to the Commission what she had done. She cooperated in the Commission's investigation and has challenged neither the Commission's findings nor its conclusions of law, and respondent agrees that some discipline is warranted. Weighing the severity of her conduct against her candor and her cooperation, we conclude that suspension is appropriate. At the conclusion of her suspension, respondent may resume the duties of her office.

The Supreme Court of North Carolina orders that respondent Denise S. Hartsfield be, and is hereby, SUSPENDED without compen-

sation from office as a Judge of the General Court of Justice, District Court Division, Judicial District Twenty-One, for SEVENTY-FIVE days from the entry of this order for conduct in violation of Canons 1, 2A, 3A(1), 3A(4) and 5F of the North Carolina Code of Judicial Conduct, and for conduct prejudicial to the administration of justice that brings the judicial office into disrepute and willful misconduct in office in violation of N.C.G.S. § 7A-376.

By order of the Court in Conference, this the 8th day of March, 2012.

s/Jackson, J.
For the Court

STATE OF NORTH CAROLINA v. SAMUEL KRIS HUNT

No. 195PA11

(Filed 9 March 2012)

1. Sexual Offenses— second-degree sexual offense—motion to dismiss—sufficiency of evidence—mentally disabled victim

The trial court did not err by denying defendant's motions to dismiss the charge of second-degree sexual offense. The record contained sufficient evidence that the victim was mentally disabled, her condition rendered her substantially incapable of resisting defendant's sexual advances, and defendant knew or reasonably should have known of the victim's mental disability.

2. Sexual Offenses— crimes against nature—motion to dismiss—sufficiency of evidence

The trial court did not err by denying defendant's motions to dismiss the charge of crimes against nature. The record contained sufficient evidence that defendant engaged in nonconsensual or coercive sexual acts with a minor.

3. Sexual Offenses— expert testimony—not necessarily required to establish mental capacity of victim to consent to sexual acts

The Court of Appeals erred by concluding that expert testimony was required to establish the extent of a victim's mental

capacity to consent to sexual acts including second-degree sexual offense under N.C.G.S. § 14-27.5 or crimes against nature under N.C.G.S. § 14-177. There may be cases involving a person's mental capacity that will necessitate expert testimony, but it was not necessary in this case in light of the victim's own testimony and the significant amount of lay witness testimony regarding the victim's condition.

On discretionary review pursuant to N.C.G.S. § 7A 31 of a unanimous decision of the Court of Appeals, —— N.C. App. ——, 710 S.E.2d 339 (2011), reversing a judgment entered on 8 October 2009 by Judge Edwin G. Wilson, Jr. in Superior Court, Randolph County, and vacating defendant's convictions. Heard in the Supreme Court on 10 January 2012.

Roy Cooper, Attorney General, by Anne M. Middleton, Assistant Attorney General, for the State-appellant.

M. Alexander Charns for defendant-appellee.

JACKSON, Justice.

Defendant was convicted of second-degree sexual offense and crime against nature, based upon the victim's age and inability to consent due to a mental disability. In this appeal we consider whether expert testimony is always necessary to establish whether a victim in such a case had the requisite mental capacity to consent. Because we hold that expert testimony is not required as articulated by the Court of Appeals, and that the State presented sufficient evidence to withstand defendant's motions to dismiss, we reverse and remand.

On 25 May 2008, defendant and his wife hosted a birthday party at a local park for their daughter Madison[1] who was turning sixteen. Approximately thirty people attended the party, including the complaining witness Clara, who was seventeen. Madison and Clara lived on the same street, rode the school bus together, and often visited each other's homes. After the party, defendant and his wife took Madison, Clara, and Madison's friend Ashley back to defendant's house for a sleep over. Defendant and his wife left the house around 9:00 p.m. to patronize several bars in Greensboro. While defendant and his wife were gone, Madison, Clara, Ashley, and defendant's four

1. We adopt the pseudonyms used in the Court of Appeals' opinion. In addition, we refer to Madison's other friend who attended the sleep over by the pseudonym "Ashley."

other children—ages four, ten, eleven, and fifteen—watched a movie and looked at pictures from the party while in the living room.

Defendant and his wife returned home around 3:00 a.m. on 26 May 2008. Defendant had consumed six beers and eight to ten "Jäger bombs" at the bars and was admittedly intoxicated. Defendant and his wife went into their bedroom but defendant soon emerged alone, wearing sweatpants but no shirt. Defendant went into the living room, where the children still were watching the movie, and sat down on the couch. Defendant then got up and motioned for Clara to follow him into the kitchen after tapping her on the arm. Clara testified that she followed defendant into the kitchen because she "thought [defendant] was going to show [her] where the cups were" located.

Once they were in the kitchen, defendant began touching Clara outside her clothing on her breasts, vagina, and "butt." Defendant asked Clara, "Do you like it?" Clara testified that she "was scared" and "didn't know what [defendant] was going to do." Defendant then pulled his penis out of his sweatpants. Clara was "shocked" and "thought [defendant] was going to do something else" to her. Instead, defendant forced Clara's head down to his penis and she put her mouth on it. Clara testified that she only put her mouth on defendant's penis because he "forced [her] head down to it." She said that she was "scared" because she "thought [defendant] was going to hurt [her] more than he did." Clara tried to raise her head but defendant pushed it back down to his penis, which he forced into her mouth again. At some point during the encounter, defendant told Clara, "Don't tell nobody. I can get in serious trouble." Eventually, Clara pulled her head away from defendant's penis.

After Clara pulled her head away, defendant told her, "Go in the girls' bedroom and take off your clothes." Instead, Clara returned to the living room and told Ashley that defendant had asked her to go into the girls' bedroom and remove her clothes. Ashley told Madison what Clara had told her. Clara also told Madison that defendant had "touched [her] all over" and "made [her] suck his penis." Madison and Ashley took Clara into the bathroom and stayed with her while she washed her hands and brushed her teeth. Clara asked Madison and Ashley to protect her from defendant. The girls went into Madison's bedroom and talked until they fell asleep at approximately 6:00 a.m. Before they fell asleep, the girls arranged themselves in the bed to protect Clara. Clara was against the wall with Madison lying next to her.

Sometime after the girls fell asleep, defendant came into their bedroom, touched Clara's feet, and motioned for her to come into the hallway. Clara woke Madison, who was sleeping next to her, and told Madison that defendant wanted her to come into the hallway. Madison told Clara not to go into the hallway, and the girls went back to sleep.

Later that morning, Madison woke her mother and told her what had occurred between defendant and Clara. Based on this information, defendant's wife confronted him. Defendant's wife testified that defendant initially denied the accusations, but eventually admitted that Clara had performed oral sex on him. Defendant's wife became upset and told defendant to get out of the house.

At approximately the same time, Clara decided to walk home and tell her father what defendant had done. Defendant started to follow Clara, but then turned around and returned home after Clara called defendant's wife. Defendant subsequently decided to turn himself in to the police. Defendant drove to the Asheboro police station and told an officer on duty that he had "made a mistake" and "messed up." Defendant gave police a statement, admitting that he "rubbed [Clara] on her chest and she put [his] dick in her mouth for about one minute or so." Defendant later admitted to a second officer that he had "sexual relations" with Clara.

On 21 July 2008, defendant was indicted for second-degree sexual offense and crime against nature. On 6 October 2009, defendant was tried in the Superior Court, Randolph County. At the close of the State's evidence and again at the close of all the evidence, defendant moved to dismiss the charges based upon insufficiency of the evidence. In support of these motions, defendant argued in part that the State had not introduced expert testimony to show that Clara had a mental disability that rendered her substantially incapable of consenting to sexual acts or resisting unwanted sexual advances. The trial court denied all defendant's motions.

After deliberating for less than one hour, the jury found defendant guilty of second-degree sexual offense and crime against nature. The trial court then denied defendant's renewed motion to dismiss. The trial court consolidated defendant's convictions and sentenced him to an active term of seventy-three to ninety-seven months imprisonment.

Defendant appealed to the Court of Appeals, which unanimously reversed and vacated defendant's convictions, holding "that in situa-

tions such as presented by this case, where the victim's IQ falls within the range considered to be 'mental retardation[,]' but who is highly functional in her daily activities and communication, the State must present expert testimony as to the extent of the victim's mental disability as defined by N.C.[G.S.] § 14-27.5." *State v. Hunt*, —— N.C. App. ——, ——, 710 S.E.2d 339, 348 (2011) (alteration in original). We allowed the State's petition for discretionary review.

Our standard of review regarding motions to dismiss is well established:

> When reviewing a defendant's motion to dismiss a charge on the basis of insufficiency of the evidence, this Court determines whether the State presented substantial evidence in support of each element of the charged offense. Substantial evidence is relevant evidence that a reasonable person might accept as adequate, or would consider necessary to support a particular conclusion. In this determination, all evidence is considered in the light most favorable to the State, and the State receives the benefit of every reasonable inference supported by that evidence. The defendant's evidence, unless favorable to the State, is not to be taken into consideration, except when it is consistent with the State's evidence, the defendant's evidence may be used to explain or clarify that offered by the State. Additionally, a substantial evidence inquiry examines the sufficiency of the evidence presented *but not its weight*, which is a matter for the jury. Thus, if there is substantial evidence—whether direct, circumstantial, or both—to support a finding that the offense charged has been committed and that the defendant committed it, the case is for the jury and the motion to dismiss should be denied.

State v. Abshire, 363 N.C. 322, 327-28, 677 S.E.2d 444, 449 (2009) (citations and quotation marks omitted).

The State argues that expert testimony should not be required to establish the extent of a victim's mental capacity to consent to sexual acts and contends that it presented sufficient evidence to withstand defendant's motions to dismiss. During defendant's trial Clara testified for the State, giving the jury the opportunity to observe independently whether or not she was mentally disabled. In addition, the State presented six lay witnesses who testified about Clara's capabilities.

Lisa Cheek was the school social worker for Asheboro High School and had known Clara for almost three and a half years. Cheek

testified that certain children with developmental disabilities can be "mainstreamed" into regular classes but those who likely will struggle in the traditional school environment are placed into the occupational course of study. Cheek stated that Clara had been in occupational training classes for as long as Cheek had known her. Cheek said that Clara was "very up-front about her . . . disabilities." Cheek also testified that Clara had a mental health counselor at N.C. Mentor, a mental health facility for persons with disabilities. Cheek said that Clara's N.C. Mentor counselor met with Clara at least once or twice a week. Cheek further testified that Clara received a Social Security disability check. Cheek stated that the Randolph County Department of Social Services ("DSS") managed Clara's money because Clara was unable to oversee her own finances.

Heather Cox was Clara's special education teacher at Asheboro High School for three years. Cox testified that Clara is intellectually disabled, with an intelligence quotient ("IQ") of sixty-one.[2] Cox explained that Clara struggled intellectually and that her "processing" was slow. Cox further stated that Clara was placed on an individual education plan for students with disabilities. Cox classified Clara's disability as being in the "mild category" and testified that Clara had been placed into the second of three levels of intellectually disabled students in the special education program. Cox explained that students in the second level have more severe disabilities than those in the first level and are not able to learn the general curriculum, even with modifications. These students do not receive a regular high school diploma, but instead receive a certificate upon completion. They generally find work in the restaurant and hospitality industries as housekeepers, fry cooks, dishwashers, and busboys. They are able to function in society with some assistance. Cox testified that Clara had never taken any classes outside the special education curriculum.

Cheryl Lackey handled adult protective referrals for DSS. Lackey testified that Clara had developmental disabilities and an IQ below 70. Lackey stated that DSS prepared a budget for Clara and gave her money for clothes and medication. Lackey also said that Clara lived with Mary Nunez, the mother of another developmentally disabled child, and DSS paid for Clara's room and board. Lackey further testified that Nunez helped Clara go to the store, and representatives from

2. According to the American Psychiatric Association, an individual with an IQ between fifty to fifty-five and approximately seventy falls within the "Mild Mental Retardation" category. Am. Psychiatric Ass'n, *Diagnostic and Statistical Manual of Mental Disorders* 42 (4th ed. 2000).

N.C. Mentor helped Clara determine what she wanted to do and made sure that she was not neglected or exploited. When asked if Clara could interact with her as an adult, Lackey stated, "Yes, I mean, she can talk to me and everything. But like I said before, she has a problem understanding."

Detective Deborah McKenzie of the Asheboro Police Department testified that she knew Clara based on the five and a half years that she had served as a school resource officer at South Asheboro Middle School. Detective McKenzie had served in law enforcement for twenty years and specialized in the investigation of sexual assaults of women and children. She described Clara as "very child-like" and observed that Clara's "behavior was more child-like for her age group than the other kids at the school." Detective McKenzie interviewed Clara at the police station as part of her investigation of defendant's actions. She testified that "[b]ecause of [Clara's] mental disability, it was more like interviewing a child than a young adult." Detective McKenzie explained that Clara had difficulty writing a statement and that Clara agreed to let Detective McKenzie write it for her instead.

In addition to these witnesses, Madison testified that her family was aware that Clara had disabilities and had talked about it. Defendant's wife also testified that after Clara had visited their house and played with their children a few times, she asked Madison if Clara was "slow." Defendant's wife had observed that Clara seemed to be more at the intellectual level of her ten-year-old daughter than on Madison's level. Defendant's wife also recalled discussing Clara's apparent mental impairment with defendant. In addition, defendant's wife stated that Clara's father had told both defendant and her that Clara was "kind of slow."

After the State presented its witnesses, defendant testified that he "knew [Clara] was sexually active" and "thought that she was used to sexual transactions." Defendant admitted that Clara performed oral sex on him, but stated that it was consensual. Defendant denied that Clara's father or anyone else had told him that Clara was developmentally disabled or "slow." Defendant stated that he had never noticed anything unusual about Clara. Defendant testified that he did not learn that Clara had a mental disability until he was interviewed at the police station.

[1] After carefully reviewing the testimony at trial, we conclude that the trial court properly denied defendant's motions to dismiss the second-degree sexual offense charge. The crime of second-degree sex-

ual offense is set forth in section 14-27.5(a) of the North Carolina General Statutes: "A person is guilty of a sexual offense in the second degree if the person engages in a sexual act with another person . . . [w]ho is mentally disabled . . . and the person performing the act knows or should reasonably know that the other person is mentally disabled . . . ." N.C.G.S. § 14-27.5(a)(2) (2011). The term "mentally disabled" is defined in section 14-27.1(1) of the North Carolina General Statutes as:

> (i) a victim who suffers from mental retardation, or (ii) a victim who suffers from a mental disorder, either of which temporarily or permanently renders the victim substantially incapable of appraising the nature of his or her conduct, or of resisting the act of vaginal intercourse or a sexual act, or of communicating unwillingness to submit to the act of vaginal intercourse or a sexual act.

Id. § 14-27.1(1) (2011). Here, the record contains sufficient evidence that: (1) Clara is mentally disabled; (2) her condition rendered her substantially incapable of resisting defendant's sexual advances; and (3) defendant knew or reasonably should have known of Clara's mental disability.

First, the State presented evidence that Clara is mentally disabled. *See id.* §§ 14-27.1(1), -27.5(a)(2). Clara has an IQ of sixty-one. At the time of the incident, Clara was enrolled in special education classes that had a vocational, rather than an academic, focus. According to the testimony of one of her teachers, Clara was placed in the middle level of intellectually disabled students in the special education curriculum. Although Clara earned good grades for her intelligence level, her academic accomplishments were measured differently from those of students who were placed in the regular curriculum.

In addition, the State presented evidence that Clara requires assistance to function in society. Clara receives much of this assistance from DSS. Although Clara lives with Nunez, DSS pays for her room and board. DSS also provides Clara with assistance in setting a budget and gives her money to purchase clothes and medication. To ensure that Clara is not taken advantage of when she interacts with others, Clara receives help from both Nunez and representatives from N.C. Mentor. As Lackey testified, Clara "can talk to me and everything" but she "has a problem understanding."

Second, the State demonstrated that Clara's condition rendered her substantially incapable of resisting defendant's advances. *See id.*

§ 14-27.1(1). When defendant asked Clara to follow him into the kitchen, she thought he was going to show her where the cups were located. Clara testified that defendant's act of "rubbing" her breasts, vagina, and butt "scared" her because she "didn't know what [defendant] was going to do." Clara said that she was "shocked" when defendant pulled his penis out of his sweatpants. After defendant forced Clara to put his penis into her mouth, Clara again said that she was scared because she "thought [defendant] was going to hurt [her] more than he did." In addition, when Clara tried to raise her head, defendant pushed it back down to his penis.

Finally, the record contains evidence that defendant knew or reasonably should have known about Clara's mental disability. Defendant's wife testified that previously defendant and she had discussed Clara's condition. Defendant's wife further stated that on one occasion defendant, Clara's father, and she discussed Clara's mental disability.

Considered in the light most favorable to the State, *see Abshire*, 363 N.C. at 328, 677 S.E.2d at 449, a reasonable juror could have inferred from this evidence that: (1) Clara was mentally disabled; (2) her condition rendered her substantially incapable of resisting defendant's sexual advances; and (3) defendant knew or should reasonably have known of Clara's mental disability, *see* N.C.G.S. §§ 14-27.1(1), -27.5(a)(2). Therefore, the State presented sufficient evidence to overcome defendant's motions to dismiss the second-degree sexual offense charge. *See Abshire*, 363 N.C. at 327-28, 677 S.E.2d at 449.

[2] In addition, the State presented sufficient evidence to overcome defendant's motions to dismiss the crime against nature charge. *See id.* Section 14-177 of the North Carolina General Statutes states: "If any person shall commit the crime against nature, with mankind or beast, he shall be punished as a Class I felon." N.C.G.S. § 14-177 (2011). "[T]he legislative intent and purpose of [N.C.]G.S. [§] 14-177 . . . is to punish persons who undertake by unnatural and indecent methods to gratify a perverted and depraved sexual instinct which is an offense against public decency and morality." *State v. Stubbs*, 266 N.C. 295, 298, 145 S.E.2d 899, 902 (1966). In response to the United States Supreme Court's decision in *Lawrence v. Texas*, 539 U.S. 558, 156 L. Ed. 2d 508 (2003), the scope of section 14-177 has been narrowed. *State v. Whiteley*, 172 N.C. App. 772, 777, 616 S.E.2d 576, 580 (2005). Nonetheless, the statute "may properly be used to prosecute conduct in which a minor is involved, conduct involving non-consensual or coercive sexual acts, conduct occurring in a public place, or conduct involving prostitution or solicitation." *Id.* at 779, 616 S.E.2d at 581.

Here the record contains sufficient evidence that defendant engaged in nonconsensual or coercive sexual acts with a minor. As defendant concededly knew, Clara was seventeen at the time of her encounter with him. Defendant also admitted that Clara performed oral sex on him. As we concluded above, the State introduced sufficient evidence to demonstrate that Clara's condition rendered her substantially incapable of resisting defendant's advances. This evidence indicates that the sexual acts were not consensual. In addition, the record suggests that the sexual acts were coercive. Clara testified that defendant "forced" her head down to his penis and "pushed [her] head back down" when she tried to raise it. Clara stated that she only put her mouth on defendant's penis because he "forced [her] head down to it." Clara said that she was "scared" because she "thought [defendant] was going to hurt [her]." Clara also testified that defendant told her twice not to tell anybody because he could get in "serious trouble." Considered in the light most favorable to the State, *see Abshire*, 363 N.C. at 328, 677 S.E.2d at 449, a reasonable juror could infer from these facts that defendant engaged in nonconsensual or coercive sexual acts with a minor, *see Whiteley*, 172 N.C. App. at 779, 616 S.E.2d at 581. Therefore, the State presented sufficient evidence to overcome defendant's motions to dismiss the crime against nature charge. *See Abshire*, 363 N.C. at 327-28, 677 S.E.2d at 449.

[3] Accordingly, we hold that the Court of Appeals erred by overruling the trial court. In so holding, we emphasize that expert testimony is not necessarily required to establish the extent of a victim's mental capacity to consent to sexual acts when a defendant is charged with second-degree sexual offense pursuant to section 14-27.5 or crime against nature pursuant to section 14-177 of the North Carolina General Statutes.

Rule 702(a) of the North Carolina Rules of Evidence provides that: "If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion . . . ." N.C.G.S. § 8C-1, Rule 702(a) (2011) (emphasis added). Thus, Rule 702(a) recognizes the permissive, rather than mandatory, nature of expert testimony. *See* 2 Kenneth S. Broun, *Brandis and Broun on North Carolina Evidence* § 184, at 700 (7th ed. 2011) ("The Rule should not be interpreted to require such a witness."). Additionally, it has been well settled in this state that lay witness testimony may be received regarding the mental condition of

an individual whose capacity is at issue. *See Clary's Adm'rs v. Clary*, 24 N.C. (2 Ired.) 78, 83-85 (1841) ("[I]f belief of capacity founded on personal observation be evidence, and we think it is, it is admissible whether the opportunity for observation has been frequent or rare."). Particularly, " '[a]nyone who has observed another, or conversed with him, or had dealings with him, and a reasonable opportunity, based thereon, of forming an opinion, satisfactory to himself, as to the mental condition of such person, is permitted to give his opinion in evidence upon the issue of mental capacity, although the witness be not a psychiatrist or expert in mental disorders.' " *State v. Mayhand*, 298 N.C. 418, 424, 259 S.E.2d 231, 236 (1979) (quoting *In re Will of Brown*, 203 N.C. 347, 350, 166 S.E. 72, 74 (1932)). We previously have applied these principles to authorize lay witness opinions or observations about mental capacity in a variety of contexts. *See, e.g.*, *State v. Silvers*, 323 N.C. 646, 653-54, 374 S.E.2d 858, 863-64 (1989) (capacity to stand trial); *Mayhand*, 298 N.C. at 424-25, 259 S.E.2d at 236 (insanity defense); *In re Will of Jones*, 267 N.C. 48, 51, 147 S.E.2d 607, 609 (1966) (execution of a will and codicil); *Moore v. N.Y. Life Ins. Co.*, 266 N.C. 440, 448-50, 146 S.E.2d 492, 499-500 (1966) (contracts); *State v. Armstrong*, 232 N.C. 727 *passim*, 62 S.E.2d 50 *passim* (1950) (credibility of a witness); *Bryant v. Carrier*, 214 N.C. 191, 193-94, 198 S.E. 619, 620-21 (1938) (liability for punitive damages in criminal conversation case). Moreover, courts in a number of other jurisdictions explicitly have rejected the notion that expert testimony is required to establish that a victim lacks the mental capacity to consent to sexual acts. *See, e.g.*, *Jackson v. State*, 890 P.2d 587, 592 (Alaska Ct. App. 1995) (stating that expert testimony is not required to establish that a victim is "incapable of understanding the consequences of sexual intercourse" because "[a] person's capacity to understand something . . . is a factual issue for the jury . . . [that] may properly be established by circumstantial evidence"); *People v. Thompson*, 142 Cal. App. 4th 1426, 1437, 48 Cal. Rptr. 3d 803, 810 ("There is a nationwide consensus that expert testimony on th[e] issue [of a victim's mental capacity to consent] is not required."), *rev. denied*, 2006 Cal. LEXIS 15393 (2006); *Wilkinson v. People*, 86 Colo. 406, 412, 282 P. 257, 259 (1929) (stating that the jury could determine whether the victim had the mental capacity to consent, without the testimony of expert witnesses, because "[t]he victim was present in court and testified," giving the jury "the opportunity of seeing her, and . . . judging as to her mentality"); *State v. Collins*, 7 Neb. App. 187, 202, 583 N.W.2d 341, 350-51 (1998) (concluding that expert testimony is not always required but when expert testimony is not presented, "a

court must examine the evidence and determine whether the nonexpert testimony is of sufficient probative value to justify a rational finding that the victim was mentally or physically incapable of resisting or appraising the [defendant's] conduct"); *People v. Cratsley*, 86 N.Y.2d 81, 87, 653 N.E.2d 1162, 1165-66 (1995) (stating that "determination of capacity is a judicial, not a medical, function" that "is best based on evidence concerning the victim's ability to function in society" as presented by "[p]eople who observe the [victim] daily" and that this "assessment [is] within the ken of the average juror"); *State v. Kingsley*, 383 N.W.2d 828, 830 (N.D. 1986) (concluding that "expert medical testimony was not required to establish" a prima facie case that the victims were "incapable of understanding the nature of the conduct involved," but such testimony "would have established a stronger case for the prosecution and provided additional helpful information for the juries"); *State v. Summers*, 70 Wash. App. 424, 428-29, 853 P.2d 953, 956 (stating that expert testimony is not "indispensable" to prove a victim's mental incapacity; rather, "[t]he issue is best approached on a case by case basis, by examining whether the non-expert testimony justifies a rational finding that the victim lacked the capacity to consent"), *rev. denied*, 122 Wash. 2d 1026, 866 P.2d 40 (1993); *State v. Perkins*, 2004 WI App. 213, ¶ 21, 277 Wis. 2d 243, 257, 689 N.W.2d 684, 690 ("[W]e cannot conclude that expert testimony should be required in every case to establish the existence of a mental illness or deficiency rendering the victim unable to appraise his or her conduct . . . ."), *rev. denied*, 2005 WI 1, 277 Wis. 2d 153, 691 N.W.2d 354 (2004). Although not binding on this Court, the principles articulated in these cases are well-reasoned and support our conclusion in the case at bar.

We recognize that there may be cases involving a person's mental capacity that will necessitate expert testimony; however in light of Clara's own testimony and the significant amount of lay witness testimony regarding Clara's condition, this is not such a case. Consequently, the State was not required to use expert testimony pursuant to Rule 702 to establish the extent of Clara's mental capacity to consent to sexual acts. Accordingly, we reverse the decision of the Court of Appeals and remand this case to that court for consideration of defendant's remaining issues.

REVERSED AND REMANDED.

STATE OF NORTH CAROLINA v. AERIC L. WHITEHEAD A/K/A ERIC LAMONT WHITEHEAD

No. 279PA11

(Filed 9 March 2012)

Sentencing— Fair Sentencing Act—life sentence—Structured Sentencing Act—retroactive application—modification of sentence—erroneous

The trial court erred in granting defendant's motion for appropriate relief and modifying defendant's life sentence imposed under the Fair Sentencing Act by retroactively applying the Structured Sentencing Act. The sentencing for defendant's offense was controlled exclusively by the Fair Sentencing Act and the trial court's order and judgment violated a clear and unambiguous statute.

On writ of certiorari pursuant to N.C.G.S. § 7A-32(b) to review an order and judgment on a motion for appropriate relief dated 17 May 2011 and entered on 1 June 2011 by Judge Quentin T. Sumner in Superior Court, Nash County. Heard in the Supreme Court on 11 January 2012.

Roy Cooper, *Attorney General*, *by Elizabeth F. Parsons*, *Assistant Attorney General*, *for petitioner-appellant North Carolina Department of Correction.*

Staples S. Hughes, *Appellate Defender*, *by Anne M. Gomez*, *Assistant Appellate Defender*, *for defendant-appellee.*

MARTIN, Justice.

Defendant is presently serving a life sentence for the crime of second-degree murder. Addressing defendant's 2011 amended motion for appropriate relief for his 1994 conviction, the Superior Court, Nash County, modified defendant's life sentence by "retroactively appl[ying]" the Structured Sentencing Act. The sentencing for defendant's offense, however, is controlled exclusively by the Fair Sentencing Act. Because the trial court's order and judgment violate a clear and unambiguous statute, we vacate and remand.

On 29 July 1994, defendant pled guilty to second-degree murder in Superior Court, Nash County. The date of the offense was 25 August 1993. The trial court imposed a life sentence, the maximum aggravated

term for second-degree murder, which was a Class C felony under the Fair Sentencing Act. N.C.G.S. §§ 14-1.1, 14-17, 15A-1340.4(f) (1993).

The Fair Sentencing Act (FSA), under which defendant was originally sentenced, governs sentencing for felonies committed between 1 July 1981 and 1 October 1994. *Id.* § 15A-1340.1(a) (Cum. Supp. 1981); Crime Control and Prevention Act of 1994, ch. 24, sec. 14, 1993 N.C. Sess. Laws (Extra Sess. 1994) 82, 96. Under the FSA the presumptive range for second-degree murder, a Class C felony, is fifteen years, N.C.G.S. §§ 14-17, 15A-1340.4(f) (1993), and the maximum aggravated term is fifty years or life, *id.* § 14-1.1(a)(3) (1993). The General Assembly enacted the Structured Sentencing Act (SSA) to supersede the FSA for offenses committed *on or after* the SSA's effective date, 1 October 1994. Act of July 24, 1993, ch. 538, 1993 N.C. Sess. Laws 2298 (enacting Structured Sentencing of Persons Convicted of Crimes), *amended* by ch. 24, sec. 14, 1993 N.C. Sess. Laws (Extra Sess. 1994) at 96. In contrast to the FSA, the SSA imposes shorter terms of imprisonment for second-degree murder. N.C.G.S. §§ 14-17, 15A-1340.10, 15A-1340.17 (2009).

On 2 December 2010, defendant filed a motion for appropriate relief (MAR) alleging that his trial counsel rendered ineffective assistance and that his guilty plea was not knowing, voluntary, and intelligent. He filed an amended MAR dated 28 March 2011, alleging that the discrepancy between his actual sentence under the FSA and the sentence he would have received if his crime had been committed after 1 October 1994 under the SSA violates his constitutional rights of due process and liberty. The amended MAR requested modification of defendant's sentence under the SSA.

Following a hearing on defendant's MAR, the Superior Court issued an order on 17 May 2011 concluding that "[t]he sentencing procedure used today in the year 2011 for persons convicted of second degree murder should be retroactively applied to the defendant." In a judgment and commitment dated "05/17/2011 for 07/29/1994," the Superior Court ordered that defendant's life sentence be modified to a term of 157 to 198 months under the SSA. Defendant had already served more than 198 months and, therefore, under the terms of the Superior Court's order, was eligible for immediate and unconditional release from prison.

The Constitution of North Carolina grants this Court "jurisdiction to review upon appeal any decision of the courts below." N.C. Const. art. IV, § 12. In the interest of "ensur[ing] the uniform administration

of North Carolina's criminal statutes," *State v. Ellis*, 361 N.C. 200, 205, 639 S.E.2d 425, 429 (2007), "[t]his Court will not hesitate to exercise its rarely used general supervisory authority when necessary to promote the expeditious administration of justice," *State v. Stanley*, 288 N.C. 19, 26, 215 S.E.2d 589, 594 (1975) (citations omitted). We therefore allowed the State's petition for writ of certiorari to determine whether the Superior Court erred in modifying the sentence it previously had imposed on defendant under the FSA.

Under Article I, Section 6 of the Constitution of North Carolina, "[t]he legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other." N.C. Const. art. I, § 6; *see also Bacon v. Lee*, 353 N.C. 696, 716, 549 S.E.2d 840, 853-54, *cert. denied*, 533 U.S. 975, 122 S. Ct. 22 (2001); *Jernigan v. State*, 279 N.C. 556, 563-64, 184 S.E.2d 259, 265 (1971). It is axiomatic that the " 'legislature has exclusive power to determine the penalogical system of the [State]. It alone can prescribe the punishment for crime.' " *Jernigan*, 279 N.C. at 564, 184 S.E.2d at 265 (alteration in original) (citations omitted). The function of the judicial branch is " 'to determine the guilt or innocence of the accused, and, if that determination be one of guilt, then to pronounce the punishment or penalty prescribed by law.' " *Id.* at 563-64, 184 S.E.2d at 265 (citation omitted). The executive branch in turn must implement the lawful sentence pursuant to the requirements set forth by the legislature. *Id.* at 564; 184 S.E.2d at 265. Because the legislature has the exclusive authority to prescribe the punishments for crimes, any sentence ordered by the judicial branch and enforced by the executive branch must be within the parameters established by the legislature.

We have previously vacated criminal sentences that were not entered consistently with the appropriate sentencing provisions of the General Statutes. *See, e.g.*, *Ellis*, 361 N.C. 200, 639 S.E.2d 425; *State v. Wall*, 348 N.C. 671, 502 S.E.2d 585 (1998). In *Ellis*, applying the reasoning in *Wall*, we held that the Superior Court erred by ordering that terms of imprisonment for armed robbery run concurrently, despite the clear statutory mandate that the sentences in that case run consecutively. *Ellis*, 361 N.C. at 205-06, 639 S.E.2d at 429. We vacated the Superior Court's order because it was contrary to the law as established in the General Statutes. *Id.* at 206, 639 S.E.2d at 429. Similarly, in *State v. Roberts*, 351 N.C. 325, 523 S.E.2d 417 (2000), we held that a sentence for a term not authorized by the General Statutes was properly corrected in a MAR hearing. *Id.* at 327, 523 S.E.2d at 418. Recognizing the limitations imposed by the state constitution's

express separation of powers clause, we wrote, "Trial courts are required to enter criminal judgments consistent with the [appropriate] provisions of the [General Statutes]." *Id.*

Defendant nonetheless contends that the Superior Court was permitted to enter the modified sentence at the hearing on his MAR. We disagree and hold that the modified sentence contravenes the appropriate sentencing statutes.

The General Assembly clearly and unambiguously provided that the Structured Sentencing Act may not be applied retroactively:

> This act becomes effective October 1, 1994, and applies only to offenses occurring on or after that date. Prosecutions for, or sentences based on, offenses occurring before the effective date of this act are not abated or affected by the repeal or amendment in this act of any statute, and the statutes that would be applicable to those prosecutions or sentences but for the provisions of this act remain applicable to those prosecutions or sentences.

Ch. 24, sec. 14, 1993 N.C. Sess. Laws (Extra Sess. 1994) at 96. Trial courts are required to enter criminal judgments in compliance with the sentencing provisions in effect at the time of the offense. *Roberts*, 351 N.C. at 327, 523 S.E.2d at 418. The court here therefore erred in applying the SSA retroactively to the sentence for defendant's crime of second-degree murder—which was committed before 1 October 1994—in violation of the statute's clear and unambiguous mandate. Further, this provision of the SSA directs that sentences for offenses that occurred before the SSA's effective date of 1 October 1994 shall not be affected by the Act. The statutes that applied to pre-SSA sentences remain applicable to those sentences. Accordingly, the FSA remains the applicable law for defendant's sentence.

Defendant asserts that the State waived or invited any error and therefore should not be permitted to complain on appeal. We considered a similar issue in *Wall*, in which, at a hearing on the defendant's MAR, the assistant district attorney consented to the defendant's position that his sentences were to be served concurrently rather than consecutively, contrary to the requirements in the General Statutes. *Wall*, 348 N.C. at 673-74, 502 S.E.2d at 586-87. In that case, the State's consent did not render the illegal sentence unappealable. Rather, because the trial court was required to impose a sentence in accordance with the law, this Court held that the illegal sentence "must, therefore, be vacated." *Id.* at 676, 502 S.E.2d at 588. Just as in *Wall*,

the consent of the assistant district attorney here did not render the illegal sentence unappealable. We therefore must vacate the trial court's 17 May 2011 judgment. *See id.*

Having concluded that defendant is not entitled to resentencing under the SSA, we also note that defendant's MAR provides no appropriate grounds for resentencing under the FSA. The trial court lost jurisdiction to modify defendant's 1994 sentence, subject to limited exceptions, after the adjournment of the session of court in which defendant received this sentence. *See State v. Duncan*, 222 N.C. 11, 13, 21 S.E.2d 822, 824 (1942); Strong's N.C. Index 4th Criminal Law § 1619 (2009). Although a trial court may properly modify a sentence after the trial term upon submission of a MAR, none of the appropriate statutory grounds are present here. *See* N.C.G.S. § 15A-1415(b) (2011) (listing the only grounds which a defendant may assert by a MAR filed more than ten days after entry of judgment). Defendant contends that, based on his MAR, he is entitled to resentencing under the FSA because his original FSA sentence violates the Eighth Amendment. He argues that the difference between his actual sentence under the FSA and the sentence he would have received at the time of his MAR hearing under the SSA violates the Eighth Amendment's proportionality principle. However, a comparison of the gravity of defendant's offense, second-degree murder, with the severity of his sentence, life with the possibility of parole, leads to no inference of gross disproportionality. *See Graham v. Florida*, —— U.S. ——, ——, 130 S. Ct. 2011, 2022 (2010) (instructing that this comparison is a threshold consideration that must be met before comparing a defendant's sentence to the sentences of others for similar offenses). Accordingly, under the allegations of the MAR before this Court, modification of defendant's sentence under the FSA would likewise not be appropriate relief. *See* N.C.G.S. § 15A-1417 (2011).

Criminal sentences may be invalidated for cognizable legal error demonstrated in appropriate proceedings. But, in the absence of legal error, it is not the role of the judiciary to engage in discretionary sentence reduction. That power resides in the executive branch, as established by the state constitution and acts of the General Assembly.[1] The Superior Court erred in applying the SSA to a sen-

1. In 2005, 2007, 2009, and 2011, the General Assembly directed the Post-Release Supervision and Parole Commission to determine whether inmates sentenced under previous sentencing standards have served more time in custody than they would have served if they had received the maximum sentence under the SSA. Current Operations and Capital Improvements Appropriations Act of 2005, ch. 276, sec. 17.28.(a)-(c), 2005

tence controlled exclusively by the FSA. Exercising our general supervisory role to ensure the uniform application of North Carolina's criminal statutes, we vacate the Superior Court's 17 May 2011 order and judgment and remand to the trial court for reinstatement of the original 29 July 1994 judgment.

VACATED AND REMANDED.

FRED WALLY, LAVON BENTON, RANDALL BENTON, DON CROWE, AND GEORGE MARTOCCHIO v. CITY OF KANNAPOLIS

No. 111PA11

(Filed 9 March 2012)

Zoning— amendment—statement of reasonableness—failure to approve—amendment invalid

Where defendant failed to approve a statement of reasonableness as required by N.C.G.S. § 160A-383 when adopting a zoning amendment which rezoned rural land to promote commercial development, the amendment was invalid. The unanimous opinion of the Court of Appeals was reversed.

On discretionary review pursuant to N.C.G.S. § 7A 31 of a unanimous, unpublished decision of the Court of Appeals, —— N.C. App. ——, 709 S.E.2d 601 (2012), affirming an order granting summary judgment for defendant entered on 23 February 2009 by Judge Michael E. Beale in Superior Court, Cabarrus County. Heard in the Supreme Court on 9 January 2012.

N.C. Sess. Laws 668, 948-49; Current Operations and Capital Improvements Appropriations Act of 2007, ch. 323, sec. 17.11.(a)-(c), 2007 N.C. Sess. Laws 616, 841-42; Current Operations and Capital Improvements Appropriations Act of 2009, ch. 451, sec. 19.8.(a)-(c), 2009 N.C. Sess. Laws 914, 1114-15; Current Operations and Capital Improvements Appropriations Act of 2011, ch. 145, sec. 18.7.(a)-(c), 2011 3 N.C. Adv. Legis. Serv. 109, 358-59 (LexisNexis). These provisions instructed the Commission to report its findings and reinitiate the parole review process for offenders in this class. Defendant's sentence appears to fall within the purview of this directive. In addition, wholly independent of the Commission's grant of authority, the state constitution empowers the Governor to "grant reprieves, commutations, and pardons, after conviction, for all offenses . . . upon such conditions as he may think proper." N.C. Const. art. III, § 5(6).

Brough Law Firm, by T.C. Morphis, Jr., for plaintiff-appellants.

Hamilton Stephens Steele & Martin, PLLC, by Keith J. Merritt and Rebecca K. Cheney, for defendant-appellee.

TIMMONS-GOODSON, J.

This case involves a dispute between the City of Kannapolis ("defendant"), which rezoned rural land to promote commercial development, and neighboring land owners ("plaintiffs"). At issue is whether defendant approved a statement of reasonableness as required by N.C.G.S. § 160A-383 when adopting the zoning amendment. We hold defendant did not approve such a statement, and therefore, the amendment is invalid. Accordingly, we reverse the opinion of the Court of Appeals and remand for proceedings not inconsistent with this opinion.

The property at issue in this case consists of 75.9 acres owned by Coddle Creek, LLC and the Wallace Charitable Trust (collectively, "the Owners"). Until 2007 the property was subject to Cabarrus County zoning designations. In September of that year defendant annexed the property at the request of the Owners, thus subjecting it to defendant's Unified Development Ordinance and 2015 Land Use Plan. A month later the Owners submitted a zoning request to the Kannapolis Planning and Zoning Commission ("Zoning Commission") seeking a more permissive zoning classification, Campus Development-Conditional Zoning. This classification would permit the Owners to develop a neighborhood office and a light industrial and retail business park on the property. In November 2007, the Zoning Commission approved the request, and plaintiffs, as neighboring property owners, appealed to the Kannapolis City Council ("City Council").

At a public hearing in December 2007, the City Council received a staff report from the Zoning Commission regarding the proposed zoning amendment. The staff report contained an analysis of the proposed amendment, including the compatibility of the proposed zoning designation with the surrounding area and impacts on safety, traffic, parking, the environment, and public facilities. Ultimately, the city staff concluded that the rezoning request was "consistent with the long range goals of the City, and reasonable in light of existing and approved infrastructure." At the December 2007 meeting defendant approved the zoning request. The following month defendant adopted a resolution to designate the property as Campus Development-Conditional Zoning.

In March 2008 plaintiffs filed an amended complaint in Superior Court, Cabarrus County, alleging, *inter alia*, that defendant failed to "adopt a statement" as required by N.C.G.S. § 160A-383 and that the rezoning constituted illegal spot zoning. Plaintiffs asked the court to declare the zoning amendment void and to rezone the property to its previous classification. Both parties filed motions for summary judgment and stipulated that there was no genuine issue of material fact. On 23 February 2009, the trial court entered an order granting defendant's motion for summary judgment on all claims and dismissing plaintiffs' declaratory judgment action.

Plaintiffs appealed to the Court of Appeals. Regarding the section 160A-383 issue, the panel presumed the zoning amendment valid and held that plaintiffs failed to show the City Council did not "approve a statement." *Wally v. City of Kannapolis*, —— N.C. App. ——, 709 S.E.2d 601, 2011 WL 601167, at *5 (2011) (unpublished). The court also held that section 160A-383 prohibits judicial review of whether the City Council's statement was statutorily sufficient. *Id.* On a separate issue, the Court of Appeals, relying upon *Blades v. City of Raleigh*, 280 N.C. 531, 187 S.E.2d 35 (1972), and its progeny, held that the rezoning did not constitute spot zoning because the property had more than one owner at the time of rezoning. *Wally*, 2011 WL 601167, at *6-7. The Court of Appeals also addressed additional issues that are not before this Court. We allowed plaintiffs' subsequent petition for discretionary review of two issues: (1) whether defendant complied with N.C.G.S. § 160A-383 when adopting the zoning amendment, and (2) whether the rezoning of a property with more than one owner can constitute spot zoning.

Analysis

"We review a trial court's order for summary judgment de novo . . . ." *Robins v. Town of Hillsborough*, 361 N.C. 193, 196, 639 S.E.2d 421, 423 (2007) (citations omitted). In determining whether defendant complied with N.C.G.S. § 160A-383 when it adopted the subject zoning amendment, we recognize that the amendment is presumed valid "and the burden [is] upon [plaintiffs] to show otherwise." *Raleigh v. Morand*, 247 N.C. 363, 368, 100 S.E.2d 870, 874 (1957) (citations omitted), *appeal dismissed*, 357 U.S. 343, 2 L. Ed. 2d 1367 (1958). We conclude that plaintiffs have met their burden and therefore hold that the zoning amendment is invalid. Because the amendment is void, it is unnecessary for us to address the spot zoning issue.

Zoning ordinances regulate land use, not ownership. *See Blades*, 280 N.C. at 546, 187 S.E.2d at 43 ("The whole concept of zoning implies a restriction upon the owner's right to use a specific tract . . . ."). "The original zoning power of the State reposes in the General Assembly." *Allgood v. Town of Tarboro*, 281 N.C. 430, 437, 189 S.E.2d 255, 260 (1972) (citation omitted). The General Assembly, in turn, may delegate zoning authority to the legislative body of a municipality. *Id.* Because zoning authority derives from the state's police power, zoning ordinances are valid only when they "promote the public health, the public safety, the public morals or the public welfare." *Zopfi v. City of Wilmington*, 273 N.C. 430, 433, 160 S.E.2d 325, 330 (1968). In addition, "[t]he power to zone . . . is subject to the limitations of the enabling act," *Schloss v. Jamison*, 262 N.C. 108, 114, 136 S.E.2d 691, 695 (1964) (citations omitted), and "[z]oning regulations shall be made in accordance with a comprehensive plan," N.C.G.S. § 160A-383 (2011). Exercise of the zoning power also must comport with certain procedural requirements, such as those provided in section 160A-383.

> When adopting or rejecting any zoning amendment, the governing board shall also approve a statement describing whether its action is consistent with an adopted comprehensive plan and any other officially adopted plan that is applicable, and briefly explaining why the board considers the action taken to be reasonable and in the public interest. That statement is not subject to judicial review.

N.C.G.S. § 160A-383.

By its plain language section 160A-383 states that when the governing board adopts a zoning amendment, the board "shall also" approve a statement. *Id.* Thus, the statute requires that defendant take two actions in this situation: first, adopt or reject the zoning amendment, and second, approve a proper statement. *Id.* The approved statement must *describe* whether the action is consistent with any controlling comprehensive plan and *explain* why the action is "reasonable and in the public interest." *Id.* In addition, the statute declares that when such a statement is made, it "is not subject to judicial review."

Defendant asserts that N.C.G.S. § 160A-383 expressly prohibits judicial review of the City Council's statement, and therefore, the trial court did not err by granting summary judgment in its favor. Next, defendant argues that the City Council approved a statement in satis-

faction of section 160A-383 by adopting the zoning amendment with the staff report that was before the City Council. Under this theory, the City Council impliedly approved the staff's statement regarding consistency and reasonableness. Finally, defendant contends that the City Council complied with the statute by adopting the following statement: "[T]he Council's final vote conforms to the guidelines under which they are granted final authority to act upon a rezoning petition." We are not persuaded by these arguments.

As a preliminary matter, we disagree with defendant's argument that the statute bars judicial review of this issue. The statute provides, "That statement is not subject to judicial review," and by "[t]hat statement," the statute refers to an approved statement. While an approved statement is not subject to judicial review, the statute does not prohibit review of *whether* the City Council approved a statement, which is the issue here. Accordingly, we review whether the City Council approved a statement.

Turning to the issue proper, we hold that the City Council did not approve a statement as required by N.C.G.S. § 160A-383. First, while the City Council took the initial step of adopting the zoning amendment, it failed to take the second step and "approve a statement" that addresses consistency, reasonableness, and the public interest. This failure is evidenced by the trial court's uncontested finding of fact that "there was no per se written statement of reasonableness," a fact that is binding on appeal. *Morand*, 247 N.C. at 365, 100 S.E.2d at 872 (stating that where no challenge is made to the findings of fact, those findings are presumed supported by competent evidence and are binding upon appeal).

Second, we are not persuaded by defendant's argument that it complied with the statute by impliedly approving the staff report by virtue of having the report in hand when adopting the zoning amendment. The language of section 160A-383 does not authorize an implied approval. Defendant cites no authority permitting implied approval in this context, and we have found none. Defendant's argument also fails because, while section 160A-383 requires the approved statement to explain why "the board [the City Council] considers the action taken to be reasonable," the staff report merely states that the *staff* considers the action reasonable.

Finally, we do not agree that the City Council satisfied the statute by adopting a statement announcing that it acted within the guidelines of its zoning authority. Compliance with section 160A-383

requires more than a general declaration that the action comports with relevant law. Section 160A-383 explains that to meet the statutory requirements, an approved statement must describe whether the zoning amendment is consistent with any controlling land use plan and explain why it is reasonable and in the public interest. The statement adopted by the City Council provides no such explanation or description. Rather, it consists of a general declaration that in adopting the zoning amendment, the City Council acted within the guidelines of its zoning authority.

Conclusion

The zoning amendment at issue is invalid because defendant failed to properly approve a statement under N.C.G.S. § 160A-383. Having determined the amendment void, it is unnecessary for us to address the spot zoning issue. Accordingly, we reverse the Court of Appeals and remand this case to the Court of Appeals for further remand to the trial court for proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

ANTHONY G. WILLIS, EXECUTOR OF THE ESTATE OF JANICE D. WILLIS, BENEFICIARY AND TRUSTEE OF THE JANICE D. WILLIS REVOCABLE TRUST DATED THE 25TH OF SEPTEMBER 2009, AND INDIVIDUALLY; AND THE JANICE D. WILLIS REVOCABLE TRUST DATED THE 25TH OF SEPTEMBER 2009 v. ROBERT WILLIS, ROBIN WILLIS, AND THE ESTATE OF EDWARD CARROLL WILLIS

No. 457A11

(Filed 9 March 2012)

Reformation of Instruments— mistake of one party not induced by fraud of other—no grounds for relief

Mistake of one party to a deed or instrument alone, not induced by the fraud of the other, affords no ground for relief by reformation in North Carolina. The three circumstances under which reformation could be available as a remedy include: (1) mutual mistake of the parties; (2) mistake of one party induced by fraud of the other; and (3) mistake of the draftsman.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, —— N.C. App. ——, 714 S.E.2d

857 (2011), affirming an order on directed verdict entered on 28 May 2010 by Judge W. Allen Cobb, Jr. in Superior Court, Carteret County. Heard in the Supreme Court on 14 February 2012.

Harvell and Collins, P.A., by Russell C. Alexander and Wesley A. Collins, for plaintiff-appellants.

Beswick & Goines, PLLC, by George W. Beswick and Erin B. Meeks, for defendant-appellees.

HUDSON, Justice.

Plaintiff Anthony Willis, on behalf of the estate of Janice Willis, seeks reformation of a deed based on unilateral mistake of the grantor in the absence of fraud. Because this remedy is unavailable as a matter of law, we modify and affirm the decision of the Court of Appeals.

Janice Willis had two sons, Eddie and Anthony. In December 2004 she drafted a will bequeathing "any interest that I may own in my home place" to Eddie. The will also expressed Mrs. Willis's "wish" that, if she conveyed the property to Eddie before her death and he decided to sell it, Eddie would divide the proceeds with his brother Anthony. The will also bequeathed the residue of her estate to Eddie and Anthony in equal shares, to pass to their children per stirpes if either or both predeceased her.

In January 2005 Mrs. Willis executed a general warranty deed reserving a life estate in her home for herself and conveying the remainder to Eddie in fee simple. Eddie died suddenly in November 2007, while Mrs. Willis was still alive. When it became clear that Eddie's interest in the property had passed to his children, Mrs. Willis contended that the result was not what she had intended. She filed this lawsuit seeking reformation of the deed on the basis of her unilateral mistake. At the conclusion of the evidence presented at trial, the trial judge granted a directed verdict for defendants. The Court of Appeals affirmed in a two to one decision. *Willis v. Willis*, ___ N.C. App. ___, ___, 714 S.E.2d 857, 860 (2011). During the appeal of this matter, Mrs. Willis died; her other son Anthony, as the executor of her estate, was substituted as plaintiff. *Id.* at ___ n.1, 714 S.E.2d at 859 n.1.

Plaintiff relies entirely on the Court of Appeals decision in *Nelson v. Harris*, 32 N.C. App. 375, 232 S.E.2d 298, *disc. rev. denied*, 292 N.C. 641, 235 S.E.2d 62 (1977), for the rule under which reformation is sought. In *Nelson* the Court of Appeals wrote that "[t]he grantor of a conveyance for which no consideration was given by the grantee is entitled to reformation when the deed fails to express the actual

intent of the parties due to the grantor's unilateral mistake." *Id.* at 379, 232 S.E.2d at 300 (citations omitted). At trial plaintiff sought to prove that the property was conveyed without consideration and that the deed did not express Mrs. Willis's intent due to her own mistake. The parties presented evidence on both issues. Based on the recitation of consideration in the deed and the fact that love and affection between a parent and child may serve as consideration for a conveyance, the trial court found that "the deed at issue in this action was given for good and valuable consideration." Thus, the trial court found that reformation under *Nelson* was not available. The trial court did not reach the issue of mistake.

On appeal the parties again argued both the consideration issue and the mistake issue. The Court of Appeals assumed without deciding that there was no consideration, but held that there had been no mistake that would merit reformation in this case. The Court of Appeals likened the case to *Mims v. Mims*, in which " '[t]he only mistake . . . [was the] plaintiff's erroneous understanding of North Carolina law governing deeds and perhaps his misunderstanding of the legal effect of having the deed made to both him and his wife as grantees.' " *Willis*, —— N.C. App. at ——, 714 S.E.2d at 860 (quoting *Mims v. Mims*, 305 N.C. 41, 60, 286 S.E.2d 779, 792 (1982)) (alterations in original). The Court of Appeals determined that here there was not "even a scintilla of evidence" of "unilateral mistake" that would merit reformation and therefore, that directed verdict was proper. *Id.* at ——, 714 S.E.2d at 860. The dissent argued that the majority misapplied the case law and that there was sufficient evidence for the issues of mistake and consideration to have gone to the jury. *Id.* at ——, 714 S.E.2d at 861 (Calabria, J., dissenting).

Plaintiff appealed to this Court based on the dissenting opinion. Both parties made the same arguments to this Court that they advanced below, and neither party challenged the premise that *Nelson v. Harris* provided authority for a claim of reformation based on unilateral mistake by the grantor. However, the quoted statement from *Nelson* is nonbinding dictum and is actually contrary to North Carolina law. Thus, we need not examine the evidence or review the directed verdict issued in this case, because we hold that the remedy sought is unavailable as a matter of law.

Nelson v. Harris involved reformation of a deed based on mutual mistake of the parties. 32 N.C. App. at 378-79, 232 S.E.2d at 300. There the Court of Appeals determined that parol evidence was permissible

to prove mutual mistake and that there was sufficient evidence of mutual mistake to justify reformation. *Id.* at 378, 232 S.E.2d at 300. The analysis of the issues comported with precedent, and those portions of the opinion remain good law without regard to the discussion that follows.

In its discussion of the trial evidence, the *Nelson* court stated that "[t]he grantor of a conveyance for which no consideration was given by the grantee is entitled to reformation when the deed fails to express the actual intent of the parties due to the grantor's unilateral mistake." *Id.* at 379, 232 S.E.2d at 300. This statement did not describe the facts of the case and had no impact on the decision. Moreover, the statement had no basis in prior North Carolina law—the Court of Appeals cited *American Jurisprudence* and *American Law Reports* as authority, but referenced no North Carolina case law. Given that the statement was dictum unsupported by precedent, the statement would be of quite limited value even if it did not conflict with previous decisions of this Court. Our research has found no appellate court decision in North Carolina that has relied on the quoted statement in *Nelson* to reform a deed based on unilateral mistake. Accordingly, Plaintiff's reliance on *Nelson* for the claim fails because the statement in *Nelson* regarding reformation of gift deeds is contrary to settled law in North Carolina.

This Court described the possible grounds for reformation of a deed in the case of *Crawford v. Willoughby*, 192 N.C. 269, 134 S.E. 494 (1926). This Court offered three circumstances under which reformation could be available as a remedy: (1) mutual mistake of the parties; (2) mistake of one party induced by fraud of the other; and (3) mistake of the draftsman. *Id.* at 271, 134 S.E. at 495. The Court further explained that "mistake of one party to the deed, or instrument, alone, not induced by the fraud of the other, affords no ground for relief by reformation." *Id.* at 272, 134 S.E. at 496. While *Crawford* related to a mistake by the draftsman, and reform was allowed on that basis, *id.* at 271, 134 S.E. at 495, the three bases for reformation identified by that opinion have been cited and reaffirmed in this state many times in various situations since 1926. *E.g.*, *Mason v. Brevoort*, 254 N.C. 619, 622, 119 S.E.2d 453, 455 (1961) (citing *Crawford* to affirm nonsuit in a reform action when there was no evidence of mutual mistake, unilateral mistake induced by fraud, or a mistake of the draftsman); *Smith v. Smith*, 249 N.C. 669, 674, 107 S.E.2d 530, 533-34 (1959) (citing *Crawford* and stating that a mere assertion that

the wife's name was included in the deed "through error" was insufficient proof of grounds for reformation); *U.S. Bank, N.A. v. Cuthbertson*, —— N.C. App. ——, 697 S.E.2d 526, 2010 WL 2651630, at *2 (2010) (unpublished) (citing the *Crawford* rule as stated in *Smith* and affirming trial court's order reforming the deed based on mutual mistake); *Parker v. Pittman*, 18 N.C. App. 500, 504, 197 S.E.2d 570, 573 (1973) (restating the rule in *Crawford* as "[i]f a deed fails to express the true intention of the parties it may be reformed to express such intent only when the failure is due to the mutual mistake of the parties, to the mistake of one party induced by fraud of the other, or to mistake of the draftsman").

There were no allegations in this case of mutual mistake, of unilateral mistake induced by fraud, or of a mistake of the draftsman. Thus, reformation is unavailable under *Crawford* and its progeny. Because this case can be decided as a matter of law, we need not explore the evidence presented on the issues of consideration or unilateral mistake of the grantor. We merely reaffirm that *Crawford* set forth the three scenarios under which reformation of a deed is available.

While Mrs. Willis may have truly intended a different result, "[t]he mistake of one party to the deed, or instrument, alone, not induced by the fraud of the other, affords no ground for relief by reformation." *Crawford*, 192 N.C. at 272, 134 S.E. at 496.

MODIFIED AND AFFIRMED.

IN RE: INQUIRY CONCERNING A JUDGE, NO. 10-194 JOHN WILLIAM TOTTEN, II, RESPONDENT

No. 471A11

(Filed 9 March 2012)

Judges— ex parte order—signing erroneous order—not fully reviewed

A judge was censured by the North Carolina Supreme Court for his conduct where, after accepting a driving while impaired plea, he initiated an *ex parte* contact with the defense attorney about setting aside the interlock device requirement and signed without fully reviewing an order that resulted in the suppression of the defendant's blood alcohol concentration.

IN RE TOTTEN

[365 N.C. 458 (2012)]

This matter is before the Court pursuant to N.C.G.S. §§ 7A-376 and -377 upon a recommendation by the Judicial Standards Commission entered 22 September 2011 that respondent John William Totten, II, a Judge of the General Court of Justice, District Court Division, State of North Carolina Judicial District Twenty-Six, be censured for conduct in violation of Canons 1, 2A, 3A(1), and 3A(4) of the North Carolina Code of Judicial Conduct and for conduct prejudicial to the administration of justice that brings the judicial office into disrepute in violation of N.C.G.S. § 7A-376(b). Calendared for argument in the Supreme Court on 9 January 2012, but determined on the record without briefs or oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure and Rule 2(c) of the Rules for Supreme Court Review of Recommendations of the Judicial Standards Commission.

No counsel for Judicial Standards Commission or respondent.

ORDER OF CENSURE

By the recommendation of the North Carolina Judicial Standards Commission ("Commission"), the issue before this Court is whether respondent John William Totten, II ("respondent") should be censured for conduct in violation of Canons 1, 2A, 3A(1), and 3A(4) of the North Carolina Code of Judicial Conduct and conduct prejudicial to the administration of justice that brings the judicial office into disrepute in violation of N.C.G.S. § 7A-376(b).

The facts are not in dispute and respondent does not oppose the Commission's recommendation that he be censured. Respondent waived his right to a formal hearing before the Commission, and counsel for the Commission, respondent, and counsel for respondent entered the following stipulations:

> 1. The Commission is a body organized under the laws of North Carolina and is authorized to recommend to the North Carolina Supreme Court (Court) the censure, suspension and removal of Judges and Justices of the General Court of Justice pursuant to the Constitution of North Carolina, Article IV, Section 17, and the procedures prescribed by the North Carolina General Assembly in the North Carolina General Statutes, Chapter 7A, Article 30.
>
> 2. Judge John William Totten, II, (Respondent) was at all times referred to herein a Judge of the General Court of Justice, District Court Division, Judicial District 26, and as such is subject to the Canons of the North Carolina Code of Judicial Conduct, the

laws of the State of North Carolina, and the provisions of the oath of office for a district court judge set forth in the North Carolina General Statutes, Chapter 11.

3. On October 13, 2010, the North Carolina Judicial Standards Commission (Commission), in accordance with its Rule 9, notified Respondent that it had ordered a formal investigation to determine whether formal proceedings should be instituted against him under Commission Rule 12. The notice generally informed the Respondent of the nature of the alleged misconduct to be investigated, that the investigation would remain confidential in accordance with G.S. § 7A-377 and Commission Rule 6, and that Respondent had the right to present for the Commission's consideration any relevant matters which he might choose.

4. On March 24, 2011, Respondent was personally served with a Statement of Charges in this matter in which the Commission concluded that formal proceedings should be instituted against Respondent based on the evidence developed by the formal investigation into this inquiry. On April 8, 2011, the Commission entered an Order extending Respondent's time to Answer until May 3, 2011 based on Respondent's unopposed motion filed that same day. The Respondent timely filed a Verified Answer on May 2, 2011.

5. Notice of Hearing was mailed to Respondent and Respondent's counsel on July 14, 2011, notified [sic] that a hearing would commence at 10:00 a.m. on November 10, 2011 in the North Carolina Court of Appeals Courtroom located at 1 West Morgan Street, Raleigh, North Carolina for the purpose of determining whether or not the allegations contained in the Statement of Charges against the Respondent could be proven by clear and convincing evidence.

Evidentiary Facts

6. On September 24, 2010, Respondent presided over a session of criminal district court in Mecklenburg County. During that session of court, the matter of State of North Carolina v. Glenmore Hopkins File Nos. 10 CR 205803 and 205804 were scheduled for disposition. Hopkins was charged with Driving While Impaired (DWI) in 10 CR 205803 and Careless and Reckless Driving (C&R) in 10 CR 205804. Pursuant to a plea agreement, Hopkins, who was represented by attorney David Lange, entered a plea of guilty to the charge of DWI. Assistant [D]istrict [A]ttorney

Steven Hardgrave dismissed the charge of C&R. Hardgrave arraigned Hopkins and proffered to the court the relevant facts to support the charge, including the breath alcohol concentration (BAC) test result of 0.17. All proffered evidence was heard by the Respondent and without objection or motion from the defense. Respondent found Hopkins guilty of DWI, entered a level four sentence and the hearing was concluded.

7. At the conclusion of the proceeding as described in Paragraph 6, Lange approached the assistant clerk of court working in the courtroom, Dana McComb, to retrieve Hopkins' paperwork, whereupon Respondent requested that Lange approach the bench. Respondent advised Lange of Respondent's intent to set aside the requirement for an interlock device for Hopkins. Respondent then asked McComb about the procedure for setting aside the interlock device that would be recognized by the Division of Motor Vehicles. McComb stated that she was required to report to the Division of Motor Vehicles BAC results of 0.15 and above in DWI convictions, unless an order was entered. Respondent told Lange that if he would prepare an order that he would sign it. Lange agreed to prepare the order. All of Respondent's conversations with Lang[e] and McComb referenced in this paragraph took place in the courtroom, at the bench, during an open session of court, but not as part of the official proceedings in this matter. Hardgrave was not asked to participate in the discussion between Respondent, Lange and McComb, nor was Hardgrave aware of the substance of the discussion when it occurred. Respondent initiated this ex parte communication with Lange.

8. Following the conversation described in paragraph 7, Lange returned to the courtroom and handed Respondent a prepared order to suppress the BAC results in Hopkins' matter. Lange left the bench, got Hardgrave, the ADA present in the courtroom, and came back to the bench. Hardgrave was not given the opportunity to make substantive arguments on the entry of the order before Respondent stated that the State's objection to entry of the order was noted. Respondent signed the Order to Suppress. The recollections of the Respondent differ from McComb and Hardgrave on whether the order was signed before or after Hardgrave approached the bench and Respondent noted the State's objection.

9. The order entered by Respondent resulted in the suppression of the BAC results in Hopkins' DWI conviction. The order stated that this matter was heard by the Respondent during

the morning session of court for Mecklenburg County on September 24, 2010 and present in [c]ourt was counsel for the defendant, David R. Lange and the State of North Carolina was represented by Assistant District Attorney Stephen Hardgrave. The order further stated the matter was heard on the defense counsel's Motion to Suppress the results of the chemical analysis given to the defendant on February 8, 2010. In addition the order stated that it was entered based upon the review of the evidence, arguments made by counsel on the motion, a review of the record and the law. Because he believed that he was signing a form order setting aside the interlock device, Respondent did not fully review the order before signing it and was not aware of the erroneous findings and conclusions contained therein.

10. Respondent acknowledged it was his responsibility to read fully the order and to understand both the nature of the order and the applicable law prior to his signing the order. Respondent should have known that the order he signed suppressing the chemical analysis (BAC) given to Hopkins on February 8, 2010 required a motion to suppress and a hearing. Respondent offers by explanation that he did not read the entire order and that his actions were based on his incorrect understanding of the law.

11. Respondent's statements in his January 14, 2011 interview by Judicial Standards Commission Investigator R. Glenn Joyner were made to the best of his knowledge and recollection at the time of those interviews. His recollection was different in some respects than other individuals involved in the above proceedings. Respondent acknowledges that the recollections of others may be accurate on some of those issues, but Respondent never made any intentional misrepresentations or any statements for the purpose of misleading the Commission and the investigation into this matter.

12. Respondent acknowledge[d] that he [wa]s represented by counsel in the[ ] proceedings and that he [wa]s entitled to go forward with the hearing scheduled for 10:00 a.m. Thursday, November 10, 2011. However, after having discussed the matter with his counsel, upon acceptance by the Commission of this stipulation and joint recommendation for a Censure, Respondent waive[ed] his right to a hearing and acknowledge[d] that his conduct set out in the stipulations establishes by clear and convincing evidence conduct prejudicial to the administration of justice

that brings the judicial office into disrepute in violation of G.S. § 7A-376(b).

13. Respondent acknowledges further that the conduct admitted in this stipulation is in violation of Canons 1, 2A, 3A(1) and (4) of the Code of Judicial Conduct.

14. Respondent, with the consent of Counsel to the Commission, agrees to accept a recommendation of Censure from the Commission to the North Carolina Supreme Court.

Following a hearing on 7 September 2011, the Commission made findings of fact and incorporated, as additional findings of fact, the stipulations agreed to by respondent, respondent's counsel, and the Commission. Determining that the findings of fact were based upon clear and convincing evidence, the Commission concluded as a matter of law that respondent's conduct "constitutes conduct in violation of Canons 1, 2A, 3A(1) and (4) of the Code of Judicial Conduct" and "constitutes conduct prejudicial to the administration of justice that brings the judicial office into disrepute in violation of N.C.G.S. § 7A-376(b)." On 22 September 2011, the Commission unanimously concurred in a recommendation that this Court censure respondent.

This Court concludes that the Commission's findings of fact are supported by the stipulations and by other evidence in the record. In addition, we conclude that the Commission's findings of fact support its conclusions of law. Therefore, we accept the Commission's findings and adopt them as our own. Based upon those findings and conclusions and the recommendation of the Commission, we conclude and adjudge that respondent be censured.

Therefore, pursuant to N.C.G.S. §§ 7A-376(b) and -377(a5) and Rule 3 of the Rules for Supreme Court Review of Recommendations of the Judicial Standards Commission, it is ordered that respondent John William Totten, II be CENSURED for conduct prejudicial to the administration of justice that brings the judicial office into disrepute in violation of N.C.G.S. § 7A-376(b) and which violates Canons 1, 2A, 3A(1), and 3A(4) of the Code of Judicial Conduct.

By order of the Court in Conference, this the 8th day of March, 2012.

s/Jackson, J.
For the Court

STATE OF NORTH CAROLINA v. CHRISTOPHER JAMES WOODARD

No. 183PA11

(Filed 9 March 2012)

On discretionary review pursuant to N.C.G.S. § 7A 31 of a unanimous decision of the Court of Appeals, —— N.C. App. ——, 709 S.E.2d 430 (2012), finding no error in judgments entered on 28 April 2010 by Judge James U. Downs in Superior Court, Avery County. Heard in the Supreme Court on 13 February 2012.

Roy Cooper, Attorney General, by Allison A. Angell, Assistant Attorney General, for the State.

Mary March Exum for defendant-appellant.

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

STATE OF NORTH CAROLINA v. HENRY EUGENE BROWN

No. 218A11

(Filed 9 March 2012)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, —— N.C. App. ——, 710 S.E.2d 265 (2012), finding no prejudicial error in a trial resulting in judgments and an order entered on 17 July 2009 by Judge Dennis J. Winner in Superior Court, Jackson County. On 25 August 2011, the Supreme Court allowed defendant's petition for discretionary review of an additional issue. Heard in the Supreme Court on 14 February 2012.

Roy Cooper, *Attorney General*, *by Joseph Finarelli and Jane Rankin Thompson*, *Assistant Attorneys General*, *for the State.*

Staples S. Hughes, *Appellate Defender*, *by Kristen L. Todd*, *Assistant Appellate Defender*, *for defendant-appellant.*

PER CURIAM.

As to the issue before this Court under N.C.G.S. § 7A-30(2), the decision of the Court of Appeals is affirmed. Further, we conclude that the petition for discretionary review as to the additional issue was improvidently allowed.

AFFIRMED; DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

STATE OF NORTH CAROLINA v. JACKIE RAY ANDERSON

No. 382A11

(Filed 9 March 2012)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, —— N.C. App. ——, —— S.E.2d ——, 2011 WL 3569529 (Aug. 16, 2011) (No. COA10-1573), finding error in a judgment entered on 17 May 2010 by Judge Walter H. Godwin, Jr. in Superior Court, Wilson County, and granting defendant a new trial. Heard in the Supreme Court on 14 February 2012.

Roy Cooper, *Attorney General*, *by Derrick C. Mertz*, *Assistant Attorney General*, *for the State-appellant.*

Michael J. Reece for defendant-appellee.

PER CURIAM.

AFFIRMED.

STATE v. JONES

[365 N.C. 467 (2012)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	FROM MECKLENBURG COUNTY
	)	
CHRIS ALAN JONES	)	

No. 8PA11

(Filed 9 March 2012)

ORDER

On 31 August 2011, the State filed a motion to amend the record, asking leave to include (1) a copy of the crime lab report showing a substance to be cocaine and (2) a copy of the N.C.G.S. § 90-95 notice provided to defendant's trial counsel by the District Attorney's Office on 8 September 2009 indicating an intent to introduce the report into evidence. The existence of these items was apparently not known to appellate counsel when the case was before the Court of Appeals.

Now, therefore, this Court allows the State's motion to amend the record and, on its own motion, ORDERS that the 21 December 2010 decision of the Court of Appeals is VACATED and REMANDS this matter to the Court of Appeals for reconsideration in light of the amended record.

By order of the Court in Conference, this 8th day of March, 2012.

s/Jackson, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 9th day of March 2012.

CHRISTIE S. CAMERON ROEDER
Clerk of the Supreme Court

s/M.C. Hackney
Assistant Clerk

CHEYENNE SALEENA STARK, A MINOR, AND CODY BRANDON STARK, A MINOR, BY THEIR GUARDIAN AD LITEM, NICOLE JACOBSEN v. FORD MOTOR COMPANY, A DELAWARE CORPORATION

No. 313PA10

(Filed 13 April 2012)

Products Liability— product alteration or modification defense—not required to be party to action

The Court of Appeals erred by concluding the General Assembly limited the use of the product alteration or modification defense to those occasions when the one who altered or modified the product was a party to the action at the time of trial. The defense found in N.C.G.S. § 99B-3 applies not only when the one who modifies or alters the product is a party to the action concerning the product, but also whenever anyone other than the manufacturer or seller modifies or alters the product and the remaining statutory requirements are met. There was sufficient evidence presented from which the jury could conclude that the accident victim's father modified the seatbelt for his child in the automobile. The case was remanded to the Court of Appeals for additional proceedings.

Justice **HUDSON** concurring in part and dissenting in part.

Justice **TIMMONS-GOODSON** joining in opinion concurring in part and dissenting in part.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 204 N.C. App. 1, 693 S.E.2d 253 (2010), reversing a judgment dismissing plaintiffs' complaint entered on 15 May 2007 and vacating an order awarding costs to defendant entered on 28 April 2008, both entered by Judge Forrest D. Bridges in Superior Court, Mecklenburg County, and remanding for entry of judgment in favor of Cheyenne Stark and for a trial on the issue of damages. Heard in the Supreme Court on 3 May 2011.

Wyrick Robbins Yates & Ponton LLP, by K. Edward Greene and Tobias S. Hampson; and Gilbert and Ollanik, P.C., by James L. Gilbert, pro hac vice, for plaintiff-appellees.

Kilpatrick Townsend & Stockton LLP, by Adam H. Charnes, Richard J. Keshian, and Richard D. Dietz; and Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan L.L.P., by Kirk G. Warner and Christopher R. Kiger, for defendant-appellant.

Edward Eldred, Attorney at Law, PLLC, for The Covenant With North Carolina's Children and KidsAndCars.org, amici curiae.

Yates, McLamb & Weyher, LLP, by Dan J. McLamb, for National Association of Manufacturers, Chamber of Commerce of the United States of America, American Tort Reform Association, and Property Casualty Insurers Association of America, amici curiae.

Michael W. Patrick, for North Carolina Advocates for Justice, amicus curiae.

Poyner Spruill LLP, by Steven B. Epstein, for North Carolina Association of Defense Attorneys and North Carolina Chamber, amici curiae.

I. Beverly Lake Jr., pro se, and for former members of the North Carolina General Assembly H. Parks Helms, Robert B. Jordan, III, I. Beverly Lake Jr., and H. Martin Lancaster, amici curiae.

Womble Carlyle Sandridge & Rice, PLLC, by Burley B. Mitchell, Jr., William F. Womble, Jr., James R. Morgan, Jr., and John E. Pueschel, for Product Liability Advisory Council, amicus curiae.

NEWBY, Justice.

This case presents the question whether the product alteration or modification defense provided to manufacturers and sellers in products liability actions by section 99B-3 of our General Statutes applies only if the one who altered or modified the product is a party to the litigation at the time of trial.[1] By its plain language, section 99B-3 protects manufacturers and sellers from liability for injury proximately caused by a modification or alteration made by anyone else to their product without their consent or instruction. The General Assembly did not limit the use of this defense to those occasions when the one who alters or modifies the product is a party *to the action* at the time of trial. As the Court of Appeals concluded otherwise, we reverse that decision and remand this case to that court for additional proceedings.

Tonya Stark was driving her husband to work and her children to school in a 1998 Ford Taurus on the morning of 28 April 2003. Tonya began that day between 5:00 and 5:30 a.m. by waking up and bathing

1. While other issues were raised by the parties and passed upon by the Court of Appeals, our resolution of this question obviates the need to address them.

three of her children. While Tonya was busy with the children, Gordon Stark, her husband, prepared for a day of work. When the Starks were ready to go, Gordon put their sleeping daughter Cheyenne in the rear seat of the Taurus, directly behind the driver's seat, and then he sat in the front passenger seat. Tonya secured their son Cory in the middle rear seat before she got into the driver's seat. Their son Cody seated himself in the rear seat of the Taurus, directly behind Gordon. The plan was to take Gordon to work at Husqvarna, where he needed to arrive between 7:00 and 7:30 a.m., and then travel to Kannapolis to have the children at their school by 8:20 a.m.

At some point that morning, Gordon told Tonya that he needed to stop at a convenience store before work. Tonya entered the parking lot of a store at the corner of The Plaza and Eastway in Charlotte, North Carolina. Gordon went into the store to make some purchases, but returned to the car when he realized he did not have his wallet. Gordon told Tonya to take him back home so he could get his wallet and return to complete his purchases before they continued on to work and school. Tonya backed out of her parking space and attempted to leave the convenience store parking lot via a pass-through, which would allow the Starks to return to the house more quickly. She remembered almost immediately, however, that the pass-through had been closed. Tonya then made a U-turn and entered the adjacent parking lot of a Bojangles restaurant. The car began to accelerate rapidly, proceeding through several empty parking spaces. Gordon and Tonya struggled over the steering wheel as the Starks continued through the lot. Their trip came to an abrupt end when the Taurus went up and over a small curbed island containing mulch and monkey grass and then slammed into the concrete base of a light pole while moving at twenty-six miles per hour. At no point during these events did Tonya apply the Taurus's brakes.

The Starks suffered numerous injuries in the crash. Gordon looked at his wife immediately after the impact, and he thought she was dead. Cory suffered a cut to his eye area through which his "eye-ball" was visible "even though his eye was closed," as well as a concussion and a neck injury. Gordon shattered his elbow and left wrist and broke his left shoulder. Gordon's doctors informed him that his left hand might need to be amputated due to the severity of the fracture. Cody and Cheyenne had the most serious injuries. Cody experienced a tear in his liver, several superficial tears on the surface of his colon, a hematoma underneath his bowel, and a perforation of his small bowel causing leakage into his stomach. Cody required

emergency lifesaving surgery as a result. Cheyenne sustained bruises on her abdomen, an abrasion on her forehead, a tear on the tip of her tongue, and an injury to her spinal cord. Though Cheyenne was able to walk after the crash, her condition deteriorated later that day, and she became paralyzed.

Through their Guardian ad Litem, Cheyenne and Cody (plaintiffs) sued Ford Motor Company (Ford) after the crash. Plaintiffs acknowledged that Ford did not cause the wreck, but claimed that the Taurus's seat belt system caused their enhanced, or more serious, injuries. Cody and Cheyenne contended that the seat belts did not fit them properly and did not hold them in place during the incident. They alleged these deficiencies in the design of the Taurus caused Cody's abdominal injuries and Cheyenne's paralysis. Ford asserted that Cody and Cheyenne suffered these injuries because of the seriousness of the collision and a failure to use the Taurus—and specifically its safety equipment—as it was designed and as Ford instructed. Ford contended the Taurus and its seat belt system are reasonably designed and safe when used properly.

Plaintiffs presented evidence in support of their claims. They offered testimony from Joseph Burton, M.D., an expert in forensic pathology, biomechanics, and occupant kinematics. He testified that seat belts are designed to "couple" a passenger to a vehicle in a crash, allowing the passenger to slow down with the car. When the passenger and vehicle are slowing together, the passenger can rely in part on the crush zone of the vehicle to absorb energy. In contrast, an unbelted passenger continues to move at the same speed the car was traveling before impact until the passenger hits something that causes him to slow down. In that case the passenger does not get the benefit of the vehicle's crush zone. Dr. Burton stated that a vehicle's seat belt system should couple the passenger to the vehicle with both a shoulder belt that comes over the passenger's shoulder and then goes down "along the rib cage" without covering the "soft parts of [the] abdomen," and a lap belt that rests over the bones of a passenger's pelvis.

Dr. Burton explained to the jury that the seat belt system in the Taurus did not perform in this manner for Cody and Cheyenne. He opined that a defect in the seat belt system allowed excess belt webbing to come off the spool, creating slack in the belt. This slack prevented the Taurus's belt system from coupling Cody and Cheyenne to the vehicle as it should have. The shoulder belt slipped off Cody's and Cheyenne's shoulders. As a result of that slippage Cody sustained

bruising from his lap belt over his hips, some type of abrasion "to the right side of his chest" from his shoulder belt, and numerous internal injuries in his abdominal area. Cheyenne suffered a bruise above her navel, a bruise on her lower abdomen from her lap belt, an abrasion on her forehead, a cut on the end of her tongue, and "some changes" in the lumbar area of her spine. Her shoulder belt also acted as a fulcrum, damaging her spinal cord at level T3, which is in her upper back. Dr. Burton informed the jury that he believes that before the crash, both Cody and Cheyenne were properly belted, with their shoulder belts in front of them. He posited that Cheyenne's smaller size may be the reason for her permanent injury.

Dr. Burton also testified that the collision was not responsible for Cheyenne's and Cody's enhanced injuries. He explained that plaintiffs' enhanced injuries are not what he would expect from the type of collision in which they were involved. Instead, he characterized their injuries as "mechanical injuries," which "are caused by . . . the way the[ir] bodies are interacting with the structure." Such injuries, he said, are not related to the speed of the car before impact and may result from a vehicle that is traveling twenty miles per hour or sixty miles per hour when a collision occurs.

Ford asserted in response that this was a serious collision in which the Taurus was misused. Joe Kent, Ford's accident reconstruction and accident analysis expert, informed the jury that the impact of the crash was roughly the same as would have been achieved by dropping the Taurus from the fourth floor of a building. Dr. Murray Mackay, Ford's expert in seat belt occupant interaction, biomechanics, injury mechanism, and occupant kinematics, testified that Cheyenne's seat belt system had been modified by placing the shoulder belt behind her back. Cheyenne had no bruising or other markings on her body consistent with the shoulder belt having been in front of her at the time of the collision, though she did have bruises from her lap belt. Dr. Mackay also stated that Cheyenne's seat belt had markings and other characteristics consistent with its being behind her back. Dr. Mackay explained to the jury that, in his opinion, Cheyenne's paralysis resulted from her lap belt compressing her abdomen, which, combined with the absence of a shoulder belt, caused her chest to move toward the floor, which stretched and bent her spinal cord until her chest ultimately came into contact with her thigh. Pamela Oviatt, Ford's expert in vehicle and occupant restraint design performance, also testified that Cheyenne's shoulder belt exhibited markings consistent with its being behind her back at the

time of the collision. Ford presented evidence indicating that Cheyenne had on prior occasions placed the shoulder portion of the belt behind her back and that on the date in question, Gordon did the same thing.

At the close of evidence plaintiffs argued that Ford's defense under section 99B-3 should not be submitted to the jury, and they sought a directed verdict in their favor on that issue. Plaintiffs asserted that section 99B-3 allows manufacturers to be relieved of liability only when an alteration or modification by another party to the litigation proximately causes injury. Plaintiffs maintained that because neither Gordon nor Tonya was then a party to the action, Ford could not use this statutory defense to avoid liability for any injury proximately caused by a modification made by either of them. The trial court rejected plaintiffs' argument.

At the conclusion of the five week trial, the court instructed the jury on the section 99B-3 defense. The court explained that if it reached this issue, the jury must decide whether

> the enhanced injuries to Cheyenne Stark [were] proximately caused by an alteration or modification made to the product by someone—were the enhanced injuries to Cheyenne Stark caused by an alteration or a modification of the 1998 Ford product.
>
> On this issue the burden of proof is on the defendant. This means that the defendant must prove by the greater weight of the evidence four things:
>
> First, that the 1998 Ford Taurus was altered or modified. A product has been altered or modified if there has been a change in its design or use from that—if there has been a change in its use from that which was originally designed, tested, or intended by the manufacturer. An alteration—let me say that again.
>
> A product has been altered or modified if there has been a change in its use from that originally designed, tested, or intended by the manufacturer.
>
> Second, that someone other than the defendant made the alteration or modification after the Ford Taurus left the control of the defendant.
>
> Third, that the defendant did not expressly consent to that alteration or modification, or that such alteration or modification was not in accordance with the defendant's instruction and specifications.

> Fourth, that such alteration or modification was a proximate cause of injuries to Cheyenne Stark. Of course, we are talking about enhanced injuries. You now know what proximate cause is. I have said that several times. It's a cause in which in a natural and continuous sequence produces a person's injury and a cause in which a reasonable and prudent person could have foreseen would probably produce that injury or such similar injurious result. Keep in mind there may be more than one proximate cause of an injury.
>
> In this case the defendant Ford contends and the plaintiff denies that there was an alteration or modification of the product after it left the defendant's control; namely, that Gordon and Tanya [sic] failed to properly secure and restrain Cheyenne Stark in the rear seat of the Ford Taurus; that Cheyenne's shoulder strap at the time of this collision was being worn behind her back.
>
> The defendant contends that you should find these facts from the evidence, and the plaintiff disagrees that you should do so. Obviously, again, this determination is one of the decisions that you have to make based upon the evidence that has been presented and taking into account all the various rules that I have mentioned to you.
>
> So then finally on this Issue Number 6 on which the defendant has the burden of proof, if you find by the greater weight of the evidence that the enhanced injuries to Cheyenne Stark were proximately caused by an alteration or a modification to the Ford Taurus, made by someone other than Ford Motor Company after it left Ford's control and without Ford's consent or not in accordance with Ford's instructions or specifications, then it would be your duty to answer this issue yes, in favor of the defendant.
>
> On the other hand, if you fail to so find, it would be your duty to answer this issue no, in favor of the plaintiff.

After addressing the jury on the section 99B-3 defense, the trial court finished its instructions and submitted the case to the jury.

After three days of deliberation, the jury returned its verdict, finding Ford not liable for the enhanced injuries to Cody and Cheyenne. Plaintiffs were unable to sustain an unreasonable design claim for Cody's belt, but did so with respect to Cheyenne's. Nonetheless, the jury determined that Cheyenne's enhanced injuries were also proximately caused by a modification of the Taurus, which relieved Ford

of liability. The trial court entered judgment accordingly and taxed $45,717.92 in costs against plaintiffs and the Guardian ad Litem. After unsuccessfully moving for judgment notwithstanding the verdict, a new trial on the modification defense, and a new trial on all issues, plaintiffs and the Guardian ad Litem appealed from the judgment, the order taxing costs, and the order denying their alternative motions.

The Court of Appeals reversed the trial court's judgment, holding among other things that plaintiffs were entitled to a directed verdict on Ford's affirmative defense under section 99B-3. *Stark ex rel. Jacobsen v. Ford Motor Co.*, 204 N.C. App. 1, 12, 15, 693 S.E.2d 253, 260-61 (2010). Disagreeing with the trial court's interpretation, the Court of Appeals reasoned that section 99B-3 gives a manufacturer or seller no defense when the product modifier is not a party to the action at the time of trial. *Id.* at 12, 693 S.E.2d at 260. The court concluded, *inter alia*, that because Gordon Stark was not a party to the action at the time of trial, any modification by him could not support the defense in section 99B-3. *Id.* We allowed defendant's petition for discretionary review. *Stark ex rel. Jacobsen v. Ford Motor Co.*, 365 N.C. 74, 705 S.E.2d 741 (2011).

To resolve this appeal we must decide whether the trial court properly interpreted the scope of the defense provided by section 99B-3 of our General Statutes. Plaintiffs assert that the Court of Appeals correctly stated that section 99B-3 affords a defense only when the product modifier is a party to the action at the time of trial. Defendant, on the other hand, contends the trial court properly interpreted this statute, which allows a manufacturer to be relieved of liability when anyone else alters or modifies its product. Whether a statute has been properly interpreted is a legal question, which this Court reviews de novo. *In re Ernst & Young, LLP*, 363 N.C. 612, 616, 684 S.E.2d 151, 154 (2009) (citations omitted).

We begin our analysis by examining the text of the statute. *Correll v. Div. of Soc. Servs.*, 332 N.C. 141, 144, 418 S.E.2d 232, 235 (1992) (citation omitted). Section 99B-3 states:

> (a) No manufacturer or seller of a product shall be held liable in any product liability action where a proximate cause of the personal injury, death, or damage to property was either an alteration or modification of the product by a party other than the manufacturer or seller, which alteration or modification occurred after the product left the control of such manufacturer or such seller unless:

> (1) The alteration or modification was in accordance with the instructions or specifications of such manufacturer or such seller; or
>
> (2) The alteration or modification was made with the express consent of such manufacturer or such seller.
>
> (b) For the purposes of this section, alteration or modification includes changes in the design, formula, function, or use of the product from that originally designed, tested, or intended by the manufacturer. It includes failure to observe routine care and maintenance, but does not include ordinary wear and tear.

N.C.G.S. § 99B-3 (2011). According to its text, the statute shields a manufacturer or seller from liability proximately resulting from changes to a product's "design, formula, function, or use . . . from that originally designed, tested, or intended" and other unspecified "alteration[s]" and "modification[s]." *Id.* § 99B-3(b). Section 99B-3 does not, however, relieve a manufacturer or seller of liability for all alterations and modifications, only some. *Id.* § 99B-3(a). Whether a manufacturer or seller can avail itself of this statutory defense depends on when and how the modification or alteration occurred and, to a limited extent, on who modified or altered the product. *Id.* A manufacturer or seller cannot escape liability for injury proximately caused by an alteration or modification done before the point in time at which the product left the manufacturer's or seller's control, regardless of who modified the product and how it was done. *Id.* Of those alterations or modifications done after the product leaves the manufacturer's or seller's control, the manufacturer or seller cannot use this defense, no matter who modifies the product, if the alteration or modification was done "in accordance with [the manufacturer's or seller's] instructions or specifications," N.C.G.S. § 99B-3(a)(1), or with its "express consent," *id.* § 99B-3(a)(2). Finally, a manufacturer or seller is not relieved of liability for damage proximately caused by its own modification or alteration; the defense is available only when the modification or alteration "was . . . by a party *other than* the manufacturer or seller." *Id.* § 99B-3(a) (emphasis added).

Plaintiffs and defendant disagree whether the legislature intended the word "party" in section 99B-3 to have a broad, general meaning or a narrow, technical meaning. The legislature has not defined the word "party" in the statute, *see id.* § 99B-3, or anywhere else in Chapter 99B of our General Statutes, which addresses products liability actions, *see* N.C.G.S. §§ 99B-1 to -11 (2011). Undefined words

are accorded their ordinary meaning, for which we may look to a dictionary. *Perkins v. Ark. Trucking Servs., Inc.*, 351 N.C. 634, 638, 528 S.E.2d 902, 904 (2000) (citations omitted). When not being used in reference to a social event, the noun form of the word "party" is generally defined as a "person" or "group." *Merriam-Webster's Collegiate Dictionary* 848 (10th ed. 1999). The word is used to refer, generally, to an "individual" and can also be used to describe, specifically, an individual or individuals who are involved in a contest, organized for political purposes, or taking part in an activity. *Id.*

The only limiting language in the text of the statute pertaining to the legislature's use of the term "party" is the phrase "other than the manufacturer or seller." N.C.G.S. § 99B-3. That modifying phrase reveals the General Assembly's intent regarding the meaning and scope of the word "party" here. The General Assembly used the term "party" in such a way that it felt it necessary specifically to exclude the manufacturer or seller from the term's broad reach, without regard to whether the manufacturer or seller had been made a party to any litigation by virtue of being sued. Because the status of the manufacturer or seller in regard to a suit is immaterial, this blanket exclusion of the manufacturer or seller from those whose modification or alteration will relieve the manufacturer or seller from liability demonstrates the General Assembly's intent that a "party" under the statute is not limited to a party to the action. In other words, the General Assembly used "party" in such a way that a manufacturer or seller who had not been sued and was not a party to any litigation could nevertheless be a party whose modification or alteration could invoke the defense if the manufacturer or seller had not been specifically excluded. Thus, the limiting language of the statute establishes the intent of the General Assembly that the defense set out in section 99B-3 is available when anyone other than the manufacturer or seller modifies or alters the product.

Moreover, the one who modifies or alters the product becomes a "party" as that word is used in section 99B-3 at the time of the modification, before the commencement of any litigation. The text of section 99B-3 focuses on several distinct points in time. The introductory language of the statute is concerned with the time at which the defense of product modification or alteration is used in litigation: "No manufacturer or seller of a product shall be held liable in any product liability action . . . ." *Id.* § 99B-3(a). The remaining temporal portion of section 99B-3 focuses on the points in time at which the modifica-

tion and injury occurred: When "a proximate cause of the personal injury . . . was . . . an alteration or modification . . . by a party other than the manufacturer or seller, which . . . occurred after the product left the control of such manufacturer or such seller." *Id.* The legislature's use of the past tense "was" when referring to the modification by a party illustrates that the one who modifies the product is a "party" as that word is used in section 99B-3 at the time of the modification, before any litigation regarding the subject. This usage, too, indicates that the General Assembly intended that the word "party" have a broad, general meaning, and that the defense found in section 99B-3 be available when anyone other than the seller or manufacturer modifies or alters the product. Accordingly, we conclude that the trial court's interpretation is consistent with the statute's text.

The trial court's interpretation of section 99B-3 comports with the long-standing explanation of this statute found in our Pattern Jury Instructions. There are two Pattern Jury Instructions that address section 99B-3: Civil 744.07 and Civil 743.07. The former applies to causes of action arising on or after 1 January 1996, and it was drafted following the only amendment to the statute in its history. *See* Act of July 29, 1995, ch. 522, sec. 1, 1995 N.C. Sess. Laws 1872, 1873-74. The instruction states in relevant part that this defense applies when "someone other than the defendant made the alteration or modification." 1 N.C.P.I.—Civ. 744.07 (gen. civ. vol. May 1999) ("Products Liability—Seller's and Manufacturer's Defense of Product Alteration or Modification. N.C.G.S. § 99B-3(a)."). The latter instruction applies to pre-1996 causes of action, and it similarly interprets the defense found in section 99B-3 to be available when "someone other than the defendant made the alteration or modification." 1 N.C.P.I.—Civ. 743.07 (gen. civ. vol. May 1999) ("Products Liability—Seller's and Manufacturer's Defense of Product Alteration or Modification. N.C.G.S. § 99B-3(a)."). The North Carolina Pattern Jury Instructions are prepared by a committee of ten trial judges appointed by the President of the Conference of Superior Court Judges of North Carolina, 1 N.C.P.I.—Civ. .005 (gen. civ. vol. June 2010), and those instructions are designed to articulate the law plainly and accurately, 1 N.C.P.I.—Civ. .010 (June 1975). While the Pattern Jury Instructions are not binding on this Court, *State v. Ward*, 364 N.C. 157, 161, 694 S.E.2d 729, 732 (2010), they do express the long-standing, published understanding of this statute, with which the trial court's explanation in this case—the section 99B-3 defense applies when "someone other than the defendant made the alteration or modification"—is consistent.

The trial court's interpretation of section 99B-3 is also consistent with scholarly commentary. Shortly after the statute's enactment, a law review article written by two distinguished members of the bar observed that under section 99B-3, "an alteration or modification by someone other than the manufacturer or seller relieves both parties of liability if (1) the modification or alteration was not done according to instructions or specifications or (2) the modification or alteration was not done with the express consent of the manufacturer or seller." Charles F. Blanchard & Doug B. Abrams, *North Carolina's New Products Liability Act: A Critical Analysis*, 16 Wake Forest L. Rev. 171, 175 (1980). More recent commentary is consistent with that initial observation. *E.g.*, John N. Hutson, Jr. & Scott A. Miskimon, *North Carolina Contract Law* § 16-3-1, at 775 (2001) ("The Products Liability Act provides a defense to product liability actions where a proximate cause of the injury was an alteration or modification of the product by someone other than the manufacturer or seller."). It is worth noting that during these years of consistent commentary and interpretation, the General Assembly has revisited section 99B-3 only once, in 1995, making just a superficial, nonsubstantive change by adding a serial comma after the word "death." Ch. 522, sec. 1, 1995 N.C. Sess. Laws at 1873-74.

The Court of Appeals' reading of section 99B-3, on the other hand, is not supported by the text of the statute. That court reasoned that, by using the word "party" in the phrase "party other than the manufacturer or seller," the legislature intended to limit the availability of this defense to cases in which the one who modified or altered the product is a party to the action at the time of trial. *Stark*, 204 N.C. App. at 12, 693 S.E.2d at 260. If the General Assembly had intended to limit the availability of this defense to the circumstances articulated by the Court of Appeals, it could have done so by inserting the words "to the action" into the statute. A cursory review of other sections of our General Statutes reveals the legislature is familiar with the phrase "party to the action." *See*, *e.g.*, N.C.G.S. § 58-2-75(d) (2011) ("Appeals . . . may be taken to the appellate division of the General Court of Justice by any *party to the action* as in other civil cases." (emphasis added)). Adopting the Court of Appeals' interpretation would force this Court impermissibly to read into section 99B-3 words the legislature chose not to include in its text.

The Court of Appeals' interpretation of section 99B-3 is contrary to that statute's plain language, so we reverse that court's decision. We hold instead that the defense found in section 99B-3 applies not

only when the one who modifies or alters the product is a party to the action concerning the product, but also whenever anyone other than the manufacturer or seller modifies or alters the product and the remaining statutory requirements are met. The Court of Appeals held that Ford could not establish a section 99B-3 defense using Gordon or Tonya Stark as the modifier because they were not parties to the action at the time of trial. *Stark*, 204 N.C. App. at 10-12, 693 S.E.2d at 259-60. Because there is no such legal requirement, to resolve the directed verdict inquiry, we must now consider whether there is sufficient evidence, or some factual basis, to support a determination that someone other than Ford modified the Taurus.

In this undertaking we must be mindful of the posture of this case and the rules regarding directed verdict. In considering a motion for directed verdict, the trial court in this case was required to view the evidence in the light most favorable to Ford and to give Ford all reasonable inferences from the evidence, resolving all evidentiary conflicts in Ford's favor. *See Farmer v. Chaney*, 292 N.C. 451, 452-53, 233 S.E.2d 582, 583-84 (1977) (citations omitted); *see also Taylor v. Walker*, 320 N.C. 729, 733-34, 360 S.E.2d 796, 799 (1987) (citations omitted) (explaining the standard to be used when considering a motion for judgment notwithstanding the verdict, but noting the same standard is applied when ruling on motions for directed verdict). So long as some view of the facts reasonably established by the evidence would support a jury's decision in favor of Ford, the trial court properly denied plaintiffs' motion. *Taylor*, 320 N.C. at 733-34, 360 S.E.2d at 799 (citation omitted). In other words, if there is more than a scintilla of evidence supporting this affirmative defense, the trial court's decision should be affirmed. *See Brinkley v. Nationwide Mut. Ins. Co.*, 271 N.C. 301, 305-06, 156 S.E.2d 225, 228-29 (1967) (citation omitted).

With this deferential standard in mind, we conclude there is sufficient evidence in the record from which the jury could have concluded that Gordon Stark modified the vehicle. He testified that he placed Cheyenne in the Taurus on the morning of the accident. Gordon explained that Cheyenne was asleep when he put her in the vehicle and that he was the one who buckled her seat belt that morning. When Gordon placed Cheyenne in the Taurus, he observed that the seat belt was "way too big" for her and that it fell across her head and neck area. Gordon informed the jury that Cheyenne's shoulder belt was behind her after the collision. Ford's experts opined that the shoulder portion of Cheyenne's seat belt was behind her back during the collision as well. From this evidence the jury could properly

conclude that Gordon Stark, despite his recollection to the contrary, placed the shoulder portion of Cheyenne's seat belt behind her back after buckling her in, perhaps in an attempt to prevent the belt from falling uncomfortably across her head and disturbing her sleep. The trial court's decision on plaintiffs' motion for directed verdict, as well as the jury's verdict and the trial court's judgment applying section 99B-3 to relieve Ford of liability for the injury proximately caused by the design of its product, can therefore be sustained on the basis of this evidence, and we need not consider evidence of other potential modifications or modifiers.

In sum, we reverse the decision of the Court of Appeals that the defense found in section 99B-3 of our General Statutes is available only when the product modifier is a party to the action at the time of trial. The plain language of section 99B-3 says that this defense may be used when anyone other than the manufacturer or seller modifies the product, so long as the remaining requirements of that section are met. There was sufficient evidence presented in this five week trial from which the jury could conclude that Gordon Stark modified the Taurus. Having resolved this case on that issue, we need not consider the remaining issues presented by the parties to this Court, and any discussion of them would be obiter dictum. Accordingly, we express no opinion regarding other aspects of the Court of Appeals decision on the propriety of incorporating child negligence principles into the provisions of Chapter 99B, the party status of Gordon and Tonya Stark at the time of trial, and the validity of conducting a trial in this case solely on the issue of damages. This case is remanded to the Court of Appeals for additional proceedings consistent with this opinion.

REVERSED AND REMANDED.

Justice HUDSON concurring in part and dissenting in part.

I concur with the majority's holding that the use of the word "party" in N.C.G.S. § 99B-3(a) does not limit that defense to alterations or modifications by parties to the lawsuit. Because I disagree with the majority's decision to address additional issues, and particularly the majority's assertion that, from the evidence presented, the jury could properly conclude that Gordon Stark modified the Taurus by placing the seat belt behind Cheyenne, I respectfully dissent from the majority's ultimate holding. I would instead reverse the Court of Appeals' decision on the availability of the section 99B-3 defense without reaching any additional issues, and remand for consideration of those issues.

First and foremost, I believe the majority here improperly engaged in the sufficiency of the evidence analysis found near the end of the opinion. In its opinion the Court of Appeals held that Gordon Stark was not a "party" under section 99B-3; therefore, that court did not analyze the evidence regarding modification by Gordon Stark. The entire discussion of this matter in the Court of Appeals' opinion is as follows:

> Plaintiff next addresses Defendant's argument that Gordon Stark or Tonya Stark modified the seatbelt by improperly placing Cheyenne in the seat with the shoulder belt behind her back. Plaintiffs argue that Cheyenne was still entitled to a directed verdict because neither Gordon Stark nor Tonya Stark was "a party" to the action, as required by N.C. Gen. Stat. § 99B-3.
>
> N.C.G.S. § 99B-3 provides in pertinent part that:
>
> No manufacturer or seller of a product shall be held liable in any product liability action where a proximate cause of the personal injury, death, or damage to property was either an alteration or modification of the product by a party other than the manufacturer or seller, which alteration or modification occurred after the product left the control of such manufacturer or such seller. . . .

N.C.G.S. § 99B-3 (emphasis added).

> Defendant argues that the trial court's judgment, based on the jury's verdict, was supported by evidence that Gordon Stark misused the rear seatbelt by putting Cheyenne in the backseat and buckling her seatbelt with the shoulder belt behind her back. Defending against Plaintiffs' motion for directed verdict, Defendant argued at trial that "[m]ore importantly, what is the specific evidence in this case about who used Cheyenne Stark's belt; Gordon Stark. He put her in that belt on that day. He is the one who affixed her to this vehicle. He's the one who used the product." Plaintiffs argue that N.C.G.S. § 99B-3 is inapplicable to any alleged alterations or modifications performed by either Tonya Stark or Gordon Stark in placing Cheyenne in the seatbelt improperly, because neither Tonya Stark nor Gordon Stark is a party to this action.
>
> At the time of trial, neither Tonya Stark nor Gordon Stark were parties to the action.
>
> . . . .

> Because Defendant asserts that the modification was performed by Gordon Stark, who is not a party to the action in this case, Defendant is unable to establish an N.C.G.S. § 99B-3 defense as to such an alleged modification.
>
> . . . .
>
> In light of our holding, we need not address Plaintiffs' arguments concerning judgment notwithstanding the verdict, entry of judgment, or motion for a new trial.

Stark ex rel. Jacobsen v. Ford Motor Co., 204 N.C. App. 1, 9-10, 12-13, 693 S.E.2d 253, 258-59, 260-61 (2010).

It is the practice of this Court to reach only those issues passed upon by the Court of Appeals and to remand for consideration of any issues beyond those necessary for our decision. *See*, *e.g.*, N.C. R. App. P. 16(a) (stating that "[r]eview by the Supreme Court after a determination by the Court of Appeals . . . is to determine whether there is error of law in the decision of the Court of Appeals"); *Va. Elec. & Power Co. v. Tillett*, 316 N.C. 73, 76, 340 S.E.2d 62, 64-65 (1986) ("Giving proper deference to the Court of Appeals, we decline to address the remaining issues raised by the parties but not addressed by that court in its opinion in this case. Instead, we remand the case to the Court of Appeals so that it may address those issues initially on appeal and prior to their being decided by this Court."). In my view, the majority incorrectly identifies our task here: after reversing the Court of Appeals' decision on section 99B-3, the majority states that "to resolve the directed verdict inquiry, we must now consider whether there is sufficient evidence, or some factual basis, to support a determination that someone other than Ford modified the Taurus." Contrary to this assertion, it is not our task to "resolve the directed verdict inquiry," which by its nature requires weighing of evidence and drawing of inferences. Rather, we need only review the decision below for error of law, as required by Rule 16(a). Because the Court of Appeals did not assess in any way the sufficiency of the evidence of Gordon Stark as modifier, that issue is not properly before this Court.

The only error of law shown in the decision below relates to the interpretation of section 99B-3, and the majority here reverses the Court of Appeals' interpretation of the word "party" in that section. It should have done no more than so holding and remanding for the Court of Appeals to consider the evidence. Because I would remand upon deciding that the Court of Appeals misinterpreted section 99B-3, I dissent to the extent that the majority's opinion goes beyond that point.

The Court of Appeals first, and now the majority here, resolve this case only on Issues I and II as presented in plaintiffs' brief to the Court of Appeals. Because of its resolution of Issues I and II, the Court of Appeals did not reach issues III or IV, which argued alternative grounds for relief, or Issue V regarding costs. None of the latter three issues were presented to this Court, and as such, they have not yet been addressed by any court. Accordingly, I would specifically hold that on remand, the Court of Appeals should address these remaining issues.

Our proper role, in my opinion, is to ask the Court of Appeals to review the sufficiency of the evidence whether Gordon Stark modified the Taurus before we undertake that matter. Nonetheless, because the majority decided to engage in that analysis—incorrectly, in my view, holding the evidence sufficient—I include the following discussion of why I conclude the opposite.

It is undisputed that Ford bears the burden of proof on its affirmative defense under N.C.G.S. § 99B-3. "In the case of an affirmative defense . . . a motion for directed verdict is properly granted against the defendant where the defendant fails to present more than a scintilla of evidence in support of each element of his defense." *Snead v. Holloman*, 101 N.C. App. 462, 464, 400 S.E.2d 91, 92 (1991) (citations omitted). On the other hand, we are reviewing the denial of a directed verdict sought by plaintiffs; therefore, "[defendant's] evidence must be taken as true and all the evidence must be considered in the light most favorable to the [defendant], giving him the benefit of every reasonable inference to be drawn therefrom." *Manganello v. Permastone, Inc.*, 291 N.C. 666, 670, 231 S.E.2d 678, 680 (1977) (citations omitted). We also "must ignore that which tends to establish another and different state of facts or which tends to contradict or impeach the testimony presented by [defendant]." *Morgan v. Great Atl. & Pac. Tea Co.*, 266 N.C. 221, 222-23, 145 S.E.2d 877, 879 (1966). "But, when the evidence is so considered, it must do more than raise a suspicion, conjecture, guess, surmise, or speculation as to the pertinent facts in order to justify its submission to the jury." *Jenrette Transp. Co. v. Atl. Fire Ins. Co.*, 236 N.C. 534, 539, 73 S.E.2d 481, 485 (1952) (citing *Denny v. Snow*, 199 N.C. 773, 774, 155 S.E. 874, 874 (1930) (per curiam)).

With these standards in mind, I now examine the evidence. Both sides presented expert testimony on the design of the seat belt and the injuries to the children. Based on their evaluations of the injuries and the condition of the seat belts after the accident, defendant's

experts testified that the shoulder belt must have been behind Cheyenne's back at the time of the accident. Taking this evidence as true, *Manganello*, 291 N.C. at 670, 231 S.E.2d at 680, I must assume that the shoulder belt was, in fact, behind Cheyenne at the time of the accident. Because N.C.G.S. § 99B-3 does not on its face accord any significance to the identity of the party that alters or modifies the product, except that the party be someone "other than the manufacturer or seller," N.C.G.S. § 99B-3(a) (2011), that showing alone would ordinarily survive directed verdict against the section 99B-3 defense. Present here, however, are special circumstances which require us to evaluate precisely how or by whose hand the shoulder belt came to be behind Cheyenne. Specifically, because Cheyenne was only five years old, I conclude, as the Court of Appeals did, that she was incapable as a matter of law of altering or modifying the Taurus within the meaning of the statutory defense. As a result, the defense is only available to Ford if it can show that someone other than Cheyenne modified or altered the Taurus.

While the text of the statute does not generally require that the modifying or altering party be identified, the statute does specifically use the phrase "proximate cause." It is a long-standing rule of construction that "when a statute makes use of a word, the meaning of which was well ascertained at common law, the word will be understood in the sense it was at common law." *Smithdeal v. Wilkerson*, 100 N.C. 66, 67, 100 N.C. 52, 53, 6 S.E. 71, 71 (1888) (citing *Kitchen v. Tyson*, 7 N.C. 232, 233, 7 N.C. [3 Mur.] 314, 315 (1819); *accord Standard Oil Co. of N.J. v. United States*, 221 U.S. 1, 59, 31 S. Ct. 502, 515 (1911) (stating that "where words are employed in a statute which had at the time a well-known meaning at common law or in the law of this country, they are presumed to have been used in that sense"). As such, unless otherwise stated, the statute incorporates common law principles associated with proximate cause. *See Ridge Cmty. Investors, Inc. v. Berry*, 293 N.C. 688, 695, 239 S.E.2d 566, 570 (1977) (noting that "[i]n interpreting statutes . . . . it is always presumed that the Legislature acted with full knowledge of prior and existing law") (citations omitted).

As the Court of Appeals properly discussed, under the common law, "[f]oreseeability of some injurious consequence of one's act is an essential element of proximate cause, though anticipation of the particular consequence is not required." *Hastings ex rel. Pratt v. Seegars Fence Co.*, 128 N.C. App. 166, 170, 493 S.E.2d 782, 785 (1997) (citing *Sutton v. Duke*, 277 N.C. 94, 107, 176 S.E.2d 161, 168-69

(1970)). This Court in *Walston v. Greene* held that a child under seven years of age is incapable of negligence as a matter of law "because a child under 7 years of age lacks the discretion, judgment and mental capacity to discern and appreciate circumstances of danger that threaten its safety." 247 N.C. 693, 696, 102 S.E.2d 124, 126 (1958) (citations omitted). In other words, a child under seven years of age cannot, as a matter of law, determine the foreseeable consequences of her actions in the analysis of proximate cause. The Court of Appeals analyzed this issue properly and concluded that Cheyenne was "unable to 'foresee' that any modification or alteration could be a proximate cause of her injury." *Stark*, 204 N.C. App. at 8, 693 S.E.2d at 258. Even if Cheyenne altered or modified the Taurus by her use of the shoulder belt, her actions cannot, as a matter of law, be considered the proximate cause of her own injury. Therefore, the defense in N.C.G.S. § 99B-3 is only available to Ford if it provides sufficient evidence that someone other than Cheyenne modified or altered the belt.

Addressing that issue, the majority here summarizes some of the evidence and concludes that "[f]rom this evidence the jury could properly conclude that Gordon Stark, despite his recollection to the contrary, placed the shoulder portion of Cheyenne's seat belt behind her back after buckling her in." The problem with this conclusion is that the testimony does not support it.

The evidence shows that Gordon buckled Cheyenne into the seat belt. Gordon testified that she was asleep when he buckled her in. He also testified that the belt was "way too big" for her and fell across her head and neck area.[1] Under the directed verdict review standard, we must ignore the obvious inference from Gordon's testimony that, because the belt was "right under her head/neck area," it had to be in front of her. *See Morgan*, 266 N.C. at 222-23, 145 S.E.2d at 879. We also must ignore Tonya Stark's testimony that she confirmed that the children's seat belts were properly worn before the car moved. *See id.* Last, as discussed earlier, we accept as true evidence from defendant's experts that the belt was behind Cheyenne at the time of the accident.

Thus, we are left with the following "facts" under the directed verdict standard of review: Gordon buckled a sleeping Cheyenne into

1. The majority speculates that "perhaps" he moved the belt behind her "in an attempt to prevent the belt from falling uncomfortably across her head and disturbing her sleep." Such pure speculation has no place in the legal analysis here. That the evidence provides a possible reason why Gordon might have wanted to move the belt does not lead to a reasonable inference that he *did* move the belt.

her seat and noticed that the belt was "way too big" for her; roughly five or ten minutes later[2] the belt was behind her at the moment of the accident. Based on careful review of the transcripts, I conclude there is no testimony or other evidence whatsoever as to what, if anything, happened to the shoulder belt in the intervening time period. In light of this lack of evidence, then, there are at least three possible scenarios consistent with the evidence: 1) Gordon put the belt behind Cheyenne; 2) Cheyenne moved the belt behind her, either voluntarily after waking up or involuntarily while sleeping in the moving car; or 3) Cheyenne slipped out from under the belt while sleeping because it was too big. There is absolutely no evidence on which a jury could choose among these three options. "A resort to a choice of possibilities is guesswork." *Powell v. Cross*, 263 N.C. 764, 768, 140 S.E.2d 393, 397 (1965) (citations omitted).[3]

Thus, even "when the evidence shown in the record of [a] case on appeal is taken in the light most favorable to [defendants], and giving to them the benefit of every reasonable inference therefrom, the case . . . is left in a state of uncertainty and rests upon possibility." *Wall v. Trogdon*, 249 N.C. 747, 752, 107 S.E.2d 757, 761 (1959). "A verdict or finding in favor of one having the burden of proof will not be upheld if the evidence upon which it rests raises no more than mere conjecture, guess, surmise, or speculation." *Jenrette Transp. Co.*, 236 N.C. at 539-40, 73 S.E.2d at 485. The evidence as presented by defendant raises no more than "a suspicion, conjecture, guess, surmise, or speculation" that Gordon Stark modified or altered the seat belt. *Id.* Because defendant Ford bore the burden of proving the affirmative defense, I conclude it failed to carry that burden, even with the inherent advantages of the directed verdict standard of review.

I concur that the Court of Appeals erred in its interpretation of the use of the word "party" in N.C.G.S. § 99B-3. I would remand for

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2. As to the time elapsed between Gordon buckling Cheyenne into the seat and the moment of the accident, we only have testimony that the trip from the house to the store was "three to five minutes" and that Gordon had gone into the store and come back out. We can reasonably infer that the accident occurred approximately five or ten minutes after Gordon buckled Cheyenne in.

3. The Court in *Powell* further stated that "[t]he sufficiency of the evidence in law to go to the jury does not depend upon the doctrine of chances. However confidently one in his own affairs may base his judgment on mere probability as to a proposition of fact and as a basis for the judgment of the court, he must adduce evidence of other than a majority of chances that the fact to be proved does exist. It must be more than sufficient for mere guess and must be such as tends to actual proof." 263 N.C. at 768, 140 S.E.2d at 397 (citations omitted).

that court to consider all remaining issues, including the sufficiency of the evidence that Gordon Stark modified the Taurus. Nevertheless, because the majority improperly reaches that question, and because the evidence fails to establish the section 99B-3 defense as to Gordon Stark as modifier, I respectfully dissent.

Justice TIMMONS-GOODSON joins in this opinion concurring in part and dissenting in part.

STATE OF NORTH CAROLINA v. PAUL BRANTLEY LEWIS

No. 386PA10

(Filed 13 April 2012)

1. Evidence— bias—investigator's remarks to juror in prior trial

The trial court did not abuse its discretion in a retrial for first-degree sexual offense and other charges by excluding all evidence of remarks made in the first trial by the lead investigator to a juror who was also a deputy. Evidence of bias is relevant to credibility, while cross-examination to show bias or interest is a substantial legal right.

2. Identification of Defendants— cross-examination—identification procedures

In a prosecution for first-degree sexual offense, felonious breaking or entering, and armed robbery remanded on other grounds, the defendant on retrial was to be allowed to cross-examine both the investigators and the victim about the procedures used to identify an alleged co-defendant and whether he later established an alibi.

3. Evidence— knife—destroyed after prior trial—testimony concerning

In a prosecution remanded on other grounds, the trial court did not err by allowing the State to present evidence in a retrial about a knife that was allegedly used in the crime but was destroyed after the original trial. Defendant was able to challenge the victim's identification of the knife on cross-examination. In the absence of an allegation that the evidence was destroyed in

bad faith, the State's failure to preserve the knife for defendant's retrial did not violate defendant's right to due process.

4. Criminal Law— retrial—law of the case—new evidence

In a prosecution remanded on other grounds, the trial court erred by applying the law of the case to defendant's motion to suppress a photo identification at retrial where there was new evidence that, if true, suggested that a detective may have included more than one photograph of defendant in the lineup, that the victim's identification of defendant was tainted, and that a member of the first jury knew of the taint.

5. Criminal Law— motion to dismiss for insufficient evidence—not renewed—waiver

In a case remanded on other grounds, defendant waived his earlier motion to dismiss by presenting evidence after the State rested; moreover, the State presented sufficient evidence to survive defendant's motion to dismiss.

On discretionary review pursuant to N.C.G.S. § 7A 31 of a unanimous, unpublished decision of the Court of Appeals, 206 N.C. App. —, 698 S.E.2d 768 (2010), reversing judgments entered on 17 July 2008 by Judge Laura J. Bridges in Superior Court, Avery County, and remanding for dismissal of all charges against defendant. Heard in the Supreme Court on 17 October 2011.

Roy Cooper, *Attorney General*, *by Robert C. Montgomery*, *Special Deputy Attorney General*, *and Anne M. Middleton*, *Assistant Attorney General*, *for the State-appellant.*

Staples S. Hughes, *Appellate Defender*, *by Benjamin Dowling-Sendor*, *Assistant Appellate Defender*, *for defendant-appellee.*

EDMUNDS, Justice.

In this case, we consider whether defendant Paul Brantley Lewis ("defendant") was properly denied the opportunity at his retrial to examine the State's lead investigator about the investigator's possible bias and about instances of purported misconduct by the investigator during defendant's first trial. We agree with the holding of the Court of Appeals that the retrial court erred in limiting defendant's ability to explore these matters before the jury. In addition, we consider other issues raised on appeal and conclude that defendant is entitled to a new trial.

On 12 September 2003, defendant was convicted of first-degree sexual offense, felonious breaking or entering, and robbery with a dangerous weapon. The Court of Appeals found no error. *State v. Lewis*, 168 N.C. App. 730, 609 S.E.2d 497, 2005 N.C. App. LEXIS 432, at *1 (2005) (unpublished) ("*Lewis I*"). Thereafter, defendant discovered information previously unknown to him relating to his trial. On 14 July 2006, defendant filed a motion for appropriate relief ("MAR") in Superior Court, Avery County, alleging that his trial had been tainted because of improper communication between the investigating detective and a juror. *State v. Lewis*, 188 N.C. App. 308, 310, 654 S.E.2d 808, 809 (2008) ("*Lewis II*"). At a hearing on the MAR, defendant presented evidence that when his case was called for trial Deputy Eddie Hughes ("Deputy Hughes" or "Hughes") of the Avery County Sheriff's Department was in the pool of prospective jurors. *Id.* at 309-10, 654 S.E.2d at 809. During the time defendant had been in custody awaiting trial, Deputy Hughes had transported him to Central Prison in Raleigh twice. *Id.* at 309, 654 S.E.2d at 809. On one of those trips, defendant told Deputy Hughes that he had failed a polygraph examination. *Id.* In addition, Deputy Hughes had assisted Detective Derek Roberts ("Detective Roberts" or "Roberts"), the lead investigator in the case, in preparing a photographic lineup for use in the investigation. *Id.* While undergoing voir dire as a prospective juror, Deputy Hughes acknowledged that he knew defendant and had discussed the case with him. *Id.* Nonetheless, while he had misgivings about serving as a juror, Deputy Hughes also stated that he believed he could be impartial. *Id.* Defendant insisted that Deputy Hughes remain on the jury and so his attorney did not exercise a peremptory challenge to remove the deputy from the panel. *Id.*

The evidence at the MAR hearing further showed that, during a break in the trial proceedings, Deputy Hughes encountered Detective Roberts, who said to Deputy Hughes that "if we have . . . a deputy sheriff for a juror, he would do the right thing. You know he flunked a polygraph test, right?" 188 N.C. App. at 310, 654 S.E.2d at 809. Because Deputy Hughes had already learned from defendant about the failed polygraph, he considered Detective Roberts' comments irrelevant and did not report them to the trial court. *Id.* Later, while testifying at the suppression hearing that preceded defendant's retrial, Detective Roberts admitted discussing the case with Deputy Hughes, though he disputed some of Deputy Hughes' details.

At the conclusion of the MAR hearing, the trial court denied defendant's MAR. *Id.* The Court of Appeals allowed defendant's

petition for writ of certiorari and reversed, finding that defendant had been prejudiced by Detective Roberts' inappropriate communication with Deputy Hughes, and ordering a new trial. 188 N.C. App. at 312, 654 S.E.2d at 811.

Venue for defendant's retrial was changed from Avery County to Watauga County, where defendant once more was convicted of all charges. On appeal, the Court of Appeals again reversed defendant's convictions and remanded the case to the trial court with instructions to dismiss the charges against defendant. *State v. Lewis*, 206 N.C. App. —, 698 S.E.2d 768, 2010 N.C. App. LEXIS 1590, at *1 (2010) (unpublished) ("*Lewis III*"). Although the majority's mandate in *Lewis III* was based upon its holding that the trial court erred when it denied defendant's motion to dismiss at the conclusion of the State's case-in-chief, Judge Wynn argued in a concurring opinion that, because defendant's cross-examination of lead investigator Detective Roberts relating to his possible bias had been curtailed improperly, he should receive a new trial. *Lewis III*, 2010 N.C. App. LEXIS 1590, at *25-26 (Wynn, J., concurring). On 15 June 2011, we allowed the State's petition for discretionary review as to a number of issues. For the reasons that follow, we hold that defendant is entitled to a new trial.

At defendant's *Lewis III* retrial, the State presented evidence that, in the early morning hours of 1 December 2002, the victim was sleeping in her home when she heard "rapid knocking" at the door. She got out of bed and peered through a window in the door frame. By the light of a street light and the breaking dawn, she saw two men standing on her front porch. She described one man as being "an unkempt person" with "a scruffy unshaven look" and "dirty blond hair." She added that this man was unusually tall, "much taller than the second person."

The victim "cracked" the door open approximately two to three inches to speak with the taller man, who told her he needed to use the telephone because there had been an accident on the highway. As the victim opened the door in response to what she believed to be an urgent need, the taller man "kicked the door in," causing the victim to hit an adjacent wall with her back and then fall on her hip and knee. Both men entered. The shorter walked past the victim and into her kitchen, where he rummaged through cabinets and took a bottle of her prescription medicine, along with a box of insulin syringes. He also emptied the victim's purse onto the floor and stole some of her credit cards, a debit card, and eighty dollars in cash.

At the same time, the taller intruder approached the victim, carrying a knife and unzipping his trousers. When he bent down and held the knife to the victim's throat, she could see his face. She added that she was also able to see the knife and described it as "a yellow and brown handled pocketknife" that "looked very dull and old." The assailant then "got two handfuls of [her] hair" and pulled her up toward his body, forcing her to perform oral sex. He put his penis in the victim's mouth with such force that her tooth cut her lower lip and she could not breathe. He then pushed her away, striking her on the left eye and cutting her right forearm, right hand, and breast as he attempted to slice off her nightgown with his knife. The victim feared she was going to die, so she held her breath and lay still to "play dead." She thought she may have passed out or suffered a seizure and did not hear the men leave her home.

When the victim regained consciousness, she could not stand up because of pain in her knee, so she pulled herself across the living room floor to her Lifeline unit, which she used to report the attack. Shortly thereafter, Avery County Deputy Sheriffs Danny Phillips, Dan White, and Ralph Coffey arrived at the victim's home, as did paramedics. She told the deputies what had happened and gave a brief description of her attacker and his companion. Based on the descriptions, Deputy Phillips contacted the lead investigator, Detective Roberts, and advised that he believed defendant and Alex Tsilianos might be the perpetrators.

The victim was transported by ambulance to Cannon Memorial Hospital. She described the assault to her mother, adding that her attacker smelled like exhaust fumes and "slung his arms funny" in "real jerky motions." The victim's mother immediately thought of defendant, whom she had known "probably most of his life," and with whom she associated those mannerisms. When Detective Roberts arrived at the hospital, the victim described her assailant's appearance and characteristics to him. Deputy Coffey told Detective Roberts that defendant fit the description. After the victim told Detective Roberts that she thought she could identify her assailant, he retrieved a mug shot of defendant from the Sheriff's Office. When he showed the photograph of defendant to the victim, she "became very emotional, very upset, [and] said, 'Yes, that's him.' "[1]

1. The record indicates that Detective Roberts also prepared a photographic lineup that, according to the opinion issued by the Court of Appeals after defendant's first conviction, consisted of a different photo of defendant and photos of six others. *Lewis I*, 2005 N.C. App. LEXIS 432, at *3. This lineup was displayed to the victim "a

After the victim identified defendant's photo as depicting her attacker, Detectives Roberts and Tipton went to defendant's home. Defendant's mother was at the residence and gave the detectives a pocketknife. This knife was not available at defendant's retrial because it had been destroyed after the Court of Appeals affirmed the result of defendant's first trial, but Detective Roberts testified at the retrial that the knife given him by defendant's mother matched the victim's description of the knife used by her attacker. The victim also testified at the retrial that she had been shown a knife by an investigator and that she had recognized it as the knife used to assault her.

After the State rested, the retrial court denied defendant's motion to dismiss all the charges. Defendant then called Carolyn Lewis, his mother, who testified that she and defendant lived about a mile from the victim's house and that both of them were at home the night of 30 November-1 December 2002. She stated that she had been up cleaning until around 1:00 a.m. and had spoken to defendant before she went to bed. She testified that she saw defendant twice later that night when she used the bathroom, first around 4:00 a.m. and again at 6:00 a.m. Describing the later sighting, she testified that she forgot to turn off the bathroom light and defendant grumbled because it was shining in his eyes. She awoke for the day at 8:00 a.m. and recalled that, at around 8:30 a.m., defendant asked, "Mom, you got any coffee ready?" Defense counsel did not renew the motion to dismiss at the close of all evidence.

The jury convicted defendant of all charges, and the trial court imposed presumptive range sentences for each offense. Additional facts will be provided as needed.

[1] We begin by considering the State's contention that the Court of Appeals erred in *Lewis III* when it found that the trial court abused its discretion at defendant's retrial by excluding all evidence of the remarks lead investigator Detective Roberts had made to Deputy Hughes during defendant's *Lewis I* trial. Prior to defendant's retrial, the State, citing Rules of Evidence 401 and 403, filed a motion *in limine* to suppress all evidence "raised and litigated in an M.A.R. hearing wherein the [d]efendant was subsequently ordered to have a new trial," arguing that "[a]ny evidence or allegations of jury tampering from the first trial

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few days" after she was shown defendant's mug shot and she picked out defendant. *Id.* The photographs, like the knife purportedly used in the crime, were destroyed after the Court of Appeals affirmed defendant's first conviction, and no evidence relating to a photographic lineup was presented to the jury in the *Lewis III* trial. Additional issues relating to this photographic lineup are discussed later in this opinion.

are completely irrelevant to trial of the [d]efendant on the [pending] charges." Defense counsel opposed the motion, claiming that Detective Roberts' misconduct during the first trial was directly relevant to Roberts' credibility. Defense counsel added that, even though he was aware that his questions might alert the jury to the fact that his client had been convicted in a previous trial, he intended to cross-examine Detective Roberts about the evidence raised during the MAR hearing to show that Roberts was biased against defendant. After considering the arguments, the trial court allowed the State's motion, advising the parties that:

> Due to unfair prejudice and confusion of the jury, I think that there will be substantial unfair prejudice both to [defendant] and to the State . . . I think nothing should be said about a trial having been held, or any kind of conviction, or anything that went on in that trial.

Thus, while the trial court did not explicitly cite Rule of Evidence 403, it applied the balancing test set out in that rule. Defendant appealed, *inter alia*, the retrial court's ruling on this issue to the Court of Appeals.

The Court of Appeals held that the retrial court abused its discretion in allowing the State's motion, finding both that defendant should have been permitted to cross-examine Detective Roberts regarding his misconduct because this evidence was "relevant to the jury's assessment of the truthfulness of a witness" under N.C.G.S. § 8C-1, Rule 608(b), and that the retrial court's exclusion of the evidence deprived defendant of his constitutional right effectively to cross-examine Detective Roberts under the Confrontation Clause of the Sixth and Fourteenth Amendments to the United States Constitution. *Lewis III*, 2010 N.C. App. LEXIS 1590, at *8-10 (majority). We agree that the retrial court should have denied the State's motion.

"A witness may be cross-examined on any matter relevant to any issue in the case, including credibility." N.C.G.S. § 8C-1, Rule 611(b) (2012). We have long held that evidence of bias is logically relevant to a witness' credibility and that a party may cross-examine a witness regarding facts that have a logical tendency to show that the witness is biased against that party. *State v. Hart*, 239 N.C. 709, 710-11, 80 S.E.2d 901, 902-03 (1954); *State v. Sam*, 53 N.C. 115 *passim*, 53 N.C. (8 Jones) 150 *passim* (1860). In light of this relationship between bias and credibility, we next turn to Rule of Evidence 608(b), which provides that specific instances of a witness' conduct may, "in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired

into on cross-examination of the witness . . . concerning his character for truthfulness or untruthfulness." N.C.G.S. § 8C-1, Rule 608(b) (2011).

> Rule 608(b) of the North Carolina Rules of Evidence governs the admissibility of specific acts of misconduct where (i) the purpose of the inquiry is to show conduct indicative of the actor's character for truthfulness or untruthfulness; (ii) the conduct in question is in fact probative of truthfulness or untruthfulness; (iii) the conduct in question is not too remote in time; (iv) the conduct did not result in a conviction; and (v) the inquiry takes place during cross-examination. *See State v. Morgan*, 315 N.C. 626, 634, 340 S.E.2d 84, 89-90 (1986). "Among the types of conduct most widely accepted as falling into this category are 'use of false identity, making false statements on affidavits, applications or government forms (including tax returns), giving false testimony, attempting to corrupt or cheat others, and attempting to deceive or defraud others.' " *Id.* at 635, 340 S.E.2d at 90 (quoting 3 D. Louisell & C. Mueller, *Federal Evidence* § 305 (1979)).

State v. Bell, 338 N.C. 363, 382, 450 S.E.2d 710, 720 (1994), *cert. denied*, 515 U.S. 1163, 115 S. Ct. 2619, 132 L. Ed. 2d 861 (1995).

Although the State contends that the information defendant sought to elicit by cross-examining Detective Roberts about his purported statements to Deputy Hughes was not highly probative of Roberts' credibility and that the trial court properly excluded this evidence under Rule 403 on the basis of "unfair prejudice and confusion of the jury," we have observed that a conversation between a juror and a third person may be grounds for a new trial when " 'it is of such a character as is calculated to impress the case upon the mind of the juror in a different aspect than was presented by the evidence in the courtroom, or is of such a nature as is calculated to result in harm to a party on trial.' " *State v. Sneeden*, 274 N.C. 498, 504, 164 S.E.2d 190, 195 (1968) (citation omitted). Here, Detective Roberts was no mere third person who inadvertently initiated a harmless conversation with a juror. He was the lead investigator of the case, a witness for the State, and a professional colleague of the juror. In this context, Detective Roberts' remark to Deputy Hughes that a deputy sitting on defendant's jury would "do the right thing," followed immediately by a reminder that defendant had failed a polygraph test, cannot be characterized as an innocent slip of the tongue. Instead, Detective Roberts unmistakably indicated to Deputy Hughes that, as a fellow member of the Avery County Sheriff's Department, he should find

defendant guilty. Accordingly, we conclude that Detective Roberts' conduct was calculated to harm defendant at trial.

An effort to corrupt others is among the types of conduct indicative of a person's character for untruthfulness. *See Bell*, 338 N.C. at 382, 450 S.E.2d at 720. Accordingly, the retrial court should have permitted defense counsel to cross-examine Detective Roberts regarding his statements to Deputy Hughes for the purpose of showing Detective Roberts' bias against defendant, and pursuant to Rule 608(b) of the North Carolina Rules of Evidence, to probe Detective Roberts' character for untruthfulness. *See State v. Wilson*, 314 N.C. 653, 656, 336 S.E.2d 76, 77 (1985) ("We must zealously guard against any actions or situations which would raise the slightest suspicion that the jury in a criminal case had been influenced or tampered with so as to be favorable to either the State or the defendant. Any lesser degree of vigilance would foster suspicion and distrust and risk erosion of the public's confidence in the integrity of our jury system.").

The State argues that the retrial court nevertheless properly excluded this evidence as being more prejudicial than probative under the balancing test found in Rule 403 of the North Carolina Rules of Evidence. In making her ruling, the trial judge stated, "I think that there will be substantial unfair prejudice both to [defendant] and to the State" if evidence of Detective Roberts' improper communication was admitted. Generally, the trial court has broad discretion in determining whether to admit or exclude evidence, and we are sympathetic to the trial court's legitimate worry that the evidence could complicate the case to defendant's detriment by letting the jurors know defendant had already been convicted by a previous jury. However, we have long held that "[c]ross-examination of an opposing witness for the purpose of showing . . . bias or interest is a substantial legal right, which the trial judge can neither abrogate nor abridge to the prejudice of the cross-examining party." *Hart*, 239 N.C. at 711, 80 S.E.2d at 903 (citations omitted). When defense counsel advised the trial court that he planned to cross-examine Detective Roberts about his conversation with Deputy Hughes, he specifically acknowledged that evidence regarding defendant's previous trial and conviction might be disclosed as a result of his cross-examination of Detective Roberts. Even so, defense counsel believed the risk was worth taking to inform the jury of Detective Roberts' actions to prejudice that previous trial. Thus, any error that resulted from allowing this information into evidence would have been invited by defendant. *See* N.C.G.S. § 15A-1443(c) (2011). Given the importance this Court

places on a party's right to cross-examine an opposing witness for bias, we affirm the conclusion of the Court of Appeals that the trial court erred by excluding this evidence.

Next, we must determine whether the retrial court's error was prejudicial to defendant. *See Bell*, 338 N.C. at 383, 450 S.E.2d at 721.

> A defendant is prejudiced by errors relating to rights arising other than under the Constitution of the United States when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises. The burden of showing such prejudice . . . is upon the defendant.

N.C.G.S. § 15A-1443(a) (2011). Detective Roberts was the lead investigator and involved in all aspects of the case, from taking the victim's statement and showing defendant's mug shot to her while she was still receiving medical attention, to retrieving the knife from defendant's home and describing it to the jury when it was unavailable for jury inspection at the retrial. His testimony at the suppression hearing and at trial left little doubt that he had concluded defendant was the perpetrator even before he showed defendant's photo to the victim. This testimony was an important component of the State's case, but the retrial court's ruling foreclosed any possibility that defendant could probe Detective Roberts' bias, prevented the jury from knowledgeably weighing the credibility of his testimony, and excluded evidence that he may have distorted the first jury verdict. While the evidence of defendant's guilt is strong, that strength is counterbalanced by grave misconduct that extended into the jury room. Had defendant's counsel been permitted to cross-examine Detective Roberts about his behavior at defendant's first trial, there is a reasonable possibility that a different result would have been reached at defendant's retrial. Accordingly, we hold that defendant was prejudiced by the retrial court's error.

Because defendant is entitled to a new trial on the basis of the retrial court's erroneous ruling on defendant's motion *in limine*, we need not reach his claims based upon his right to confront his accuser under the Confrontation Clauses of the Sixth Amendment to the Constitution of the United States and Article I, Section 23 of the North Carolina Constitution. *State v. Crabtree*, 286 N.C. 541, 543, 212 S.E.2d 103, 105 (1975) ("It is well established that appellate courts will not pass upon constitutional questions, even when properly

presented, if there is some other ground upon which the case can be decided . . . ." (citations omitted)).

[2] We next consider several remaining issues that may arise on retrial. As noted above, investigators developed defendant and Alex Tsilianos ("Tsilianos") as primary suspects the morning of the crime. The State contends that the Court of Appeals in *Lewis III* erred when it held that the retrial court should have allowed defendant "the opportunity to demonstrate that [the victim's] identification of the alleged co-defendant [Tsilianos] was erroneous and that charges against the co-defendant were dismissed." *Lewis III*, 2010 N.C. App. LEXIS 1590, at *12. At the pretrial hearing on the State's motion *in limine* to exclude evidence relating to the resolution of charges against Tsilianos, defense counsel stated to the retrial court that the victim "was more certain of the co-defendant's identity" than of defendant's, and that Tsilianos' "charge got dismissed" because "he had an alibi." While we do not question counsel's representations to the court, our review of the record in this case and the opinion of the Court of Appeals in *Lewis I* yields no additional information as to which identification procedures were used in the investigation of Tsilianos, when any such identification was made, or the nature of the victim's response. The record is similarly devoid of information regarding the nature of any charges brought against Tsilianos or the time of and reason for the disposition of such charges.

We have stated that "[a] defendant's guilt must be determined solely on the basis of the evidence presented against him, and it is improper to make reference to the disposition of charges against a co-defendant." *State v. Campbell*, 296 N.C. 394, 399, 250 S.E.2d 228, 230 (1979) (citations omitted). This rule applies when the conviction or plea of a co-defendant is offered as evidence that the defendant is guilty of the same offense. *Id.* Here, in contrast, defendant sought to introduce evidence relating to the resolution of Tsilianos' case, not as evidence that defendant shared his purported co-defendant's guilt, but both to impeach the victim's identification of defendant and to reinforce defendant's theory that any mistakes made by the investigators who almost immediately developed Tsilianos as a suspect may have been repeated in their early focus on defendant. We believe that evidence relating to any misidentification of Tsilianos is relevant when defendant based his defense on the theory that he was abed at home the morning the victim was attacked and did not commit the crime. However, in light of this sparse record, we conclude only that, on retrial, defendant may cross-examine both the investigators and

the victim about the procedures used to identify Tsilianos and whether Tsilianos later established an alibi.

[3] The State next argues that the Court of Appeals erred by holding that defendant's due process rights were violated when the retrial court admitted evidence relating to the knife allegedly used by the victim's assailant. As detailed above, the record indicates that Detectives Roberts and Tipton seized from defendant's residence a knife that Detective Roberts believed fit the victim's description of the knife used during the attack. The knife was admitted into evidence during defendant's first trial, but was destroyed after defendant's convictions were affirmed on appeal. Although the record indicates that the parties were unable to determine why this exhibit was destroyed, defendant does not argue that the destruction was carried out in bad faith.

Before defendant's retrial, defense counsel made an oral motion to limit evidence pertaining to the knife. While defense counsel conceded that the victim could testify that a knife was used in the assault, he opposed introduction of evidence that a knife recovered at defendant's house was identified by the victim as being the knife used in the attack. Defense counsel pointed out that he had never seen the knife, had never seen a photograph of the knife, and had been given no opportunity to test the knife. The State responded that evidence relating to the knife was admissible under the doctrine of "the law of the case," both because the knife had been admitted at the first trial and defendant had not challenged its admission on appeal, and because defendant had not raised this issue in his MAR that led to his retrial.

At the hearing on defendant's oral motion relating to the knife, the trial court also considered defendant's written motions to suppress evidence of the victim's identification of defendant. At the conclusion of all the arguments, the retrial court stated that "the motion to suppress is denied" without specifically addressing defendant's oral motion. During defendant's retrial, Officer Tipton, who had been chief of detectives for the Avery County Sheriff's Department at the time of the offense, testified that the victim had described the weapon as an old yellowish-brown knife with a bone handle and that he and Detective Roberts had recovered a knife matching that description from defendant's residence. Defendant did not object to this testimony.

Defendant prevailed on this issue before the Court of Appeals, which noted the State's statutory duty to preserve evidence that

possessed apparent exculpatory value and was of such a character that defendant would be unable to obtain comparable evidence. *Lewis III*, 2010 N.C. App. LEXIS 1590, at *13-15 (citing N.C. G.S. § 15-11.1 (2009)). Observing that the knife was the only physical evidence that linked defendant to the crimes, the Court of Appeals ruled that the retrial court abused its discretion in admitting evidence of the knife. *Id.* at *14-15.

Before us, the State argues both that defendant waived this issue by not objecting when evidence of the knife was presented and by not raising a constitutional claim to the retrial court. Defendant responds that the State made neither of these procedural default arguments before the Court of Appeals and cannot raise them for the first time before us. Having allowed discretionary review of the merits of this question in response to the State's petition, and recognizing that this question may well arise on retrial, we will review the underlying issue.

The State argues that the Court of Appeals erred in finding that defendant's due process rights were violated as a result of the destruction of the knife. Specifically, the State contends that defendant failed to show that the knife had any apparent exculpatory value. As a result, the State argues, in the absence of bad faith on its part, destruction of such evidence does not constitute a denial of due process, citing *Arizona v. Youngblood*, 488 U.S. 51, 58, 109 S. Ct. 333, 337, 102 L. Ed. 2d 281, 289 (1988) (holding that "unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law"). Defendant responds that the Court of Appeals reached the correct result and that the exculpatory character of the knife was apparent because the knife that was recovered from his residence did not match the knife described by the victim. Defendant claims that the introduction of evidence about the recovered knife during his second trial violated his due process rights.

Section 15-11.1(a) provides in pertinent part that "[i]f a law-enforcement officer seizes property pursuant to lawful authority, he shall safely keep the property under the direction of the court or magistrate as long as necessary to assure that the property will be produced at and may be used as evidence in any trial." N.C.G.S. § 15-11.1(a) (2011). When this section is violated, the Court must determine "whether defendant was thereby deprived of his rights to due process under the Fourteenth Amendment to the United States Constitution and Article I, Sections 19 and 23 of the North Carolina

Constitution." *State v. Mlo*, 335 N.C. 353, 372, 440 S.E.2d 98, 107, *cert. denied*, 512 U.S. 1224, 114 S. Ct. 2716, 129 L. Ed. 2d 841 (1994). This determination depends in part on the nature of the evidence. *See Youngblood*, 488 U.S. at 57-58, 109 S. Ct. at 337, 102 L. Ed. 2d at 289. The duty imposed by the Constitution on the State to preserve evidence is limited to "evidence that might be expected to play a significant role in the suspect's defense." *California v. Trombetta*, 467 U.S. 479, 488, 104 S. Ct. 2528, 2534, 81 L. Ed. 2d 413, 422 (1984). The Supreme Court went on to hold that "[t]o meet this standard of constitutional materiality, evidence must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." *Id.* at 489, 104 S. Ct. at 2534, 81 L. Ed. 2d at 422 (internal citation omitted); *see also State v. Robinson*, 346 N.C. 586, 594-96, 488 S.E.2d 174, 180-81 (1997) (finding no error where there was no indication that evidence had been released in bad faith and the exculpatory value of the evidence "was speculative at best").

In applying *Trombetta* to the case at bar, we begin by noting that exculpatory evidence is "evidence that is either material to the guilt of the defendant or relevant to the punishment to be imposed," 467 U.S. at 485, 104 S. Ct. at 2532, 81 L. Ed. 2d at 420, including impeachment evidence, *State v. Soyars*, 332 N.C. 47, 63, 418 S.E.2d 480, 490 (1992). The State's failure to disclose such evidence, whether in good faith or bad, violates the defendant's constitutional rights. *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 1196-97, 10 L. Ed. 2d 215, 218 (1963). However, when the State fails to preserve " 'evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant,' " *Mlo*, 335 N.C. at 373, 440 S.E.2d at 108 (quoting *Youngblood*, 488 U.S. at 57, 109 S. Ct. at 337, 102 L. Ed. 2d at 289), the unavailability of the evidence does not constitute a denial of due process of law unless the defendant shows bad faith on the part of the State, *id.* (citing *Youngblood*, 488 U.S. at 58, 109 S. Ct. at 337, 129 L. Ed. 2d at 289).

In light of the evidence presented, we conclude that defendant's due process argument does not meet the constitutional materiality threshold required by *Trombetta*. 467 U.S. at 489, 104 S. Ct. at 2534, 81 L. Ed. 2d at 422. Defendant has never contended that the evidence was destroyed in bad faith. Instead, he argues that the destruction of the knife effectively prevented him from impeaching and defending against the State's evidence concerning the knife. According to defend-

ant, the knife was the "only item of physical evidence that might have linked [him] to the crimes," and had the knife been available as evidence at his retrial, he would have been able to compare the recovered knife with the victim's description to show that the victim's identification of the knife obtained from defendant's residence as the one used by the attacker was not credible.

Nevertheless, even though the physical object was unavailable, defense counsel was able to challenge the victim's identification of the knife by using cross-examination to point out that the handle of the knife had been inside the assailant's hand. While cross-examining Detective Roberts, defense counsel also established that the victim's nightgown had been left bloody by the assault but that the recovered knife was tested for blood and DNA and found to be "clean." Thus, despite the knife's unavailability, defense counsel was able to elicit impeaching testimony from the State's witnesses concerning the knife. In the absence of an allegation that the evidence was destroyed in bad faith, we conclude that the State's failure to preserve the knife for defendant's retrial did not violate defendant's right to due process. *See Youngblood*, 488 U.S. at 58, 109 S. Ct. at 337, 102 L. Ed. 2d at 289. Accordingly, we hold that the trial court did not err by allowing the State to present evidence concerning the knife.

[4] Next, the State contends that the Court of Appeals erred when it held that the retrial court should have allowed defendant's motion to suppress the victim's in-court identification of defendant. *Lewis III*, 2010 N.C. App. LEXIS 1590, at *23. The State argues that the Court of Appeals should have applied the law of the case doctrine to uphold the trial court's ruling. The record shows that before defendant's first trial, he moved to suppress all identification testimony by the victim "on the grounds that the initial photographic identification by the victim was 'irreparably tainted by the unnecessarily suggestive' use of a single photograph in violation of defendant's due process rights." *Lewis I*, 2005 N.C. App. LEXIS 432, at *4. After considering voir dire testimony from Detective Roberts and the victim, the trial court made findings of fact, then concluded "that the single photograph identification was 'more suggestive than would be recommended by applicable North Carolina law' but was, nonetheless, 'reliable and did not produce a substantial likelihood of misidentification given the totality of the circumstances,' " and denied defendant's motion. *Id.* At the conclusion of the State's case-in-chief in defendant's first trial, the trial court admitted both the single photograph and a photo lineup that had been shown to the victim. *Id.* On appeal, the Court of Appeals affirmed the trial court's

ruling denying defendant's motion to suppress the identifications made by the victim. *Lewis I*, 2005 N.C. App. LEXIS 432, at *9-10. As with the knife discussed above, all of the pretrial photographic identification evidence was ordered destroyed after defendant's conviction was affirmed on appeal.

On 22 May and 13 June 2008, before defendant's retrial, defense counsel filed two new motions to suppress all evidence of the victim's out-of-court and in-court identifications of defendant. In both motions, defense counsel again argued that the evidence should be excluded on the grounds that defendant's due process rights were violated because the pretrial identification procedure was so "impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." At the pretrial hearing on these motions, defense counsel and the State introduced evidence that had not been presented at defendant's first trial. Deputy Hughes and Detective Roberts gave conflicting voir dire testimony during the hearing relating to a photographic lineup that had been shown to the victim. Deputy Hughes testified that he had assisted in preparing the lineup shown to the victim during the investigation and that it included three photographs of defendant. Detective Roberts, on the other hand, testified that the photographic lineup shown to the victim contained only one photograph of defendant. Detective Roberts added that defendant had been developed as a suspect because two other investigating officers had described the alleged assailant to him and stated that they thought defendant might be the perpetrator.

After Detective Roberts and Deputy Hughes completed their voir dire testimony, defense counsel argued that the retrial court should suppress the victim's in-court identification in the upcoming trial because the pretrial identification procedures employed by Detective Roberts and other investigating officers were impermissibly suggestive and because the investigating officers did not have a reasonable basis to focus on defendant as a suspect. Defense counsel argued that the victim's description of her attacker did not match the photograph of defendant, that Detective Roberts commented to the victim when he showed her defendant's mug shot that he believed the person depicted in the photograph matched her description,[2] and that the reliability of the victim's identification of defendant was diminished by her apparent misidentification of Tsilianos as the other intruder.

2. When asked during defendant's retrial, the victim had no recollection of any such comment by Roberts.

The State responded that the retrial court should deny defendant's motion on the grounds that the court was bound by the law of the case. When the issue pertaining to suppression of the victim's in-court statement was considered during defendant's first appeal, the Court of Appeals found that the trial court properly denied defendant's motion to suppress the identifications made by the victim. *Lewis I*, 2005 N.C. App. LEXIS 432, at *9-10. Defense counsel conceded that the in-court identification issue had been raised during the previous appeal, but claimed that new evidence relevant to the reliability of the victim's in-court identification required the retrial court to reconsider his motion to suppress. The retrial court denied defendant's motion after making the following finding:

> On the motion to suppress, this Court finds that there is no new evidence that has been brought to light that was not brought to light in the previous motion to suppress, and this Court will not overrule the Court of Appeals, and agrees with their analysis of the matter and will adopt the findings of fact and conclusions of law of the previous judge . . . .

The retrial court did not make findings of fact or conclusions of law relating to the additional evidence presented during voir dire that had not been available before defendant's first trial.

The Court of Appeals reversed, holding that defendant's motion to suppress his in-court identification by the victim should have been allowed. *Lewis III*, 2010 N.C. App. LEXIS 1590, at *23. The Court of Appeals held that the retrial court's finding that no new evidence had been presented was not supported by the record, and that the victim's in-court identification of defendant was not made independently of her identification of defendant from the photographic identification procedure. *Id.* at *19-20. Before us, the State maintains that the trial court was bound by the law of the case and that its ruling on defendant's motions to suppress was correct.

We have stated that:

> [A]s a general rule when an appellate court passes on a question and remands the cause for further proceedings, the questions there settled become the law of the case, both in subsequent proceedings in the trial court and on subsequent appeal, provided the same facts and the same questions which were determined in the previous appeal are involved in the second appeal.

Hayes v. City of Wilmington, 243 N.C. 525, 536, 91 S.E.2d 673, 681-82 (1956) (citations omitted). Thus, the law of the case doctrine does not apply when the evidence presented at a subsequent proceeding is different from that presented on a former appeal. As the Court of Appeals observed, the record indicates that at defendant's first trial, he did not have the information now available pertaining to Detective Roberts' improper contact with Deputy Hughes. As the Court of Appeals further observed, at defendant's first trial, the jury was presented evidence that the victim picked defendant out of a photo array purportedly consisting of a photograph of defendant and six others. *Lewis I*, 2005 N.C. App. LEXIS 432, at *3. At the hearing on defendant's motion to suppress filed before his retrial, new (albeit contested) evidence was presented indicating that the photographic lineup may have contained three photographs of defendant. Although the photos were not available at the retrial and the parties presented no evidence of the lineup to the jury, the new evidence elicited at the suppression hearing, if true, suggests that Detective Roberts may have loaded the dice by including more than one photograph of defendant in the lineup, that the victim's resulting identification of defendant in the array was tainted, and that a member of the jury that convicted defendant at his first trial knew of the taint. While we have no opinion as to the veracity of the witnesses who provided this conflicting testimony and we cannot forecast what, if any, evidence relating to the victim's in-court identification of defendant the parties will present at defendant's third trial, it is evident to us that the doctrine of the law of the case does not apply here. Accordingly, we affirm the holding of the Court of Appeals that the retrial court erred in applying the doctrine of the law of the case to defendant's motion to suppress at his retrial. We defer to the trial court any decision relating to a motion to suppress the victim's in-court identification of defendant that may be filed before or at defendant's third trial.

[5] Finally, the State argues that the Court of Appeals erred in reversing the trial court's denial of defendant's motion to dismiss. Defendant moved for dismissal when the State rested its case-in-chief, arguing that the evidence was insufficient. The retrial court denied the motion and defendant presented evidence. Defendant did not make another motion to dismiss at the conclusion of all the evidence. The Court of Appeals found that the only evidence identifying defendant was inherently unreliable and held that the retrial court should have allowed defendant's motion. *Lewis III*, 2010 N.C. App. LEXIS 1590, at *24-25. However, by electing to present evidence after the State rested, defendant waived

his earlier motion to dismiss. N.C. R. App. P. 10(a)(3). "Such a waiver precludes the defendant from urging the denial of such motion as a ground for appeal." *Id.* Defendant may preserve his right to appeal after such a waiver by making a motion to dismiss at the close of all evidence, *id.*, but defendant failed to do so. Moreover, while we express no opinion about any evidence that might be presented upon remand, our review of the record of defendant's retrial satisfies us that the State presented sufficient evidence to survive defendant's motion to dismiss.

For the reasons stated above, we affirm in part and reverse in part the opinion of the Court of Appeals. This case is remanded to the Court of Appeals for further remand to the Superior Court, Avery County, for a new trial.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED FOR A NEW TRIAL.

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

STATE OF NORTH CAROLINA v. DAVID ORDIS LAWRENCE

No. 100PA11

(Filed 13 April 2012)

Conspiracy— robbery with dangerous weapon—jury instruction—plain error analysis—no fundamental error—failure to show prejudicial effect

The Court of Appeals erred by finding plain error in the trial court's jury instructions regarding the elements of conspiracy to commit robbery with a dangerous weapon and by granting defendant a new trial on that charge. In light of the overwhelming and uncontroverted evidence, defendant could not show the prejudicial effect necessary to establish a fundamental error. In addition, the error in no way seriously affected the fairness, integrity, or public reputation of judicial proceedings.

On discretionary review pursuant to N.C.G.S. § 7A 31 of a unanimous decision of the Court of Appeals, —— N.C. App. ——, 706 S.E.2d 822 (2012), finding no error in part and reversing in part judgments entered on 4 November 2009 by Judge Douglas B. Sasser in Superior

Court, Hoke County, and remanding for a new sentencing hearing and for a new trial in part. Heard in the Supreme Court on 9 January 2012.

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

James R. Parish for defendant-appellee.

MARTIN, Justice.

The Court of Appeals found plain error as to the trial court's jury instructions regarding the elements of conspiracy to commit robbery with a dangerous weapon and granted defendant a new trial on that charge. The only questions before this Court are (1) whether the Court of Appeals applied the proper standard of review for plain error and (2) whether the trial court's jury instructions regarding conspiracy to commit robbery with a dangerous weapon rise to the level of plain error.

Almost thirty years ago, in *State v. Odom*, we adopted the federal plain error rule for criminal cases. 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir.), *cert. denied*, 459 U.S. 1018, 103 S. Ct. 381 (1982)).[1] Generally speaking, the rule provides 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. *State v. Walker*, 316 N.C. 33, 39, 340 S.E.2d 80, 83 (1986). Since that time, our appellate courts have applied the plain error standard using several different formulations.[2] *See, e.g.*, *State v. Towe*, ___ N.C. App. ___, ___, 707 S.E.2d 770, 775 (finding plain error because "it [was] highly plausible that the jury could have reached a different result"), *disc. rev. allowed*, 365 N.C. 202, 709 S.E.2d 599 (2012); *State v. Wright*, ___ N.C. App. ___, ___, 708 S.E.2d 112, 121 (holding there was not plain error because "a different result probably would not have been reached absent [the trial court's alleged error]"), *disc. rev. denied*, 365 N.C. 200, 710 S.E.2d 9-10 (2011); *State v.*

1. In North Carolina, plain error review has no application to appeals in civil cases. *See Durham v. Quincy Mut. Fire Ins. Co.*, 311 N.C. 361, 367, 317 S.E.2d 372, 377 (1984).

2. The lack of uniformity in the administration of the plain error standard should not be surprising. The plain error rule does much to protect the integrity of the adversarial process, ensure fairness and the public perception of fairness, and avoid miscarriages of justice. *See* Robert J. Martineau, *Considering New Issues on Appeal: The General Rule and the Gorilla Rule*, 40 Vand. L. Rev. 1023, 1052-54 (1987). However, a clear, conceptual definition of the rule has remained somewhat elusive. *See id.*

Jones, —— N.C. App. ——, ——, 703 S.E.2d 772, 774 (2010) (defining plain error as "so grave as to deny a fundamental right of the defendant so that, absent the error, the jury would have reached a different result"), *vacating and remanding with instructions*, —— N.C. ——, 722 S.E.2d 509 (2012); *State v. Walker*, 139 N.C. App. 512, 520, 533 S.E.2d 858, 862 (2000) (holding that any error was harmless and thus not plain error). These incomplete and inconsistent formulations lead us to conclude that clarification of the plain error standard is needed. After taking the opportunity to review application of the plain error standard, we reverse.

In August 2008, defendant engaged in a criminal partnership with a group of out-of-state residents planning to rob a drug dealer in North Carolina. The participants who drove from Florida were Marlita Williams (Williams), Travis McQueen, Twanda McQueen, and Bernard King (King). The group travelled to Fayetteville, North Carolina, in two cars. Upon arriving in Fayetteville, the group stopped at a Home Depot store and stole zip ties and a Mercury Milan for use during the course of the planned robbery. The group then went to the home of Williams's aunt to continue planning the robbery.

That night, the group drove by and parked outside several homes to choose a target. They believed each residence to be the home of a drug dealer and thus to contain significant amounts of money. The group subsequently followed a potential victim, Charlise Curtis, with whom Williams was familiar, back to her neighborhood. They decided they would rob Ms. Curtis, who was dating a man they believed was a drug dealer.

The group later discussed each person's role in the robbery. Travis McQueen would grab Ms. Curtis while threatening her with a gun. Williams said she knew someone else who could help Travis McQueen with the "muscle." The group drove to the home of defendant, David Ordis Lawrence. Defendant met the group outside and agreed to participate in the robbery. He volunteered that he already had a weapon and pulled out his semiautomatic .380 caliber handgun. They planned to rob Ms. Curtis the next morning when she took her child to school.

The next day, 29 August 2008, King drove the stolen Mercury Milan to pick up defendant. King and defendant then drove to a service station to fill up a gasoline can. After Travis McQueen joined them in the car, they discussed their plan on the way to Ms. Curtis's home. They decided to wait for Ms. Curtis to reach the end of the driveway.

They would then block her car in, and Travis McQueen and defendant would jump out of the woods, grab her, and take her back to the house. They planned to then tie her up and threaten her with their guns to force her to tell them where her boyfriend's money and drugs were located. If guns did not work, they planned to douse Ms. Curtis in gasoline and threaten to set her on fire unless she talked.

When they arrived at Ms. Curtis's residence, Travis McQueen and defendant hid in the woods. King remained in the driver's seat of the car so he could block Ms. Curtis in the driveway. Shortly thereafter, when a marked police car pulled behind King's car in response to calls from neighbors, King attempted to drive off at a high speed, but he then jumped out of the vehicle and fled. While pursuing King on foot, officers also saw persons later identified as Travis McQueen and defendant run from the woods, but the officers were unable to catch any of the three.

The group later reassembled and took defendant back to his house before returning to the home of Williams's aunt. There, the group decided they would again attempt to rob Ms. Curtis, but would wait some time before making the attempt.

The next day, the group went to a mall parking lot and stole a Ford F-250 pickup truck and a purse. They used credit cards from the stolen vehicle and purse to buy additional supplies for the next robbery attempt. The group decided to attempt a robbery again that night. They picked up defendant, who said he was ready for the second attempt. Defendant and the group then waited for a telephone call from one of Williams's family members to let them know when Ms. Curtis was on her way home. Defendant, King, and Travis McQueen drove to Ms. Curtis's home in the truck, while Twanda McQueen and Williams drove in another car. Travis McQueen and defendant planned to ambush Ms. Curtis as she walked to the door of her house.

King drove to Ms. Curtis's home and let defendant and Travis McQueen out of the vehicle before driving to a nearby service station to wait for them. Defendant and Travis McQueen ran around to the back of the house so neighbors would not see them. Nonetheless, a neighbor, Robert Murray, had observed this activity. In response, he called the police and retrieved his pistol. Mr. Murray then confronted the men, who fled the area. Mr. Murray called another neighbor and alerted him that two individuals were running his way. The second neighbor attempted to stop them, but they ran away.

Meanwhile, a police officer attempted to detain King, who was still parked at the service station, but King sped away. King wrecked the stolen truck, fled on foot, and was eventually arrested. Travis McQueen was later picked up by Twanda McQueen and Williams. Defendant hid in the woods all night and walked home in the morning.

King cooperated with the police and told them the details of the plan. He also stated that defendant was fully aware of the plan to rob and kidnap Ms. Curtis. Travis and Twanda McQueen were arrested a few days later. Twanda McQueen cooperated with police, also identifying defendant and describing the plan. Defendant was apprehended on 8 January 2009, approximately four months later, by U.S. Marshals in Mississippi.

On 27 October 2008, defendant was indicted by a grand jury in Hoke County for two counts each of attempted robbery with a dangerous weapon, attempted kidnapping, attempted breaking and entering, and conspiracy to commit robbery with a dangerous weapon. Following his arrest, he was tried and convicted by a jury of all eight charges. The trial court arrested judgment on the attempted kidnapping convictions and sentenced defendant to an active term of 90 to 117 months for the first count of attempted robbery with a dangerous weapon, a consecutive term of 90 to 117 months for the second count of attempted robbery with a dangerous weapon, a consecutive term of 30 to 45 months for one count of conspiracy to commit robbery with a dangerous weapon, a consecutive term of 30 to 45 months for the second count of conspiracy to commit robbery with a dangerous weapon, and two concurrent terms of 6 to 8 months each for two counts of attempted breaking and entering.

At defendant's trial, the trial court correctly instructed the jury on the elements of attempted robbery with a dangerous weapon when delivering its charge on that offense. That instruction included the elements that defendant possessed a firearm and intended to use it to "endanger or threaten the life of [the victim]." However, in its charge on conspiracy to commit robbery with a dangerous weapon, the trial court correctly instructed that robbery with a dangerous weapon is the taking of property from a person "while using a firearm," but erroneously omitted the element that the weapon must have been used to endanger or threaten the life of the victim. The State concedes that the instruction was erroneous because the trial court should have set out all the elements of robbery with a dangerous weapon in that portion of the charge, according to *State v. Gibbons*,

303 N.C. 484, 489, 279 S.E.2d 574, 577-78 (1981) (holding that mere possession of a dangerous weapon is insufficient to support a charge of robbery with a dangerous weapon). The trial court repeated the erroneous instruction when the jury asked for clarification on the conspiracy instruction. Defendant did not object to either instruction.

On appeal, the Court of Appeals held that the trial court's erroneous jury instructions on conspiracy to commit robbery with a dangerous weapon amounted to plain error. *State v. Lawrence*, ___ N.C. App. ___, ___, 706 S.E.2d 822, 835-36 (2011). In so doing, the Court of Appeals stated that for an instructional error to rise to the level of plain error, "[t]he party asserting error bears the burden" of "demonstrat[ing] that such error was likely, in light of the entire charge, to mislead the jury." *Id.* at ___, 706 S.E.2d at 834 (quoting *State v. Blizzard*, 169 N.C. App. 285, 297, 610 S.E.2d 245, 253 (2005)) (emphasis omitted) (quotations marks omitted). The Court of Appeals opinion included various other holdings that are not the subject of this appeal and will not be addressed.[3]

This case presents the question of how the North Carolina plain error standard of review should be applied to error that is not preserved for appellate review. The State contends that the Court of Appeals applied the wrong measure for plain error review of erroneous jury instructions. The State further argues that if the correct standard had been applied, defendant would not have met his burden of establishing that the error amounted to plain error. We agree that defendant has not demonstrated plain error.

We are mindful that this Court has not issued a doctrinal statement regarding the plain error standard of review in almost thirty years. It is the institutional role of this Court to provide guidance and clarification when the law is unclear or applied inconsistently. One of the "primary goal[s] of adjudicatory proceedings is the uniform application of law." *Bacon v. Lee*, 353 N.C. 696, 712, 549 S.E.2d 840, 851, *cert. denied*, 533 U.S. 975, 122 S. Ct. 22 (2001); *see also State v. Williams*, 351 N.C. 465, 469, 526 S.E.2d 655, 657 (2000). Therefore, to

3. The Court of Appeals also found no error in the trial court's dismissal of defendant's motions to dismiss the charges for attempted kidnapping, attempted robbery with a dangerous weapon, and attempted breaking and entering; found no error as to the trial court's instruction to the jury regarding the law of flight; found no plain error as to the trial court's jury instructions regarding attempted felonious breaking and entering; and found that the evidence was sufficient to support only one charge of conspiracy to commit robbery with a dangerous weapon. Defendant was granted a new sentencing hearing for the two attempted breaking and entering convictions. *Lawrence*, ___ N.C. App. at ___, 706 S.E.2d at 836.

promote more uniform application of the law, we now clarify how plain error review applies to unpreserved error in criminal cases under *Odom*.

To properly understand how plain error review functions, it is helpful to be cognizant of its historical development in American jurisprudence, including the advent of the harmless error doctrine. As the Supreme Court of the United States has recognized, "the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence." *Delaware v. Van Arsdall*, 475 U.S. 673, 681, 106 S. Ct. 1431, 1436 (1986) (citation omitted). To effectuate this central objective, our system of justice has long operated under an adversarial model. *See McNeil v. Wisconsin*, 501 U.S. 171, 181 n.2, 111 S. Ct. 2204, 2210 n.2 (1991). Unlike the inquisitorial model, in which the judge—a neutral decisionmaker—conducts an independent investigation, our adversarial system requires the parties to present their own arguments and evidence at trial. *Id*. As a part of this adversarial process, the parties have an obligation to raise objections to errors at the trial level. *State v. Oliver*, 309 N.C. 326, 334, 307 S.E.2d 304, 311 (1983). Any other approach would place "an undue if not impossible burden . . . on the trial judge." *State v. Black*, 308 N.C. 736, 740, 303 S.E.2d 804, 806 (1983). Parties therefore must assert a timely objection to preserve error for appellate review. N.C. R. App. P. 10(a)(1); *Walker*, 316 N.C. at 37, 340 S.E.2d at 82.[4] If parties do not timely object, they waive the right to raise the alleged error on appeal. *Oliver*, 309 N.C. at 334, 307 S.E.2d at 311.

Because our courts operate using the adversarial model, we treat preserved and unpreserved error differently. Preserved legal error is reviewed under the harmless error standard of review. N.C.G.S. § 15A-1443 (2009); N.C. R. App. P. 10(a)(1); *State v. Bishop*, 346 N.C. 365, 385, 488 S.E.2d 769, 779 (1997). Unpreserved error in criminal cases, on the other hand, is reviewed only for plain error. N.C. R. App. P. 10(a)(4); *Black*, 308 N.C. at 739-41, 303 S.E.2d at 805-07. Because the plain error standard of review imposes a heavier burden on the defendant than the harmless error standard, it is to the defendant's advantage to object at trial and thereby preserve the error for harmless error review. *See Walker*, 316 N.C. at 39, 340 S.E.2d at 83.

The harmless error rule is recognized in both the federal courts and the courts of this State. *See* Fed. R. Crim. P. 52(a); N.C.G.S.

4. We note that an error may also be automatically preserved by rule or operation of law. N.C. R. App. P. 10(a)(1); *see also State v. Ashe*, 314 N.C. 28, 39, 331 S.E.2d 652, 659 (1985). These exceptions to the waiver rule do not apply here.

§ 15A-1443(a), (b). In both systems harmless error review applies only when the defendant preserves the issue for appeal by timely objecting at trial. *See, e.g.*, *United States v. Olano*, 507 U.S. 725, 734, 113 S. Ct. 1770, 1778 (1993); *see also* N.C.G.S. § 15A-1443(b); *Black*, 308 N.C. at 739-40, 303 S.E.2d at 805-06. When violations of a defendant's rights under the United States Constitution are alleged, harmless error review functions the same way in both federal and state courts: "[B]efore a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." *Chapman v. California*, 386 U.S. 18, 24, 87 S. Ct. 824, 828 (1967); *see also* N.C.G.S. § 15A-1443(b); *State v. Ward*, 354 N.C. 231, 251, 555 S.E.2d 251, 265 (2001) (citations omitted). In other words, an error under the United States Constitution will be held harmless if "the jury verdict would have been the same absent the error." *Neder v. United States*, 527 U.S. 1, 17, 119 S. Ct. 1827, 1837 (1999). Under both the federal and state harmless error standards, the government bears the burden of showing that no prejudice resulted from the challenged federal constitutional error. N.C.G.S. § 15A-1443(b); *O'Neal v. McAninch*, 513 U.S. 432, 437-39, 115 S. Ct. 992, 995-96 (1995). But if the error relates to a right not arising under the United States Constitution, North Carolina harmless error review requires the defendant to bear the burden of showing prejudice. N.C.G.S. § 15A-1443(a). In such cases the defendant must 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." *Id.*

The United States Supreme Court held that federal constitutional error could be subjected to harmless error review in *Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824. Indeed, the Court "has recognized that most constitutional errors can be harmless" and "[do] not automatically require reversal." *Arizona v. Fulminante*, 499 U.S. 279, 306, 111 S. Ct. 1246, 1263 (1991). In a limited class of cases, the Court has also held that "some errors necessarily render a trial fundamentally unfair." *Rose v. Clark*, 478 U.S. 570, 577, 106 S. Ct. 3101, 3106 (1986). Those errors, called structural error, require automatic reversal regardless of a showing of prejudice, *Fulminante*, 499 U.S. at 309-10, 111 S. Ct. at 1264-65,[5] because they " 'affect[ ] the framework within which the trial proceeds, rather than simply an error in the trial

5. The Supreme Court has "found an error to be 'structural,' and thus subject to automatic reversal, only in a 'very limited class of cases.' " *Neder*, 527 U.S. at 8, 119 S. Ct. at 1833 (quoting *Johnson v. United States*, 520 U.S. 461, 468, 117 S. Ct. 1544, 1549 (1997)). Those cases are limited to erroneous deprivation of a criminal defendant's

process itself,' " *Neder*, 527 U.S. at 8, 119 S. Ct. at 1833 (quoting *Fulminante*, 499 U.S. at 310, 111 S. Ct. at 1265). Thus, "these errors deprive defendants of 'basic protections' without which 'a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence . . . and no criminal punishment may be regarded as fundamentally fair.' " *Neder*, 527 U.S. at 8-9, 119 S. Ct. at 1833 (quoting *Clark*, 478 U.S. at 577-78, 106 S. Ct. at 3106 (alteration in original)). Regardless, most constitutional and nonconstitutional rights may be forfeited if a defendant fails to make a timely objection. *Olano*, 507 U.S. at 731, 113 S. Ct. at 1776.

North Carolina courts also apply a form of structural error known as error per se. *See* N.C.G.S. § 15A-1443(a); *see also*, *e.g.*, *State v. Parker*, 350 N.C. 411, 421, 426, 516 S.E.2d 106, 114, 117 (1999), *cert. denied*, 528 U.S. 1084, 120 S. Ct. 808 (2000). Like structural error, error per se is automatically deemed prejudicial and thus reversible without a showing of prejudice. *See State v. Brown*, 325 N.C. 427, 428, 383 S.E.2d 910, 910 (1989) (per curiam). It should be emphasized that federal structural error and state error per se have developed independently, as "whether a federal constitutional error can be harmless is a federal question," *Connecticut v. Johnson*, 460 U.S. 73, 81 n.9, 103 S. Ct. 969, 974 n.9 (1983), while "a state court is entirely free to read its own State's constitution more broadly than [the United States Supreme Court] reads the Federal Constitution, or to reject the mode of analysis used by [the United States Supreme Court] in favor of a different analysis of its corresponding constitutional guarantee," *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 293, 102 S. Ct. 1070, 1077 (1982) (citations omitted).

We come now to the proper standard of review to be applied in the instant case—plain error. Plain error review allows appellate courts to alleviate the potential harshness of preservation rules. *Odom*, 307 N.C. at 660, 300 S.E.2d at 378. Although the Supreme Court adopted plain error review in 1936, *United States v. Atkinson*, 297 U.S. 157, 56 S. Ct. 391 (1936),[6] this Court did not recognize the plain

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choice of counsel, *United States v. Gonzalez-Lopez*, 548 U.S. 140, 126 S. Ct. 2557 (2006); defective reasonable doubt jury instructions, *Sullivan v. Louisiana*, 508 U.S. 275, 113 S. Ct. 2078 (1993); racial discrimination in the selection of the grand jury, *Vasquez v. Hillery*, 474 U.S. 254, 106 S. Ct. 617 (1986); denial of a public trial, *Waller v. Georgia*, 467 U.S. 39, 104 S. Ct. 2210 (1984); denial of the right of self-representation at trial, *McKaskle v. Wiggins*, 465 U.S. 168, 104 S. Ct. 944 (1984); complete denial of counsel, *Gideon v. Wainwright*, 372 U.S. 335, 83 S. Ct. 792 (1963); and trial by biased judge, *Tumey v. Ohio*, 273 U.S. 510, 47 S. Ct. 437 (1927).

6. We note that the Supreme Court had previously recognized the concept of plain error in *Wiborg v. United States*, 163 U.S. 632, 658, 16 S. Ct. 1127, 1137 (1896),

error doctrine until its 1983 decision in *State v. Odom*. Since that time, the federal plain error standard and this State's plain error standard have developed somewhat differently. Nonetheless, because this Court relied heavily on the federal standard when it adopted plain error review, we will discuss how the federal standard has evolved since *Odom*.

Federal plain error review is applied to criminal cases in "exceptional circumstances." *See Atkinson*, 297 U.S. at 160, 56 S. Ct. at 392. Originally, the doctrine permitted federal courts to take notice of errors for which no objection or exception had been made when "the errors [were] obvious, or if they otherwise seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings." *Id.* Federal plain error review was subsequently codified in what is now Rule 52(b) of the Federal Rules of Criminal Procedure. Fed. R. Crim. P. 52(b) ("A plain error that affects substantial rights may be considered even though it was not brought to the court's attention."). The United States Supreme Court previously held that the rule is primarily concerned with ensuring the "fundamental fairness of the trial" and preventing "miscarriage[s] of justice." *United States v. Young*, 470 U.S. 1, 16, 105 S. Ct. 1038, 1047 (1985) (citations omitted).

The Court later refined federal plain error review by creating a four-factor test to determine whether an error is reversible plain error and thus noticeable on appeal. *See Olano*, 507 U.S. at 732-37, 741, 113 S. Ct. at 1776-78, 1781; *see also Puckett v. United States*, 556 U.S. 129, ——, 129 S. Ct. 1423, 1429 (2009). First, there must be an error—that is, a "[d]eviation from a legal rule . . . unless the rule has been waived." *Olano*, 507 U.S. at 732-33, 113 S. Ct. at 1777 (noting that "[w]aiver is different from forfeiture," as forfeiture "does not extinguish an 'error' "). Second, the error must be plain, which is "synonymous with 'clear' or . . . 'obvious.' " *Id.* at 734, 113 S. Ct. at 1777. In other words, the error must be clear under current law at the time of trial or appellate consideration. *Johnson v. United States*, 520 U.S. 461, 468, 117 S. Ct. 1544, 1549 (1997). Third, the error must affect a substantial right. *Olano*, 507 U.S. at 734, 113 S. Ct. at 1777-78. To affect a substantial right, the error ordinarily must be prejudicial, meaning it affected the outcome at trial. *Id.; Puckett*, 556 U.S. at ——,

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and *Clyatt v. United States*, 197 U.S. 207, 221-22, 25 S. Ct. 429, 432 (1905). This standard appears to be focused on whether a miscarriage of justice occurred as a result of the error. Jeffrey L. Lowry, Note, *Plain Error Rule—Clarifying Plain Error Analysis Under Rule 52(b) of the Federal Rules of Criminal Procedure*, 84 J. Crim. L. & Criminology 1065, 1079 (1994).

129 S. Ct. at 1429. This third prong is similar to the harmless error standard of review, except the plain error standard requires the defendant, not the government, to bear the burden of showing prejudice. *Olano*, 507 U.S. at 734, 113 S. Ct. at 1778. Finally, federal plain error is a "permissive" rule, *id.* at 735, 113 S. Ct. at 1778, which means the appellate court should not always reverse solely because an error amounts to plain error under the first three prongs, *id.* at 736-37, 113 S. Ct. at 1779. Instead, for an appellate court to intervene, a fourth prong must be satisfied: The error must " 'seriously affect the fairness, integrity or public reputation of judicial proceedings.' " *Id.* at 736-37, 113 S. Ct. at 1779 (quoting *Atkinson*, 297 U.S. at 160, 56 S. Ct. at 392). While a miscarriage of justice, most often meaning actual innocence, would likely satisfy this standard, an error may also satisfy the standard "independent of the defendant's innocence." *Id.* at 736-37, 113 S. Ct. at 1779. The standard recognized in *Atkinson* is unlikely to be satisfied, however, when evidence of the defendant's guilt is overwhelming. *See United States v. Cotton*, 535 U.S. 625, 634, 122 S. Ct. 1781, 1787 (2002) (stating that "[t]he real threat then to the 'fairness, integrity, and public reputation of judicial proceedings' would be if [the defendant], despite the overwhelming and uncontroverted evidence [of guilt]," had the conviction overturned on appeal).

Like federal plain error review, the North Carolina plain error standard of review applies only when the alleged error is unpreserved, and it requires the defendant to bear the heavier burden of showing that the error rises to the level of plain error. *See State v. Melvin*, 364 N.C. 589, 593-94, 707 S.E.2d 629, 632-33 (2010) (citation omitted). To have an alleged error reviewed under the plain error standard, the defendant must "specifically and distinctly" contend that the alleged error constitutes plain error. N.C. R. App. P. 10(a)(4); *see also State v. Dennison*, 359 N.C. 312, 312-13, 608 S.E.2d 756, 757 (2005) (per curiam). Furthermore, plain error review in North Carolina is normally limited to instructional and evidentiary error. *State v. Wiley*, 355 N.C. 592, 615, 565 S.E.2d 22, 39-40 (2002), *cert. denied*, 537 U.S. 1117, 123 S. Ct. 882 (2003).

In our seminal plain error case, we cited to the federal standard and recognized the following approach to plain error review:

> [T]he plain error rule . . . is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a "*fundamental* error, something so basic, so prejudicial, so lacking in its elements that

> justice cannot have been done," or "where [the error] is grave error which amounts to a denial of a fundamental right of the accused," or the error has " 'resulted in a miscarriage of justice or in the denial to appellant of a fair trial' " or where the error is such as to "seriously affect the fairness, integrity or public reputation of judicial proceedings" or where it can be fairly said "the instructional mistake had a probable impact on the jury's finding that the defendant was guilty."

Odom, 307 N.C. at 660, 300 S.E.2d at 378 (alterations in original) (quoting *United States v. McCaskill*, 676 F.2d at 1002 (4th Cir.) (footnotes omitted)).

This Court and the United States Supreme Court have emphasized that plain error review should be used sparingly, only in exceptional circumstances, to reverse criminal convictions on the basis of unpreserved error:

> The adoption of the "plain error" rule does not mean that every failure to give a proper instruction mandates reversal regardless of the defendant's failure to object at trial. To hold so would negate Rule 10(b)(2) which is not the intent or purpose of the "plain error" rule. *See United States v. Ostendorff*, 371 F.2d 729 (4th Cir.), *cert. denied*, 386 U.S. 982, 18 L. Ed. 2d 229, 87 S. Ct. 1286 (1967). The purpose of Rule 10(b)(2) is to encourage the parties to inform the trial court of errors in its instructions so that it can correct the instructions and cure any potential errors before the jury deliberates on the case and thereby eliminate the need for a new trial. Indeed, even when the "plain error" rule is applied, "[i]t is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court." *Henderson v. Kibbe*, 431 U.S. 145, 154, 52 L. Ed. 2d 203, 212, 97 S. Ct. 1730, 1736 (1977).

Odom, 307 N.C. at 660-61, 300 S.E.2d at 378 (alteration in original). Both courts have continued to embrace this guiding limitation.

Historically, in conducting plain error review, our appellate courts have considered whether the error was prejudicial and whether it resulted in a miscarriage of justice. In determining whether an error was prejudicial, our courts have "examine[d] the entire record [to] determine if the . . . error had a *probable* impact on the jury's finding of guilt." *Id.* at 661, 300 S.E.2d at 379 (citations omitted) (emphasis added); *see also Bishop*, 346 N.C. at 385, 488 S.E.2d at 779-80; *Walker*, 316 N.C. at 39, 340 S.E.2d at 83. Courts have also

noted that plain error may exist when the error is "so fundamental as to amount to a miscarriage of justice," *State v. Bagley*, 321 N.C. 201, 213, 362 S.E.2d 244, 251 (1987), *cert. denied*, 485 U.S. 1036, 108 S. Ct. 1598 (1988).

We now reaffirm our holding in *Odom* and clarify how the plain error standard of review applies on appeal to unpreserved instructional or evidentiary error. For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. *See Odom*, 307 N.C. at 660, 300 S.E.2d at 378. 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." *See id.* (citations and quotation marks omitted); *see also Walker*, 316 N.C. at 39, 340 S.E.2d at 83 (stating "that absent the error the jury probably would have reached a different verdict" and concluding that although the evidentiary error affected a fundamental right, viewed in light of the entire record, the error was not plain error). Moreover, because plain error is to be "applied cautiously and only in the exceptional case," *Odom*, 307 N.C. at 660, 300 S.E.2d at 378, the error will often be one that "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings," *Odom*, 307 N.C. at 660, 300 S.E.2d at 378 (quoting *McCaskill*, 676 F.2d at 1002).

Having described the potential paths preserved and unpreserved errors can take on appeal and discussed the federal and North Carolina plain error standards of review, we turn to the present case. The State alleges that the Court of Appeals applied an incorrect standard of plain error review by examining whether the erroneous jury instruction was likely to mislead the jury. The State further contends that if the Court of Appeals had applied the correct standard, defendant would not have met his burden of showing that the erroneous jury instruction amounted to plain error.

It is uncontested that the trial court's charge on conspiracy to commit robbery with a dangerous weapon was erroneous under *State v. Gibbons*, 303 N.C. 484, 279 S.E.2d 574. Because defendant did not object at trial, we review for plain error. To establish plain error, defendant must show that the erroneous jury instruction was a fundamental error—that the error had a probable impact on the jury verdict. In its reliance on *State v. Blizzard*, 169 N.C. App. 285, 610 S.E.2d 245, the Court of Appeals applied an incorrect formulation of the plain error standard of review.

Defendant cannot meet his burden of showing that the error amounted to plain error. The trial court correctly instructed the jury on the elements of attempted robbery with a dangerous weapon. The jury convicted defendant of that offense. Therefore, the only additional element necessary to convict defendant of conspiracy to commit robbery with a dangerous weapon was that he entered into an agreement to do so. The evidence against defendant is overwhelming. The record contains testimony by multiple witnesses describing the efforts of the group, which included defendant, to kidnap, threaten, and rob Ms. Curtis. Two of those witnesses were co-conspirators. Those co-conspirators testified that defendant "knew what was going on." Defendant knew that the group was attempting to rob the homes of purported drug dealers. He knew that the group planned to use zip ties to restrain Ms. Curtis. He knew that the group planned to threaten Ms. Curtis with their firearms to force her to reveal where the money was located. He knew that they would douse her with gasoline and threaten to ignite her if that did not work. In sum, defendant knew the details of the plan, including what being "the muscle" entailed. After all, upon learning of the plan, he volunteered that he already had a gun. Through his interactions with the group, defendant conspired to commit robbery with a dangerous weapon. The evidence, including the testimony of two co-conspirators, clearly establishes that defendant and the rest of the group attempted to carry out their plan to rob Ms. Curtis over a two-day period.

In light of the overwhelming and uncontroverted evidence, defendant cannot show that, absent the error, the jury probably would have returned a different verdict. Thus, he cannot show the prejudicial effect necessary to establish that the error was a fundamental error. In addition, the error in no way seriously affects the fairness, integrity, or public reputation of judicial proceedings.

For the foregoing reasons, defendant has failed to meet his burden of demonstrating plain error. Accordingly, we reverse the decision of the Court of Appeals.

REVERSED.

VARIETY WHOLESALERS, INC. v. SALEM LOGISTICS TRAFFIC SERVICES, LLC; SALEM LOGISTICS, INC.; SALEM LOGISTICS TRANSPORT SERVICES, LLC; WINSTON TRANSPORTATION MANAGEMENT, LLC; OVERBROOK LEASING, LLC; SALEM LOGISTICS TRANSPORT FINANCE, LLC; DAVID F. ESHELMAN; AND ARK ROYAL CAPITAL, LLC

No. 269PA11

(Filed 13 April 2012)

1. Conversion— ownership of funds—genuine issue of material fact—summary judgment improper

The trial court erred in a case involving a claim of conversion arising out of a third party's possession of funds, ownership of which was disputed between the primary contracting parties, by entering summary judgment in favor of plaintiff. The record forecasted genuine issues of material fact concerning contractual intent and whether plaintiff retained ownership of the funds. Furthermore, summary judgment was improper on defendant Ark's defenses of bona fide purchaser without notice and commingling where there were genuine issues of material fact remaining. Ark's defense of lack of possession of the funds was meritless.

2. Trusts— constructive trust—no fiduciary relationship—genuine issue of material fact—summary judgment improper

The trial court erred in a case involving a claim of constructive trust arising out of a third party's possession of funds, ownership of which was disputed between the primary contracting parties, by entering summary judgment in favor of defendants. The record forecasted genuine issues of material fact with respect to the claim and both the Court of Appeals and the trial court relied on the erroneous assumption that there could be no constructive trust in the absence of a fiduciary relationship.

On discretionary review pursuant to N.C.G.S. § 7A 31 of a unanimous decision of the Court of Appeals, —— N.C. App. ——, 712 S.E.2d 361 (2012), affirming in part and reversing in part an order on summary judgment entered 19 April 2010, as amended on 12 May 2010, by Judge Howard E. Manning, Jr. in Superior Court, Vance County. Heard in the Supreme Court 10 January 2012.

Wyrick Robbins Yates & Ponton LLP, by K. Edward Greene, Tobias S. Hampson, and Paul J. Puryear, Jr., for plaintiff-appellant.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Jim W. Phillips, Jr. and Alexander Elkan, for defendant-appellee Ark Royal Capital, LLC.

Bell, Davis & Pitt, P.A., by William K. Davis and Alan M. Ruley, for North Carolina Bankers Association, amicus curiae.

HUDSON, Justice.

Here we address whether summary judgment was appropriately entered on claims of conversion and constructive trust when a third party came into possession of funds, ownership of which was disputed between the primary contracting parties. We hold that the record forecasts genuine issues of material fact with respect to both claims, and we therefore reverse and remand for further proceedings.

Background

Variety Wholesalers ("Variety") is a large retail corporation with stores in fourteen states. To support its stores, Variety maintains significant shipping and trucking operations. At times pertinent here Salem Logistics ("Salem"), now bankrupt, provided logistical services to businesses, including freight bill auditing services. Ark Royal Capital, LLC ("Ark") is an investment company that provides, among other services, asset-based loan arrangements to businesses. Asset-based loans are described here as a means for undercapitalized companies that cannot obtain traditional loans to receive a loan in exchange for a security interest in their assets, often accounts receivable.

In March 2006 Salem entered into an asset-based loan agreement with Ark. Under that agreement (hereafter "Finance Agreement") Ark provided a revolving line of credit to Salem through which Salem could pay its operating expenses. In exchange, Salem gave Ark a security interest in all its assets. The Finance Agreement capped the line of credit at the lesser of $2.2 million or 80% of Salem's "Eligible Accounts," which it defined as "valid, legally enforceable obligation[s]" that were "not subject to any claim, dispute or other defense." Under the Finance Agreement Ark required Salem to forward any funds it received and to instruct its customers to send payments directly to a lockbox account maintained by Ark at Wachovia Bank (now Wells Fargo[1]). Ark used the money that came into the lockbox account to pay itself the interest and principal on Salem's revolving

1. In December 2008 Wells Fargo acquired Wachovia; by October 2011 the names of all ongoing Wachovia entities had been changed to Wells Fargo.

line of credit, thereby making further credit available to Salem. Salem had multiple clients that paid into the lockbox account, and the funds from those multiple clients were not segregated. Ark's Chief Operating Officer, Allison Hanslik, joined Salem's Board of Directors under the loan arrangement. Hanslik and research analyst David Pearson reviewed Salem's accounts on a weekly basis before issuing borrowing certificates.

In July 2007 Variety entered into a contract (hereafter "Freight Agreement") with Salem under which Salem would provide freight bill payment and auditing services.[2] The Freight Agreement has two distinct parts. Schedule A, titled "Services Provided," describes the services that Salem would provide to Variety under that Agreement. Salem agreed to receive all of Variety's freight bills from the carriers, audit the bills, prepare a master invoice for the bills, and send the invoice to Variety weekly. Variety would then send Salem the full amount shown on the master invoice. Salem would then pay the carriers. Schedule B of the Freight Agreement, titled "Contractor Rates and Charges," describes the amounts Variety would pay to Salem for its services: $0.68 for each paper freight bill, $0.38 for each electronic freight bill, and $0.18 per small package. By letter Salem requested that Variety send the amounts on the master invoices directly to the Wachovia account, but did not inform Variety that the account was actually controlled by Ark.

Throughout the time Variety operated under the Freight Agreement, the company fielded complaints from its carriers that their payments were arriving late or not at all. Variety worked with Salem in an effort to alleviate the problem. Salem promised to do so but problems continued. Variety terminated the Freight Agreement in December 2008 and filed suit in January 2009 for recovery of approximately $888,000 it had forwarded to Salem which had not been paid to carriers. In the process Variety sought and received an order of attachment on the Wachovia account it believed belonged to Salem. In so doing Variety discovered that the account actually belonged to Ark. Variety demanded the missing funds be returned by Ark but Ark refused. Variety then amended its complaint to add Ark as a defendant.

The trial court conducted a period of discovery and depositions and received filings in support of and opposition to the parties' motions for summary judgment. After a hearing, the trial court

2. Variety and Salem also discussed and negotiated a proposal for Salem to provide some shipping services in addition to the bill auditing services; however, a draft agreement on this subject was never signed.

entered summary judgment for Variety on its claim of conversion against Ark, and for Ark on Variety's claim of constructive trust. The trial court ordered Ark to pay Variety $887,889.37, plus interest. The Court of Appeals reversed, and entered summary judgment for Ark on both issues. We now reverse and remand on both issues.

Summary Judgment

The standard of review for an order of summary judgment is firmly established in this state. We review a trial court's order granting or denying summary judgment de novo. *Builders Mut. Ins. Co. v. N. Main Constr., Ltd.*, 361 N.C. 85, 88, 637 S.E.2d 528, 530 (2006) (citation omitted). 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) (2011). "All facts asserted by the adverse party are taken as true, and their inferences must be viewed in the light most favorable to that party." *Dobson v. Harris*, 352 N.C. 77, 83, 530 S.E.2d 829, 835 (2000) (citations omitted). "The showing required for summary judgment may be accomplished by proving an essential element of the opposing party's claim does not exist, cannot be proven at trial, or would be barred by an affirmative defense . . . ." *Id.* (citation omitted).

Conversion

[1] Variety's first claim against Ark alleges conversion. This Court has stated that "[t]he tort of conversion is well 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.' " *Peed v. Burleson's, Inc.*, 244 N.C. 437, 439, 94 S.E.2d 351, 353 (1956) (citation omitted). This definition has been cited as recently as 20 March 2012 by the Court of Appeals. *Vaseleniuck Engine Dev., LLC v. Sabertooth Motorcycles, LLC*, —— N.C. App. ——, —— S.E.2d ——, 2012 WL 924875, at *2 (Mar. 20, 2012) (No. COA11-870). There are, in effect, two essential elements of a conversion claim: ownership in the plaintiff and wrongful possession or conversion by the defendant. *See Gadson v. Toney*, 69 N.C. App. 244, 246, 316 S.E.2d 320, 321-22 (1984). For Variety to maintain a conversion action against Ark, Variety must first establish that it retained ownership of the funds it sent to Salem under Schedule A of the Freight Agreement.

Before both the Court of Appeals and this Court, Variety offered a theory of bailment to show that it retained ownership of the funds

at issue, but we conclude it is unnecessary to address the bailment argument. The question is one simply of contractual intent: whether the agreement between Variety and Salem contemplated that the funds sent by Variety under Schedule A would become Salem's property or would merely pass through Salem on their way from Variety to Variety's carriers.

Variety argues that the contract's terms specifically describe a several step process in which the funds Variety sent to Salem under Schedule A would be used exclusively and immediately to pay Variety's carriers. The pertinent steps of this process as shown in Schedule A ("Services Provided") of the Freight Agreement are: "7. A master invoice id [sic] prepared once a week and submitted to Client in electronic or hard copy format (or both)[.] 8. Payment is received from client. 9. Monies are immediately distributed to carriers[.]"

The Court of Appeals interpreted the provisions of the contract to contemplate that in Step 8, Variety would pay Salem the amount on the master invoice in compensation for Salem's services, and that in Step 9, Salem would pay, out of its general funds, the bills to the carriers. *Variety Wholesalers, Inc. v. Salem Logistics Traffic Servs., LLC*, —— N.C. App. ——, ——, 712 S.E.2d 361, 365 (2011). The court based its conclusion on its interpretation of the term "payment" and the use of different terms ("payment" vs. "monies") in Steps 8 and 9. *Id.* at ——, 712 S.E.2d at 365. Specifically, the court stated that

> Black's Law Dictionary defines payment as "[t]he money or other valuable thing so delivered in satisfaction of an obligation."
>
> The use of the term "payment" is clear, so we may infer that Variety and Salem intended that the money transferred was for the satisfaction of an obligation in the form of Salem's services.
>
> The use of the term "payment" does not support an interpretation that Variety retained ownership in the funds upon transfer.

Id. at ——, 712 S.E.2d at 365 (brackets in original) (citation omitted). While this is one possible interpretation of the contract, we do not agree that this can be its only meaning as a matter of law, thus justifying summary judgment.

Instead, we see more than one possible meaning, depending on the resolution of certain disputed facts, such as those determining intent. Intent is a question of fact. Here there is conflicting evidence on the factual matters bearing on contractual intent, which is the

central inquiry in determining whether Variety retained ownership of the funds. As such, the question of contractual intent poses a genuine issue of fact material to Variety's conversion claim. As this Court has previously stated, "[w]hen an agreement is ambiguous and the intention of the parties is unclear, however, interpretation of the contract is for the jury. 'An ambiguity exists in a contract when either the meaning of words or the effect of provisions is uncertain or capable of several reasonable interpretations.' " *Schenkel & Shultz, Inc. v. Hermon F. Fox & Assocs.*, 362 N.C. 269, 273, 658 S.E.2d 918, 921 (2008) (citations omitted).

Moreover, we have stated that contracts are to be construed " 'consistently with reason and common sense.' " *Stephens Co. v. Lisk*, 240 N.C. 289, 293, 82 S.E.2d 99, 101 (1954) (citation omitted). Common sense can suggest that the contract may not have been intended to mean that Variety would pay $887,889.37 of Variety's money to Salem in compensation for its service in paying $887,889.37 of Salem's money to Variety's carriers. Rather, some evidence suggests that the contract intended that Variety fund the invoices by providing Salem with $887,889.37 that Salem was expected to "immediately distribute[ ]" among the carriers according to Schedule A, and that Salem was paid separately for its services under Schedule B. This reading of the contract is supported by language from the Freight Agreement stating that Schedule A deals expressly with "Services Provided" and Schedule B describes the "Contractor Rates and Charges."

The materials in the record provide evidence to support both of these interpretations. George Blackburn, Variety's general counsel, testified at deposition that "[o]ur understanding was . . . the funds actually belonged to either Variety or the carrier," and "the contract contemplated that all that ever happened was [the money] passed through Salem's hands." Tim Hedgepeth, Variety's transportation manager for the second half of the Salem contract, also testified that "money was *funded* to Salem" and the money sent "was to pay those invoices." On the other hand, Salem's Chief Financial Officer, Kerry Yow, testified that Salem treated the funds Variety sent as "revenue" and the payments to carriers as "costs of goods sold." When Ark had Salem conduct an audit of receivables in October 2008, Variety confirmed by letter that the amounts owed on their accounts were receivables. While this is only a small sampling of the available evidence and testimony, it reveals a conflict over the meaning of these contractual terms. Therefore, we conclude that this genuine issue of the material fact of contractual intent precludes summary judgment on the conversion claim.

In lieu of simply remanding at this point, though, we conclude that some further discussion of secondary issues is warranted. By granting summary judgment in Variety's favor on the conversion claim, the trial court implicitly addressed and rejected Ark's defenses of bona fide purchaser without notice, commingling, and lack of possession of the funds.

In its First Affirmative Defense, Ark claimed that Variety's payments "were commingled with other funds and re-advanced to Salem and Ark Royal is no longer in possession of those funds." In its Fourth Affirmative Defense, Ark claimed that it "gave value for the Variety accounts receivable and the payments on these accounts without knowledge that these accounts receivable or the funds in payment thereof were anything other than what the Salem Logistics Defendants represented them to be." Further, in its Motion for Summary Judgment, Ark argued that summary judgment in its favor was appropriate because Variety's money "was immediately commingled with other monies and was not thereafter segregated or specifically identifiable and a conversion claim cannot lie under such circumstances" and because Ark "received funds in good faith without notice of any adverse claim to such funds and gave value therefor." Thus, Ark clearly raised these defenses at the trial level, and the trial court by necessity resolved all of these defenses against Ark. For the sake of clarity, at least as to which issues remain for trial among those properly presented to this Court, we conclude the better approach is to address these secondary aspects of the conversion claim.

Bona Fide Purchaser Defense

If a jury were to decide the question of contractual intent—and thus ownership of the funds—against Variety, the conversion claim would end there. On the other hand, if the Freight Agreement is interpreted to designate Salem as a mere conduit such that the funds remained Variety's property until paid to the carriers, Variety and the trial court must then contend with Ark's defense that Ark "gave value for the Variety accounts receivable." In essence this argument, pleaded as Ark's fourth affirmative defense, is that Ark was a bona fide purchaser for value without notice that Salem may have been simply a conduit. A party who comes into possession of stolen or converted funds " 'will not be permitted thus to use [the] funds when he is fully aware of their nature, or there are circumstances to awaken suspicion and put him on inquiry,' " *Lavecchia v. N.C. Joint Stock Land Bank of Durham*, 215 N.C. 73, 74, 1 S.E.2d 119, 120 (1939)

(citations omitted); however, under the same circumstances, "a bona fide purchaser for value, without notice" receives "good title against the world." *Stricker v. Buncombe Cnty.*, 205 N.C. 536, 538, 172 S.E. 188, 189 (1934) (citation and quotation marks omitted). Though Ark denies having had any knowledge about Variety's potential possessory interest in the funds at issue, it is important to note that Ark bears the burden of proof on its affirmative defense. *See Lawing v. Jaynes*, 285 N.C. 418, 430, 206 S.E.2d 162, 170 (1974) (stating that " 'he who claims to be a *bona fide* purchaser for value without notice . . . has the burden of proving that fact' " (quoting *Whitehurst v. Abbott*, 225 N.C. 1, 7, 33 S.E.2d 129, 133 (1945))). Thus, if Ark proves it did not have notice, actual or constructive, that the funds coming into its account from Salem were actually the property of Variety, then Ark would not be held liable for conversion.[3]

Based on the record we have, evidence of actual notice is scant at best. Variety may have to pursue a constructive notice theory. While articulations of the definition of constructive notice vary in North Carolina case law, this Court has discussed the underlying concept as follows:

> Knowledge of facts which the [party] has or should have had constitutes notice of whatever an inquiry into such facts would have disclosed and is binding on the [party]. Whatever puts a person

3. Ark's brief to this Court mentioned in passing the Uniform Commercial Code as another potential defense. Variety argues, and we agree, that the trial court did not address this issue and we need not reach it. However, amicus curiae argues at some length that the UCC precludes the conversion claim here because Ark was a holder in due course. We note in response that all "holder in due course" defenses require that the holder have received the property in good faith, for value, and *without notice. See*, *e.g.*, N.C.G.S. § 25-3-302(a)(2) (2011). Thus, the analysis would be no different under the UCC—if Ark had no notice, it is immune from liability, but if it did have notice, it is not. Amicus also claims that the UCC preempts the conversion claim entirely as inconsistent with the rights and liabilities created by Article 4A, governing "Funds Transfers." *See id.* § 25-4A-102 cmt. para. 4 (2011). Though North Carolina courts have not addressed this particular issue before, on this argument, we find the Eleventh Circuit's analysis persuasive: "Article 4A is silent with regard to claims based on the theory that the beneficiary bank accepted funds when it knew or should have known that the funds were fraudulently obtained. Therefore, a provision of state law that requires a receiving or beneficiary bank to disgorge funds that it knew or should have known were obtained illegally when it accepted a wire transfer is not inconsistent with the goals or provisions of Article 4A. . . . Interpreting Article 4A in a manner that would allow a beneficiary bank to accept funds when it knows or should know that they were fraudulently obtained, would allow banks to use Article 4A as a shield for fraudulent activity. It could hardly have been the intent of the drafters to enable a party to succeed in engaging in fraudulent activity, so long as it complied with the provisions of Article 4A." *Regions Bank v. Provident Bank*, 345 F.3d 1267, 1275-76 (11th Cir. 2003).

> on inquiry amounts in law to 'notice' of such facts as an inquiry pursued with reasonable diligence and understanding would have disclosed.

N. Nat'l Life Ins. Co. v. Lacy J. Miller Mach. Co., 311 N.C. 62, 75, 316 S.E.2d 256, 264-65 (1984) (citation omitted). Further, "the question of constructive notice is generally a question for the jury . . . because the conditions are so varying under which the principle will be applied that it is impossible in most cases to declare as matter of law that there is or is not constructive notice." *Foster v. Town of Tryon*, 169 N.C. 233, 235, 169 N.C. 182, 184, 85 S.E. 211, 212 (1915). The record shows numerous conflicts in the forecast evidence regarding what Ark knew or should have known. As such, we conclude that summary judgment is not appropriate on the question of constructive notice here.

Commingling of Funds

There is one final issue that we must address before concluding our discussion of conversion. Even if the contractual issue and the notice issue are decided in Variety's favor, Ark argues that, as a matter of law, Variety cannot maintain a claim for conversion of money unless the funds in question can be specifically traced and identified. Although this Court has not explicitly so stated, the general rule is that "money may be the subject of an action for conversion only when it is capable of being identified and described." *Alderman v. Inmar Enters., Inc.*, 201 F. Supp. 2d 532, 548 (M.D.N.C. 2002) (citations omitted), *aff'd per curiam*, 58 F. App'x 47 (4th Cir. 2003). Assuming that the jury determines that the Freight Agreement creates an obligation to deliver the money in question—for otherwise, the identification question becomes immaterial—the remaining issue is whether the money can be identified or described. Ark claims that, to satisfy the identification requirement, the specific funds must have been placed in a separate, segregated account or explicitly held in escrow. In effect, Ark argues that the moment the funds were transferred into the Wachovia account and commingled with the deposits of Salem's other customers, they ceased to be identifiable and any conversion claim must fail.

"The requirement that there be earmarked money or specific money capable of identification before there can be a conversion has been complicated as a result of the evolution of our economic system." *Campbell v. Naman's Catering, Inc.*, 842 So. 2d 654, 659-60 (Ala. 2002) (citations and internal quotation marks omitted). Recognizing this reality, numerous courts around the country have adopted rules requiring the specific identification of a sum of money, rather than

identification of particular bills or coins. *See*, *e.g.*, *Moore v. Weinberg*, 383 S.C. 583, 589, 681 S.E.2d 875, 878 (2009) ("Money may be the subject of conversion when it is capable of being identified and there may be conversion of determinate sums even though the specific coins and bills are not identified." (citation omitted)); *Campbell*, 842 So. 2d at 660 ("Now, in conversion cases, the courts are not confronted so much with a particular piece of money, i.e., a coin or a bill, but with identified or segregated sources from which money has come or types of accounts into which money has been deposited." (citations and internal quotation marks omitted)).

In the context of this conversion claim, we conclude that funds transferred electronically may be sufficiently identified through evidence of the specific source, specific amount, and specific destination of the funds in question. Other courts confronting this challenge have held similarly.[4] Here Variety has provided evidence of multiple wire transfers of specific sums totaling $887,889.37 from its account to the Wachovia lockbox account. This documentation may be sufficient to meet the identifiable funds requirement and sustain a conversion claim but again, this issue is for the trier of fact to resolve.

Finally, Ark maintains that it no longer has possession of the money in question, having loaned it back to Salem and lost it when Salem went bankrupt. Ark argues that Variety cannot prove that Ark still has the money in question and therefore, cannot recover. If this

4. *See*, *e.g.*, *ADP Investor Commc'n Servs., Inc. v. In House Att'y Servs., Inc.*, 390 F. Supp. 2d 212, 224-25 (E.D.N.Y. 2005) ("ADP alleges . . . that it seeks 'a specifically identifiable sum of money . . . sent by wire transfer from [ADP's] account with JP Morgan Chase in New York to In House's bank account at California Bank & Trust c/o ILCS.' ADP also states the exact amount of the wire transfer, $277,699.89. This Court finds then that ADP properly alleges an identifiable sum of money and therefore ADP's conversion claim does not fail as a matter of law." (second and third alterations in original)); *see also Creative Trade Group, Inc. v. Int'l Trade Alliance, Inc.*, No. 08 C 2561, 2009 WL 3713345, at *9 (N.D. Ill. Nov. 4, 2009) ("For the purposes of this motion, the court assumes the wire transfer fund, which is a specific and documented amount of money ($171,388) transferred to McGrath from an outside source (Creative's account), is sufficiently identifiable to support Creative's conversion claim."); *St. Paul Travelers Cas. & Sur. Co. of Am. v. Manley*, No. 05-cv-01195-REB-BNB, 2006 WL 3019673, at *1 n.2 (D. Colo. Oct. 23, 2006) (unpublished order) ("It thus appears to be the consensus among courts that a claim of conversion is cognizable when it relates to a wire transfer of funds which are traceable to a specific bank account."); *Trey Inman & Assocs. v. Bank of Am.*, 306 Ga. App. 451, 458, 702 S.E.2d 711, 717 (2010) (holding that "$76,122.31 in funds that TIA disbursed to Brookchase Builders via wire transfer was specific and identifiable and therefore was a proper subject for the Bank's conversion claim"); *Mfrs. Hanover Trust Co. v. Chem. Bank*, 160 A.D.2d 113, 125, 559 N.Y.S.2d 704, 712 (1990) (holding funds identifiable where "[plaintiff] effected a wire transfer to [defendant] of a specific sum, $223,280.74, to be credited to a specific account"), *appeal denied by* 77 N.Y.2d 803, 568 N.Y.S.2d 15, 569 N.E.2d 874 (1991).

were the rule, Ark would be completely immunized from liability even for clear and deliberate conversion of funds, simply by the nature of the revolving line of credit. We decline to so hold. Rather, the rule cited numerous times by our Court of Appeals seems appropriate here: " ' "The essence of conversion is not the acquisition of property by the wrongdoer, but a wrongful deprivation of it to the owner . . . and in consequence it is of no importance what subsequent application was made of the converted property, or that defendant derived no benefit from the act." ' " *Mace v. Pyatt*, 203 N.C. App. 245, 256, 691 S.E.2d 81, 90 (quoting *Lake Mary Ltd. P'ship v. Johnston*, 145 N.C. App. 525, 532, 551 S.E.2d 546, 552 (citations omitted), *disc. rev. denied*, 354 N.C. 363, 557 S.E.2d 538 (2001)), *disc. rev. denied*, 364 N.C. 614, 705 S.E.2d 354 (2010).

Constructive Trust

[2] Variety's second issue here stems from its claim seeking to have the trial court impose a constructive trust on Ark. We hold that summary judgment was inappropriate on this issue as well. As we did in the discussion of conversion, here we conclude that additional discussion of constructive trust and its secondary issues is warranted, because both the Court of Appeals and the trial court relied on the erroneous assumption that there can be no constructive trust in the absence of a fiduciary relationship. Resolution of this claim on remand will require examination of the issues of notice and possible unconscientious acquisition of the funds, as well as Ark's defense of commingling raised below. We conclude that clarity is best served if we reverse summary judgment and also address what could have been an alternative basis for the summary judgment order.

> A constructive trust is a duty, or relationship, imposed by courts of equity to prevent the unjust enrichment of the holder of title to, or of an interest in, property which such holder acquired through fraud, breach of duty or some other circumstance making it inequitable for him to retain it against the claim of the beneficiary of the constructive trust.

Wilson v. Crab Orchard Dev. Co., 276 N.C. 198, 211, 171 S.E.2d 873, 882 (1970) (citations omitted). The Court of Appeals determined that, because Ark and Variety did not share a fiduciary relationship, there could be no constructive trust. *Variety Wholesalers*, —— N.C. App. at ——, 712 S.E.2d at 364. However, Variety correctly notes that a fiduciary relationship, while generally the basis for constructive trust claims, is not strictly required. In the absence of such a relationship,

Variety faces the difficult task of proving "some other circumstance making it inequitable" for Ark to possess the funds Variety paid to Salem. *Wilson*, 276 N.C. at 211, 171 S.E.2d at 882. We have also used the phrase, "any other unconscientious manner," in describing situations in which a constructive trust may be imposed without a fiduciary relationship. *See Speight v. Branch Banking & Trust Co.*, 209 N.C. 563, 566, 183 S.E. 734, 736 (1936).

It appears unlikely that Ark owed an explicit fiduciary duty to Variety. Lenders do not ordinarily owe fiduciary duties to their borrowers' customers. *See Lassiter v. Bank of N.C.*, 146 N.C. App. 264, 268, 551 S.E.2d 920, 922 (2001) (stating that " '[a] lender is only obligated to perform those duties expressly provided for in the loan agreement to which it is a party' " (citation omitted)). This makes particular sense here, when Variety admittedly did not know of the existence of Ark until after this litigation began. "For a breach of fiduciary duty to exist, there must first be a fiduciary relationship between the parties." *Dalton v. Camp*, 353 N.C. 647, 651, 548 S.E.2d 704, 707 (2001) (citations omitted).

Despite the probable lack of fiduciary duty, if Ark had actual or constructive notice that Salem did not have ownership of the funds deposited in the Wachovia account, Ark's continued acceptance of those funds could be considered unconscientious or inequitable and could thus permit the imposition of a constructive trust. As described earlier, the question of actual or constructive notice here is a genuine issue of material fact. If Ark had notice, actual or constructive, the ultimate decision whether to impose a constructive trust as an equitable remedy would rest in the discretion of the trial court. *See Kinlaw v. Harris*, 364 N.C. 528, 532, 702 S.E.2d 294, 297 (2010) (stating that "[t]rial courts have broad discretion to fashion equitable remedies"); *Sara Lee Corp. v. Carter*, 351 N.C. 27, 37, 519 S.E.2d 308, 314 (1999) (holding that the trial court properly exercised its discretion in ordering imposition of a constructive trust).

Commingling of Funds

The constructive trust issue involves a similar tracing and identification analysis as is presented in the conversion claim. Ark cites to case law involving constructive trusts and "trust pursuit" doctrine that requires tracing and identification of funds. *See*, *e.g.*, *Edgecombe Bank & Trust Co. v. Barrett*, 238 N.C. 579, 586, 78 S.E.2d 730, 736 (1953) (stating that "it is a cardinal rule of trust pursuit that the proceeds or the product of the initial property must be traced and identified

through any and all intermediate transfers into the property sought to be reached"). But, *Edgecombe* itself undercuts Ark's strict reading of this requirement, adding that "trust pursuit does not fail where *substantial* identification of the trust property or of the proceeds or product from a conversion thereof, is made." *Id.* (emphasis added) (citations omitted). This Court has also stated that

> "[w]here a trustee so mingles the trust fund or property with his own or so invests it in property together with his own that the trust fund or property cannot be separated or the amount of each ascertained, the whole mixed fund or property becomes subject to the trust except so far as the trustee may be able to distinguish or separate his own, and the burden of making the separation or distinction is on the trustee or his representative, and the rule applies as long as any portion of the fund or property with which the trust fund or property can be traced remains."

People's Nat'l Bank v. Waggoner, 185 N.C. 297, 302, 117 S.E. 6, 8 (1923) (citation omitted). Our Court of Appeals has noted the general rule that " 'the act of a trustee in mingling trust funds in a mixed bank account will not destroy their identity so as to prevent their reclamation.' " *Keith v. Wallerich*, 201 N.C. App. 550, 556, 687 S.E.2d 299, 303 (2009) (quoting *Mich. Nat'l Bank v. Flowers Mobile Homes Sales, Inc.*, 26 N.C. App. 690, 694, 217 S.E.2d 108, 111 (1975)). Similarly, we conclude here that Ark may not be immunized from imposition of a constructive trust simply because its lockbox arrangement commingled the funds.

Conclusion

Because there are genuine issues of material fact to be resolved here, we hold that summary judgment was improper. Accordingly, the trial court also erred in its award of damages to Variety. We reverse the decision of the Court of Appeals and remand this case to that court for remand to the trial court for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

IN RE P.D.R.

[365 N.C. 533 (2012)]

IN THE MATTER OF: P.D.R., L.S.R., AND J.K.R., MINOR CHILDREN

No. 283PA11

(Filed 13 April 2012)

1. Termination of Parental Rights— guardian ad litem—for parent—role at termination hearing

The issue of whether the role of a guardian *ad litem* for a parent was one of substitution rather than assistance in a termination of parental rights hearing was remanded to the Court of Appeals.

2. Termination of Parental Rights— waiver of counsel—adequate inquiry—criminal statute—not applicable

The Court of Appeals erred in a termination of parental rights (TPR) case by concluding that the trial court erred by permitting respondent to waive counsel because the trial court failed to make adequate inquiry under N.C.G.S. § 15A-1242 or to determine otherwise whether respondent waived her right to counsel knowingly and intelligently. N.C.G.S. § 15A-1242, has no application to termination of parental rights proceedings.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, —— N.C. App. ——, 713 S.E.2d 60 (2012), vacating an order entered on 28 September 2010 by Judge Elizabeth T. Trosch in District Court, Mecklenburg County, and remanding the matter to the trial court. On 25 August 2011, the Supreme Court allowed respondent's conditional petition for discretionary review as to additional issues. Heard in the Supreme Court on 10 January 2012.

Kathleen Marie Arundell for petitioner-appellant/appellee Mecklenburg County Department of Social Services, Youth and Family Services.

Richard Croutharmel for respondent-appellant/appellee mother.

Pamela Newell, Guardian ad Litem Appellate Counsel, on behalf of the minor children-appellees.

TIMMONS-GOODSON, Justice.

The parental rights of respondent-mother to her three children were terminated after a trial in which she waived her right to counsel.

The Court of Appeals concluded that the trial court abused its discretion by allowing respondent to waive counsel because the trial court failed to conduct an adequate inquiry under N.C.G.S. § 15A-1242. We hold that N.C.G.S. § 15A-1242 has no application in termination of parental rights ("TPR") proceedings. Accordingly, we reverse and remand to the Court of Appeals.

I

In October 2008 the Mecklenburg County Department of Social Services Division of Youth and Family Services ("petitioner") filed a juvenile petition asserting that respondent's three children were neglected and dependent. The trial court immediately entered a nonsecure custody order placing the children in the custody of petitioner. The following February the trial court ordered respondent to undergo a mental health evaluation to determine her capacity to proceed with the neglect and dependency petition. Respondent failed to appear for the evaluation, however, and on 30 July 2009 the trial court appointed pursuant to Rule 17 of the Rules of Civil Procedure a Guardian ad Litem ("GAL") for her. *See also* N.C.G.S. § 7B-1101.1(c) (2008) ("[T]he court may appoint a guardian ad litem for a parent if the court determines that there is a reasonable basis to believe that the parent is incompetent or has diminished capacity and cannot adequately act in his or her own interest.").

In August 2009 the trial court adjudicated the children neglected and dependent. The trial court ordered the children to remain in the custody of petitioner and directed reunification with respondent, with a concurrent goal of adoption, as the plan of care for the children. At a permanency planning hearing in September 2009, the trial court found that respondent had made no progress toward reunification. As a result the trial court ceased reunification efforts and limited the permanent plan to adoption. During the September hearing, the court also found that respondent had yet to complete a mental health evaluation.

Petitioner filed a petition on 19 November 2009 to terminate respondent's parental rights based upon, *inter alia*, dependency and neglect. A Rule 17 GAL was again appointed to respondent at the TPR hearing. As the TPR hearing began on 13 May 2010, the trial court entertained a renewed motion from respondent's counsel to withdraw in light of respondent's consistent refusal to cooperate with counsel. When asked for her opinion on the motion, respondent's GAL stated, "I would leave that to the Court." Petitioner encouraged the trial court to deny the motion because the trial court deemed

respondent incompetent to waive counsel at a prior hearing. Turning to respondent, the trial court inquired whether she understood the nature of the proceedings and her right to counsel.

> THE COURT: All right. Do you understand that because there has been a petition filed by the Department of Social Services seeking to terminate your parental rights to [P.D.R., L.S.R., and J.K.R.], you have the right to counsel? Do you understand that?
>
> [RESPONDENT]: Yes.
>
> THE COURT: All right. And do you understand that if you cannot afford to hire a lawyer you are entitled to a court-appointed lawyer; do you understand that?
>
> [RESPONDENT]: Yes, ma'am.
>
> . . . .
>
> THE COURT: Okay, do you [want] an attorney to represent you today during your trial to terminate your parental rights?
>
> [RESPONDENT]: No. I want to represent myself.

Without further inquiry, the trial court granted the motion of respondent's counsel to withdraw. Respondent, however, refused to sign a written waiver of counsel.

The TPR hearings thus began with the GAL present, but with respondent proceeding *pro se*. Two-thirds of the way through the testimony of petitioner's first witness, the trial court recessed for lunch. After lunch the GAL expressed to the trial court her concern that the trial court's competency inquiry of respondent before lunch was insufficient. The GAL explained that she did not believe respondent had "ever been explained the consequences of going pro se" or understand the trial process. The trial court then conducted a more in-depth inquiry of respondent to ensure she understood that the proceedings could result in the termination of her parental rights and that she has a right to appointed counsel. The trial court also explained that respondent could cross-examine witnesses presented by petitioner and present her case at the conclusion of petitioner's case. Satisfied that respondent was competent to waive counsel, the trial court permitted respondent to resume her case. Ultimately, the trial court entered an order in September 2010 terminating respondent's parental rights.

At the Court of Appeals respondent argued that because mental health issues rendered her incompetent, the trial court erred by allowing respondent to waive counsel and represent herself. In support of this argument, respondent noted that her incompetency led the trial court to assign her a GAL and to maintain the GAL during the TPR hearing. Respondent also argued that the trial court failed to conduct an adequate inquiry into her competency and that it was inconsistent to permit respondent to waive counsel without also dismissing the GAL.

The Court of Appeals vacated the trial court's order and ordered a new termination hearing. *In re P.D.R.*, —— N.C. App. ——, ——, ——, 713 S.E.2d 60, 61, 66 (2012). Under N.C.G.S. § 15A-1242, the trial court in criminal proceedings must conduct a thorough inquiry and satisfy itself that the defendant meets certain criteria before permitting the defendant to waive counsel. Citing that statute, the Court of Appeals held that the trial court here erred by permitting respondent to waive counsel because the trial court failed to comply with section 15A-1242 or to determine otherwise whether respondent waived her right to counsel knowingly and intelligently. *Id.* at ——, 713 S.E.2d at 65-66. The Court of Appeals also emphasized that the trial court failed to determine respondent's competency to represent herself. *Id.* at ——, 713 S.E.2d at 66-67. For these reasons the Court of Appeals vacated the trial court's order terminating respondent's parental rights and remanded the matter for a new termination hearing. *Id.* at ——, 713 S.E.2d at 67-68.

II

The parties present two issues on appeal: (1) whether the role of a GAL appointed for a parent in termination proceedings is one of assistance or substitution, and (2) whether the trial court erred by importing the requirements of N.C.G.S. § 15A-1242, a criminal statute, into TPR proceedings.

[1] On the first issue, both petitioner and respondent argue that the role of a GAL is one of substitution rather than assistance. They thus contend that the trial court was required to obtain approval of the GAL before permitting respondent to waive counsel. The parties disagree, however, whether the GAL consented to the waiver of counsel. Because both parties argued before the Court of Appeals that the decision to waive counsel fell to respondent, the Court of Appeals did not directly address the role of respondent's GAL. We remand this matter for the

Court of Appeals, after full briefing, to decide whether the GAL's role here is one of assistance or substitution.

[2] Turning to the second issue, we consider the applicability of N.C.G.S. § 15A-1242 to TPR proceedings. Section 15A-1242, titled "Defendant's election to represent himself at trial," provides:

> A defendant may be permitted at his election to proceed in the trial of his case without the assistance of counsel only after the trial judge makes thorough inquiry and is satisfied that the defendant:
>
> (1) Has been clearly advised of his right to the assistance of counsel, including his right to the assignment of counsel when he is so entitled;
>
> (2) Understands and appreciates the consequences of this decision; and
>
> (3) Comprehends the nature of the charges and proceedings and the range of permissible punishments.

N.C.G.S. § 15A-1242 (2011). Applying section 15A-1242, the Court of Appeals evaluated the trial court's inquiry of respondent and its decision to permit respondent to waive counsel. Ultimately, the Court of Appeals concluded that the trial court did not comply with section 15A-1242. Respondent contends that a section 15A-1242 inquiry of a parent in TPR proceedings is proper only if the parent is competent and any appointed GAL is dismissed. If a parent is incompetent and represented by a GAL, respondent asserts the decision to waive counsel is for the GAL. Petitioner similarly contends that any inquiry of respondent was "superfluous" because the decision whether to waive counsel falls upon the GAL.

Whether section 15A-1242 applies to parents seeking to waive counsel in TPR proceedings is an issue of statutory interpretation, which we review de novo. *See In re Ernst & Young, LLP*, 363 N.C. 612, 616, 684 S.E.2d 151, 154 (2009) ("Questions of statutory interpretation are ultimately questions of law . . . and are reviewed de novo."). When interpreting a statute the paramount objective of the courts " 'is to ascertain the intent of the legislature and to carry out such intention to the fullest extent.' " *Id.* (citations omitted). The first step in determining legislative intent is to "look . . . to the language of the statute itself." *Fowler v. Valencourt*, 334 N.C. 345, 348, 435 S.E.2d 530, 532 (1993) (citations omitted). "If the language used is clear and unam-

biguous, the Court . . . must apply the statute to give effect to the plain and definite meaning of the language." *Id.* (citations omitted).

The language of N.C.G.S. § 15A-1242 unambiguously indicates that the provisions of the statute apply in the criminal context and not in TPR proceedings. While section 15A-1242 specifically states that a "defendant" can waive counsel, a parent in termination proceedings is referred to as "respondent," not "defendant." In addition, the statute makes no mention of parents or termination proceedings. We also note that the legislature placed section 15A-1242 in N.C.G.S. Chapter 15A, which is titled "Criminal Procedure Act." If the legislature had intended for the standards articulated in section 15A-1242 to apply in the TPR context, the legislature could have included such language in Article 11 ("Termination of Parental Rights") of Chapter 7B ("Juvenile Code").

III

For the above reasons, we hold that section 15A-1242 has no application to termination of parental rights proceedings. Accordingly, we reverse the Court of Appeals on this issue. We remand this case to the Court of Appeals to decide, after full briefing by the parties, whether the role of the GAL here is one of assistance or substitution.

REVERSED AND REMANDED.

STATE OF NORTH CAROLINA v. ROBERT LEE EARL JOE

No. 333PA11

(Filed 13 April 2012)

Criminal Law— dismissal—by motion of the court—no authority

The trial court had no authority to enter an order dismissing a criminal prosecution on its own motion. The case was remanded for consideration of the State's argument concerning a motion to suppress.

On discretionary review pursuant to N.C.G.S. § 7A 31 of a unanimous decision of the Court of Appeals, —— N.C. App. ——, 711 S.E.2d 842 (2012), affirming an order dismissing all charges against defendant

entered on 19 May 2010 by Judge Patrice A. Hinnant in Superior Court, Forsyth County. Heard in the Supreme Court on 12 March 2012.

Roy Cooper, Attorney General, by Derrick C. Mertz, Assistant Attorney General, for the State-appellant.

Ann B. Petersen for defendant-appellee.

PER CURIAM.

The State of North Carolina seeks review of the unanimous Court of Appeals decision affirming the trial court's dismissal of all charges against defendant. Defendant was charged with resisting a public officer, felony possession of cocaine with intent to sell or deliver, and attaining habitual felon status. Defendant filed both a motion to dismiss the resisting charge and a motion to suppress all evidence seized during the search incident to arrest. At a pretrial evidentiary hearing on the motions, the trial court granted both of defendant's motions, thus dismissing the charge of resisting a public officer and suppressing all evidence seized. Immediately thereafter, the State announced to the trial court that it "would be unable to proceed with the case in chief" on the remaining charges. As a result, the other charges were dismissed. The State appealed. The Court of Appeals affirmed the trial court, reasoning that the prosecutor's statements to the trial court amounted to a dismissal in open court, under N.C.G.S. § 15A-931. *State v. Joe*, ___ N.C. App. ___, ___, 711 S.E.2d 842, 848 (2011).

A trial court may grant a defendant's motion to dismiss under N.C.G.S §§ 15A-954 or 15A-1227, or the State may enter "an oral dismissal in open court" pursuant to N.C.G.S. § 15A-931. Although we do not agree with the Court of Appeals' holding that the prosecutor's statements amounted to a dismissal in open court, we also conclude that the trial court had no authority to enter an order dismissing the case on its own motion.

Accordingly, we vacate the decision of the Court of Appeals to the extent it may be read as affirming the trial court's dismissal of charges on its own motion. Therefore, we remand to the Court of Appeals for consideration of the State's argument pertaining to the motion to suppress. As to all other issues, we hold that discretionary review was improvidently allowed.

VACATED IN PART AND REMANDED; DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED IN PART.

STATE OF NORTH CAROLINA	)	
	)	
v.	)	ORDER
	)	
CHAD JARRETT BARROW	)	

No. 505A11

ORDER

The State's Petition for Writ of Supersedeas dated 21 November 2011 is allowed. The State's Petition for Discretionary Review dated 21 November 2011 is allowed. Defendant's Petition for Discretionary Review as to Additional Issues filed 5 December 2011 is allowed as to Defendant's Issue I only.

By order of the Court in Conference, this 26th day of January, 2012.

s/Jackson, J.
For the Court

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

26 JANUARY 2012

003P12	Azlea Hubbard v. Eastern Savings Bank; FSB Mortgage America Bankers, L.L.C.; Terrelles Martinez Epps, aka Terry Epps; Custom Title and Escrow, Inc.; and Substitute Trustee Services, Inc., in their Capacity as Substitute Trustee	1. Plt's *Pro Se* Motion for Temporary Stay (COAP11-1070) 2. Plt's *Pro Se* Petition for *Writ of Supersedeas*	1. Dismissed **01/06/12** 2. Dismissed **01/06/12**
004P12	Galen W. Seidner, Jr., and wife Kim A. Seidner v. Town of Oak Island, a North Carolina Municipal Corporation and Body Politic	1. Def's NOA Based Upon a Constitutional Question (COA11-361) 2. Def's PDR Under N.C.G.S. § 7A-31 3. Def's Motion for Notice of Withdrawal of NOA and PDR	1.—— 2.—— 3. Allowed
006P12	George Harrington and wife, Joann Harrington v. Buddy Gerald	1. Plts' *Pro Se* PWC to Review Decision of COA (COA07-1070) 2. Def's Motion for Costs and Attorney's Fees	1. Denied 2. Denied
007P12	State v. Brandon Jason Brown	1. State's Motion for Temporary Stay (COA11-709) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **01/09/12** 2. 3.
008P12	State v. Ricky Clyde Prestwood	1. Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA11-340) 2. Def's *Pro Se* Motion to Appoint Counsel	1. Denied 2. Dismissed as Moot
022P12	State v. Cranston L. Burns	Def's *Pro Se* Petition for *Writ of Habeas Corpus*	Denied **01/13/12**

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

26 JANUARY 2012

024P12	Dewey D. Mehaffey, Employee v. Burger King, Employer, Liberty Mutual Group, Carrier	1. Plt's Motion for Temporary Stay (COA10-1421) 2. Plt's Petition for *Writ of Supersedeas* 3. Plt's PDR Under N.C.G.S. § 7A-31	l. Allowed **01/17/2012** 2. 3.
031P11-3	State v. Julius Kevin Edwards	Def's *Pro Se* Motion for Appeal (COAP11-307)	Dismissed
034P12	Terry Wells, Employee v. Coastal Cardiology Associates, Employer, Selective Insurance Company, Carrier	1. Defs' Motion for Temporary Stay (COA11-648) 2. Defs' Petition for *Writ of Supersedeas* 3. Defs' PDR Under N.C.G.S. § 7A-31	1. Allowed **01/25/12** 2. 3.
035P12	Connie Chandler, Employee, by her Guardian *ad Litem*, Celeste M. Harris v. Atlantic Scrap & Processing, Employer and Liberty Mutual Insurance Company, Carrier	1. Defs' Motion for Temporary Stay (COA11-618) 2. Defs' Petition for *Writ of Supersedeas* 3. Defs' PDR Under N.C.G.S. § 7A-31	1. Allowed **01/25/12** 2. 3.
042P04-6	State v. Larry McLeod Pulley	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (P11-204)	Denied
112P11	Speedway Motorsports International Ltd. v. Bronwen Energy Trading, Ltd., Bronwen Energy Trading UK, Ltd., Dr. Patrick Denyefa Ndiomu, BNP Pariabas (Suisse) SA, BNP Paribas S.A., Swift Aviation Group, Inc., Swift Air, LLC, Swift Aviation Group, LLC, and Swift Transportation Co., Inc.	Plt's PDR Under N.C.G.S. § 7A-31 (COA09-1451)	Denied

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

26 JANUARY 2012

113P11	Speedway Motorsports International Ltd. v. Bronwen Energy Trading, Ltd., Bronwen Energy Trading UK, Ltd., Dr. Patrick Denyefa Ndiomu, BNP Pariabas (Suisse) SA, BNP Paribas S.A., Swift Aviation Group, Inc., Swift Air, LLC, Swift Aviation Group, LLC, and Swift Transportation Co., Inc.	1. Def's (BNP Paribas S.A.) PDR Under N.C.G.S. § 7A-31 (COA09-558) 2. Plt's Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 2. Dismissed as Moot
152P11-2	State v. Keith Leonardo Shropshire	1. Def's *Pro Se* PWC to Review Order of COA (COAP11-958) 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
157P11	State v. Brian Keith Boozer and Delshaun Darron Covington	Def's (Covington) PDR Under N.C.G.S. § 7A-31 (COA10-1018)	Denied
175P11	State v. Matthew Lee Beckelheimer	1. State's Motion for Temporary Stay (COA10-203) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **05/09/11** 2. Allowed 3. Allowed
216PA11	In the Matter of District Court Administrative Order	Appellee's Motion to Dismiss	Denied **Parker, C.J., Martin, J., and Timmons-Goodson, J., Recused**
222P04-4	State v. Salramon Gonzales aka Alex Ramirez	Def's *Pro Se* Motion for PDR (COAP09-65)	Dismissed

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

26 JANUARY 2012

229P06-5	State v. Robert Wayne Smith	1. Def's *Pro Se* Motion for PDR (COAP11-450) 2. Def's *Pro Se* Motion to Proceed *In Forma* 3. Def's *Pro Se* Motion to Appoint Counsel	1. Dismissed 2. Allowed 3. Dismissed as Moot
330P11	Delhaize America, Inc. v. David W. Hoyle, Secretary of Revenue of the State of North Carolina	1. Plt's PDR Prior to Determination of COA (COA11-868) 2. Plt's Motion for Admission of Joseph P. Exposito *Pro Hac Vice* 3. Plt's Motion for Admission of Richard L. Wyatt *Pro Hac Vice* 4. Council on State Taxation's Motion for Leave to File *Amicus* Brief 5. Def's Conditional PDR Prior to Determination of COA 6. Def's Motion to Strike (Council on State Taxation) 7. N.C. Chamber of Commerce and N.C. Retail Merchants Assoc.'s Motion to Leave to File *Amicus* Brief 8. Def's Motion to Strike (N.C. Chamber of Commerce and N.C. Retail Merchants Assoc.) 9. Plt's Motion to Amend PDR	1. Denied 2. Allowed 3. Allowed 4. Dismissed as Moot 5. Dismissed as Moot 6. Dismissed as Moot 7. Dismissed as Moot 8. Dismissed as Moot 9. Allowed
344P11	State v. Kevin Burnette Johnson	1. Def's *Pro Se* NOA Based Upon a Constitutional Question (COA11-56) 2. Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 3. Def's PDR Under N.C.G.S. § 7A-31	1. Dismissed *ex Mero Motu* 2. Dismissed 3. Denied
356P11	State v. Jayson Collins Phillpott	Def's PDR Under N.C.G.S. § 7A-31 (COA10-838)	Denied
358P11	In the Matter of L.N.H. and L.M.H.	1. Respondent-Father's PDR Under N.C.G.S. § 7A-31 (COA10-1619) 2. Respondent-Mother's PDR Under N.C.G.S. § 7A-31	1. Denied 2. Denied

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

26 JANUARY 2012

361A11	State v. Michael Everett Smith	1. Def's NOA Based Upon a Constitutional Question (COA10-1386) 2. State's Motion to Dismiss Appeal 3. State's Motion to Withdraw as Counsel and to Substitute Counsel	1. —— 2. Allowed 3. Allowed
366P11	Donald Ray Strickland, Administrator of the Estate of Peyton Brooks Strickland v. The University of North Carolina at Wilmington and The University of North Carolina at Wilmington Police Department	Def's (UNCW) PDR Under N.C.G.S. § 7A-31 (COA10-1589)	Denied
373P11	Tamida Wynn, Employee v. United Health Services / Two Rivers Health-Trent Campus, Employer and The Phoenix Insurance Company, Carrier	1. Defs' Motion for Temporary Stay (COA10-991) 2. Defs' Petition for *Writ of Supersedeas* 3. Defs' PDR Under N.C.G.S. § 7A-31	1. Allowed **09/02/11**; Dissolved the Stay **01/26/12** 2. Denied 3. Denied **Hudson, J., Recused**
380P11	State v. Nicholas Brady Heien	1. State's Motion for Temporary Stay (COA11-52) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR	1. Allowed **09/06/11** 2. Allowed 3. Allowed
391P11	Andrew S. Khomyak, by and through his Guardian *ad Litem*, Carolyn J. Khomyak, and Carolyn J. Khomyak, Individually v. James M. Meek, M.D., Novant Medical Group, Inc. d/b/a Carmel Obstetrics and Gynecology	Plts' PDR Under N.C.G.S. § 7A-31 (COA10-1597)	Denied

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

26 JANUARY 2012

397P11	State v. Andrew Jackson Oates	1. State's Motion to Temporary Stay (COA10-725) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31 4. Def's Motion to Deem Response Timely Filed	1. Allowed **09/16/11** 2. Allowed 3. Allowed 4. Dismissed as Moot
407P11	State v. Albert George Khouri, Jr.	Def's PDR Under N.C.G.S. § 7A-31 (COA10-1030)	Denied
410P11	Countrywide Home Loans Servicing, LP and Substitute Trustee Services, Inc., or its Successor in Interest, Solely in its Capacity as Substitute Trustee Under that Certain Deed of Trust Recorded in Book 2283, Page 389 of the Pitt County Registry v. States Resources Corp., Waslaw, LLC, Solely in its Capacity as Substitute Trustee of the Certain Deed of Trust Recorded in Book 2060, Page 24 of the Pitt County Registry	1. Plt's (Countrywide) NOA Based Upon a Constitutional Question (COA10-1348) 2. Plt's (Countrywide) PDR Under N.C.G.S. § 7A-31 3. Def's (State Resources Corp.) Motion to Dismiss Appeal 4. Def's (States Resources Corp.) Conditional PDR Under N.C.G.S. § 7A-31	1. —— 2. Denied 3. Allowed 4. Dismissed as Moot
417P11	Charles Alonzo Tunstall-Bey v. Frank W. Balance, Jr., et al.	Petitioner's *Pro Se* Motion for Reconsideration (COAP11-237)	Denied
444P11	In the Matter of: B.E., C.C., L.C.	Respondent-Mother's PDR Under N.C.G.S. § 7A-31 (COA11-140)	Denied
455P11	State v. Paul Evan Seelig	1. Def's *Pro Se* PWC to Review Order of the COA (COAP11-761) 2. Def's *Pro Se* Motion to Appoint Counsel	1. Dismissed 2. Dismissed as Moot
463P11	State v. Jordan Glenn Peterson	Def's PDR Under N.C.G.S. § 7A-31 (COA11-20)	Denied

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

26 JANUARY 2012

472A11	State v. Timothy Alfred Sweat	State's Motion to Have Service Deemed Timely (COA11-57)	Allowed
475P11	Jody Adams v. Edwin M. Hardy	Plt's *Pro Se* PWC to Review Order of COA (COA11-786)	Denied
478P11	State v. Kevin Kenard Simmons	1. Def's NOA Based Upon a Constitutional Question (COA10-1534) 2. Def's PDR Under N.C.G.S. § 7A-31	1. Dismissed *ex Mero Motu* 2. Denied
479P11	State v. Charles O'Brien Teague	1. Def's NOA Based Upon a Constitutional Question (COA11-39) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. —— 2. Denied 3. Allowed
490P11	State v. Larrington Alando Wilson	Def's PDR Under N.C.G.S. § 7A-31 (COA11-137)	Denied
491P11	State v. Thomas Lamonte Jackson	1. Def's NOA Based Upon a Constitutional Question (COA10-1135) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. —— 2. Denied 3. Allowed
492P11	In re: Release of the Silk Plant Forest Citizen Review Committee's Report and Appendices, City of Winston-Salem, NC v. Michael N. Barker, Richard E. Best, Robert G. Cozart, John Grismer, Bryan L. Macy, Michael C. Rowe, Michael L. Sharpe, Michael Poe, Randy Patterson, Randy N. Weavil, Lonnie M. Maines, Mary McNaught, et al.	1. Petitioner's (City of Winston-Salem) PDR Under N.C.G.S. § 7A-31 (COA10-1576) 2. N.C. Press Association and N.C. Association of Broadcasters' Motion for Leave to File *Amicus* Brief	1. Denied 2. Dismissed as Moot
493P11	Learning Center/Ogden School, Inc., d/b/a The Learning Center Charter School v. Cherokee County Board of Education, d/b/a Cherokee County Schools	1. Def's PDR Prior to Determination by the COA (COA11-1270) 2. Plt's PDR Prior to Determination by the COA 3. Plt's Motion to Consolidate Related Appeals 4. Defendant's Motion to Consolidate Related Appeals	1. Denied 2. Denied 3. Dismissed as Moot 4. Dismissed as Moot

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

26 JANUARY 2012

494P11	Union Academy, Metrolina Regional Scholars Academy, Socrates Academy Charter School, Charlotte Secondary Charter School and Queens Grant Charter School v. Union County Public Schools	1. Plts' PDR Prior to Determination by the COA (COA11-1300) 2. Plts' Motion to Consolidate Related Appeals	1. Denied 2. Dismissed as Moot
496P11	George L. Petty and Steven L. Petty v. City of Kannapolis and Investors Title Insurance Co.	1. Plts' *Pro Se* NOA Based Upon a Constitutional Question (COA11-322) 2. Plts' *Pro Se* PDR Under N.C.G.S. § 7A-31 3. Def's (City of Kannapolis) Motion to Dismiss Appeal 4. Def's (City of Kannapolis) Conditional PDR Under N.C.G.S. § 7A-31	1. —— 2. Denied 3. Allowed 4. Dismissed as Moot
501P11	State v. Derald Dean Hafner	Def's *Pro Se* Motion for Petition for *Writ* of Error *Coram Vobis*	Dismissed
502P11	State v. Reynarldo Rafael Rivera	Def's PDR Under N.C.G.S. § 7A-31 (COA11-268)	Denied
505A11	State v. Chad Jarrett Barrow	1. State's Motion for Temporary Stay (COA10-978) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31 4. Def's NOA Based Upon a Dissent 5. Def's PDR as to Additional Issues	1. Allowed **11/21/11** 2. See Special Order 3. See Special Order 4. —— 5. See Special Order
509A11	State v. Roshun Kenté Pittman	Def's NOA Based Upon a Constitutional Question (COA11-485)	Dismissed *ex Mero Motu*
510P11	State v. Tyson Javon LaSalle	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA11-275)	Denied

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

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511P11	Portfolio Associates, LLC v. Richard E. Freeman Richard E. Freeman, on Behalf of Himself and All Others Similarly Situated, Counterclaimant v. Portfolio Recovery Associates, LLC, Defendant to Counterclaim	1. Def. and Counterclaimant's PDR Under N.C.G.S. § 7A-31 (COA11-220) 2. Motion to Admit Christopher W. Madel, Jennifer M. Robbins, and Nicole S. Frank, *Pro Hac Vice*	1. Denied 2. Dismissed as Moot
512P11	State v. Derrick Eugene Smith	1. Def's NOA Based Upon a Constitutional Question (COA11-216) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. —— 2. Denied 3. Allowed
513P11	State v. Avery Forney	Def's PDR Under N.C.G.S. § 7A-31 (COA11-352)	Denied
515P11	State v. Kevin E. Hayward	State's PWC to Review Order of COA (COAP11-913)	Denied
522A11	Walter Sutton Baysden v. State of North Carolina	1. State's Motion for Temporary Stay (COA11-395) 2. State's Petition for *Writ of Supersedeas* 3. State's NOA Based Upon a Dissent 4. Plt's NOA Based Upon a Constitutional Question 5. Plt's PDR Under N.C.G.S. § 7A-31	1. Allowed **12/02/11** 2. Allowed **12/02/11** 3. —— 4. Dismissed *ex Mero Motu* 5. Allowed
524P11	State v. Rodney Lee Moore	1. Def's NOA Based Upon a Constitutional Question (COA11-267) 2. Def's PDR Under N.C.G.S. § 7A-31	1. Dismissed *ex Mero Motu* 2. Allowed
527P11	State v. Julius Vongay Jordan	Def's *Pro Se* Motion for NOA	Dismissed
528P11	State v. Charles Anthony Williams	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA11-328)	Denied

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529P11	State v. Felipe A. Rico	1. Def's *Pro Se* PDR (COAP10-363) 2. Def's *Pro Se* Motion for Petition for Leave to Amend 3. Def's *Pro Se* Petition for *Writ of Habeas Corpus*	1. Denied **12/22/11** 2. Allowed **12/22/11** 3. Denied **12/22/11**
530P11	State v. Gary Lane Cole	Def's PDR Under N.C.G.S. § 7A-31 (COA11-323)	Denied
534P11	State v. Charles Clark	Def's *Pro Se* Motion for NOA	Dismissed *ex Mero Motu*
535P11	State v. Angela Chanelle Leftdwrige	1. Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA11-152) 2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis*	1. Denied 2. Allowed
538P11	State v. Joshua K. Caudill	Def's PWC to Review Decision of COA (COA10-1466)	Dismissed with Leave to File a PWC with the COA
540P11	State v. Bradley Emerson McDonald	Def's PDR Under N.C.G.S. § 7A-31 (COA11-0008)	Denied
541P11	Anita Thompson, Employee v. Fedex Ground/RPS, Inc., Employer; Crawford & Company, Third-Party Administrator	Plt's PDR Under N.C.G.S. § 7A-31 (COA11-448)	Denied
542P11	Jeffrey Harliss Freeman v. N.C. Department of Corrections; Alvin Keller, Jr., in his Capacity as Secretary of Dept. of Corr.; and Faye Daniels, in her Capacity as Administrator of Pamlico Correctional Institution	Petitioner's *Pro Se* Petition for *Writ of Habeas Corpus* (COAP11-937)	Denied **01/04/12**

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544P11	Associate Behavioral Services, Inc. and Gregory Moore v. Shirley Smith, Jeanette Smith, and Life Changing Behavioral Services, LLC	Plts' *Pro Se* Motion for NOA (COA11-1187)	Dismissed *ex Mero Motu*
549P11	State v. Harish Purushottamdas Patel	Def's PDR Under N.C.G.S. § 7A-31 (COA10-1564)	Denied
553P11	State v. Marco Antonio Rivera-Ocana	Def's PDR Under N.C.G.S. § 7A-31 (COA11-583)	Denied
555P11	State v. Gregory Mark Brown	1. State's Motion for Temporary Stay (COA11-659) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **12/22/11**; Dissolved the Stay **01/26/12** 2. Denied 3. Denied
556A90-5	State v. Blanche Kiser Taylor Moore	Def's PWC to Review Order of Superior Court of Forsyth County	Denied
1556P11	State v. Gloria Hughes Estes	Def's PDR Under N.C.G.S. § 7A-31 (COA11-408)	Denied
557P11	State v. Paul Jason Cannon	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA11-327)	Denied

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001P12	Jerry Grimsley v. Government Employees Ins. Co.	Plaintiff-Appellant's PDR Under N.C.G.S. § 7A-31 (COA11-835)	Denied
05P12	Hoke County Board of Education, et al., Plaintiffs, and Asheville City Board of Education, et al., Plaintiff-Intervenors, v. State of N.C.; State Board of Education, Defendants	1. State of N.C.'s PDR Prior to Determination of COA (COA11-1545) 2. Plts' (Hoke County Board of Education, et al.) and Plaintiff-Intervenor's (Charlotte-Mecklenburg Board of Education) PDR Prior to Determination of COA	1. Denied 2. Denied
008PA11	State v. Chris Alan Jones	State's Motion to Amend Record on Appeal	Allowed per Special Order
009P12	State v. Richard Connell Williams	Def's *Pro Se* PWC to Review the Order of COA (COAP11-797)	Dismissed
011P12	State v. Ricky Lemont Corbitt	1. Def's NOA Based Upon a Constitutional Question (COA11-542) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. —— 2. Denied 3. Allowed
012P12	State v. Reginald Ross	1. Def's NOA Based Upon a Constitutional Question (COA11-238) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. —— 2. Denied 3. Allowed
014P12	State v. Jarrell Damont Wilson	Def's PDR Under N.C.G.S. § 7A-31 (COA11-794)	Denied
015P12	State v. Darrell Maurice Hicks	Def's PDR Under N.C.G.S. § 7A-31 (COA11-295)	Denied
016P12	State v. William Thomas Sprouse	Defs' PDR Under N.C.G.S. § 7A-31 (COA11-518)	Denied **Jackson, J., Recused**
017P12	State v. Billy Ray Keel	Def's PDR Under N.C.G.S. § 7A-31 (COA11-624)	Denied
018A12	The N.C. State Bar v. Pamela A. Hunter, Attorney	Def's NOA Based Upon a Constitutional Question (COA11-221)	Dismissed *ex Mero Motu*
020P12	State v. Michael Anthony Grant	Def's *Pro Se* Motion for NOA Based Upon Constitutional Questions (COA10-261)	Dismissed *ex Mero Motu*
021P12	State v. Carlos Antonio Keels	1. Def's PDR Under N.C.G.S. § 7A-31 (COA11-350) 2. State's Motion to Deny Def's PDR	1. Denied 2. Dismissed as Moot

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026P12	State v. Anthony Junior Barnhill	Def's *Pro Se* Motion for PDR Under N.C.G.S. § 7A-31 (COAP11-1056)	Dismissed **Jackson, J., Recused**
029P12	State v. Brian Darnell Quick	Def's *Pro Se* Motion for NOA (COAP11-996)	Dismissed
030P12	State v. Stewart Roger Staton	Def's *Pro Se* Motion for Petition for *Writ of Error Coram Nobis* (COAP05-1142)	Dismissed
032A12	Joan F. Trivette and Terry Trivette, Husband and Wife v. Peter Edward Yount	1. Def's NOA Based Upon a Dissent (COA11-446) 2. Def's PDR as to Additional Issues	1. —— 2. Allowed
033P12	Mark W. White v. Robert J. Trew	Def's PDR Under N.C.G.S. § 7A-31 (COA11-337)	Allowed
036P12	State v. Angel Luis Irizar Richardson	Def's PDR Under N.C.G.S. § 7A-31 (COA11-285)	Denied
037P12	State v. Shannon Elizabeth Crawley	Def's PDR Under N.C.G.S. § 7A-31 (COA11-93)	Denied
038P12	State v. Wilfredo Luis Perez-Roman	Def's PDR Under N.C.G.S. § 7A-31 (COA11-545)	Denied
041P11-2	State v. Vernon Russell Kirk	Def's *Pro Se* Petition for *Writ of Mandamus*	Dismissed **Jackson, J., Recused**
040P12	State v. Telemanchus Monté Bess	Def's *Pro Se* PWC to Review Order of COA (COAP11-926)	Dismissed
042P12	State v. Keenan Montrell Watkins	1. State's Motion for Temporary Stay (COA11-770) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **02/01/12**; Dissolved the Stay **03/08/12** 2. Denied 3. Denied
043P12	State v. Curtis Lee Thomas	Def's PDR Under N.C.G.S. § 7A-31 (COA11-819)	Denied
045A12	State v. Aadil Shahid Khan	1. State's Motion for Temporary Stay (COA11-368) 2. State's Petition for *Writ of Supersedeas*	1. Allowed **02/03/12** 2.
047P12	State v. Michael Louis Frazier	1. Def's *Pro Se* NOA Based Upon a Constitutional Question (COA11-653) 2. Def's *Pro Se* PDR Under N.C.G.S. § 7A-31	1. Dismissed *ex Mero Motu* 2. Denied

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048P12	State v. Kelly Shawn Hogan	1. State's Motion for Temporary Stay (COA11-580) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **02/06/12** 2. 3.
049P12	State v. John Donald Matthews	1. State's Motion for Temporary Stay (COA11-356) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **02/06/12** 2. 3.
050P12	Ovarias Verdad Criego-El, Plaintiff (*In Propria Persona)* v. North Carolina Court of Appeals, Chief Judge and Judge Associates	Plt's *Pro Se* Petition for *Writ of Mandamus* (COAP11-777)	Denied **02/10/12**
052P12	State v. Derrick Omega Young	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA11-488)	Denied
056P12	State v. Kareem Abdullah Kirk	Def's *Pro Se* Petition for *Writ of Mandamus* (COA11-1289)	Denied **02/27/12**
057P12	State v. Ronald Princegerald Cox	1. State's Motion for Temporary Stay (COA11-609) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **02/17/12** 2. 3.
062P10-2	Cleo Edward Land, Sr., and Raymond Alan Land, on his own Behalf and Derivatively on Behalf of Eddie Land Masonry Contractor, Inc. v. Cleo Edward Land, Jr., Nancy K. Land, and Eddie Land Masonry Contractor, Inc.	1. Defs' Motion for Temporary Stay (COAP11-445) 2. Defs' Petition for *Writ of Supersedeas* 3. Plts' Motion to Dissolve Temporary Stay	1. Allowed **06/29/11** 2. 3. Denied **03/08/12**
066A12	State v. Marcus Devan Hunter	Def's *Pro Se* NOA Based Upon a Constitutional Question (COA10-444)	Dismissed *ex Mero Motu* **Jackson, J., Recused**
073P12	State v. Monolito Antwan Finney	Def's *Pro Se* Petition for *Writ of Habeas Corpus*	Denied **02/23/12**

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076P12	State v. Samuel Lee Stewart, Jr.	Def's *Pro Se* Motion for PDR	Dismissed
078A12	State v. Jonathan Lynn Burrow	1. State's Motion for Temporary Stay (COA11-773) 2. State's Petition for *Writ of Supersedeas*	1. Allowed **02/24/12** 2.
079P12	Joseph Richard Garner v. Alvin W. Keller, Jr., Secretary of Corrections	Petitioner's *Pro Se* Petition for *Writ of Habeas Corpus*	Denied **02/24/12**
080P12	State v. Anthony Hardesty	1. Def's *Pro Se* PWC to Review Order of COA (COAP12-41) 2. Def's *Pro Se* Motion to Appoint Counsel	1. Dismissed 2. Dismissed as Moot
081P12	State v. William Latham Reynolds	1. State's Motion for Temporary Stay (COA11-536) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **02/27/12** 2. 3.
082P12	In the Matter of: Robert Dale Hutchinson	1. State's Motion for Temporary Stay (COA11-757) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Denied **02/28/12** 2. 3.
161P07-3	State v. Milton E. Lancaster	Def's *Pro Se* Motion for PDR (COAP11-1085)	Denied **Jackson, J., Recused**
161P11	State v. Ralph Edward Gray	1. State's Motion for Temporary Stay (COA10-307) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **04/25/11**; Dissolved the Stay **03/08/12** 2. Denied 3. Denied
177P11	In the Matter of the Appeal of: Marathon Holdings, LLC	Taxpayer's PDR Under N.C.G.S. § 7A-31 (COA10-1275)	Denied **Hudson, J., Recused**

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208P11	Sharon Thomas v. State of North Carolina, North Carolina Central University, Charlie Nelms, Raymond C. Pierce, David A. Green, Letitia Melvin, Andria Knight, Vanessa Gregory, Audrey Crawford-Turner, and Laurie Charest	1. Plt's *Pro Se* Motion for NOA (COA11-404) 2. Plt's *Pro Se* PWC to Review Order of COA	1. Dismissed 2. Denied **Martin, J., Recused**
209P11	State v. Joshua Newton Clark	Def's PDR Under N.C.G.S. § 7A-31 (COA10-403)	Denied
241A93-2	State v. George Douglas Larrimore	Def's *Pro Se* Petition for *Writ of Mandamus*	Denied **02/21/12**
246P07-2	State v. Roman Perdono	Def's *Pro Se* PWC to Review the Order of COA (COAP11-976)	Dismissed
250P08-5	State v. Gregory Robinson, Jr.	Def's *Pro Se* Motion for Petition for *Writ* of Prohibition	Denied
279PA11	State v. Aeric L. Whitehead aka Eric Lamont Whitehead	Def's Motion to Dismiss Appeal	Dismissed as Moot
281P06-8	Joseph E. Teague, Jr., P.E., C.M. v. The N.C. Dept. of Transportation, et al., Including but not Limited to, Gene Conti as Successor to Lyndo Tippett, Secretary in Their Official and Individual Capacity, T.A. Krasner, Esq. in Her Official and Individual Capacity	1. Plt's *Pro Se* Motion for Petition for *Writ of Certiorari* 2. Plt's *Pro Se* Motion for Petition for *Writ of Mandamus*	1. Denied 2. Denied **Edmunds, J., Recused**
323A92-8	State v. Charles Alonzo Tunstall-Bey	1. Def's *Pro Se* Motion for NOA (COAP11-498) 2. Def's *Pro Se* Motion for Appeal	1. Dismissed 2. Dismissed
361P10-2	State v. Jose Suarez Rodriguez	Def's *Pro Se* PWC to Review Order of COA (COAP11-988)	Dismissed
363P11	State v. Lee Roy Ellison State v. James Edward Treadway	1. Def's (Ellison) NOA Based Upon a Constitutional Question (COA10-386) 2. Def's (Ellison) PDR Under N.C.G.S. § 7A-31 3. Def's (Treadway) PDR Under N.C.G.S. § 7A-31 4. State's Motion to Dismiss Appeal	1. —— 2. Allowed 3. Allowed 4. Allowed

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369P11	Willie James Cain, Jr. v. Ingersoll Rand Company and Gallagher Bassett Services, Inc.	Def's PDR Under N.C.G.S. § 7A-31 (COA10-1203)	Denied
378P11	Stephen C. Nicholson, Individually, and as Administrator of the Estate of Geraldine Anne Nicholson v. Arleen Kaye Thom, M.D.	1. Defendant-Appellant's Motion for Temporary Stay 2. Defendant-Appellant's Petition for *Writ of Supersedeas* 3. Defendant-Appellant's PDR Under N.C.G.S. § 7A-31	1. Allowed **09/02/11**; Dissolved the Stay **03/08/12** 2. Denied 3. Denied
400P06-3	State v. Billy Ray Morrison	1. Def's *Pro Se* NOA (COAP11-575) 2. Def's *Pro Se* PWC to Review Order of COA	1. Dismissed 2. Dismissed
403A11	Dianne Michele Carter v. Noah Maximov In the Matter of the Proposed Foreclosure of Claim of Lien Filed Against Erica Lauren Carter Bentley Living Trust Moorish Holy Temple of Science / Moorish Science Temple South Carolina Republic Temple No. 3A By Sycamore Grove Homeowners Association, Inc. Dated February 24, 2010 Recorded in Docket # 10-M-2730 in the Office of the Clerk of Superior Court for Mecklenburg County	Plt's *Pro Se* NOA Based Upon a Constitutional Question (COA10-1408)	Dismissed *ex Mero Motu*
406P07-3	In re: Petition for Reinstatement of Michael H. McGee	Petitioner's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA11-471)	Denied

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409P11	State v. Thomas Carroway	Def's PDR Under N.C.G.S. § 7A-31 (COA10-1473)	Denied
411P11	Jason Fisher, Byron Adams, B.C. Barnes, Cheryl Bartlett, Kathy Beam, Carolyn Boggs, Susette Bryant, Danny Case, Gene Dry, Ricky Griffin, Wendy Herndon, Everett Jenkins, Sandra Langston, Cynthia Stafford, Mary Tautin, and Timothy Thomas v. Communication Workers of America; Communication Workers of America, District 3; and Communication Workers of America, Local 3602	1. Plts' (Fisher, Adams, Barnes, Bartlett, Beam, Dry, Griffin, Herndon, Langston, Stafford, Tautin, and Thomas) NOA Based Upon a Constitutional Question (COA10-927) 2. Plts' (Fisher, et al.) Petition in the Alternative for Discretionary Review Under N.C.G.S. § 7A-31 3. Def's (Communication Workers of America, Local 3602) Motion to Dismiss Appeal 4. Def's (Communication Workers of America, Local 3602) Conditional PDR Under N.C.G.S. § 7A-31	1. —— 2. Denied **02/13/12** 3. Allowed **02/13/12** 4. Dismissed as Moot **02/13/12**
421P11	Mary Frances Powe, Employee v. Centerpoint Human Services, Employer; Brentwood Services, Carrier	Plt's PDR Under N.C.G.S. § 7A-31 (COA10-1022)	Denied **02/06/12**
423P11	State v. Herman William Johnson	Def's PWC to Review Decision of the COA (COA10-1529)	Denied
426P11	State v. Don Frederick Sauer	1. Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA10-1491) 2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis* 3. Def's *Pro Se* Motion to Appoint Counsel	1. Denied 2. Allowed 3. Dismissed as Moot
438P11	Capt. Charles McAdams v. N.C. Dept. of Transportation	Def's PDR Under N.C.G.S. § 7A-31 (COA11-102)	Denied

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441P11	R. Scott Best v. Amber L. Gallup	1. Def's *Pro Se* NOA Based Upon a Constitutional Question (COA10-1488) 2. Def's *Pro Se* PDR Under N.C.G.S. § 7A-31	1. Dismissed *ex Mero Motu* 2. Denied
446P11	Jack Tillet, Lydia Tillet, and Andrea McConnell v. Onslow Memorial Hospital, Inc.	Plts' PDR Under N.C.G.S. § 7A-31 (COA11-116)	Denied
454P11	State v. Justin Seamster	1. State's Motion for Temporary Stay (COA11-170) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31 4. Def's Motion to Deem Response in Opposition to the State's PDR Timely Filed	1. Allowed **10/21/11**; Dissolved the Stay **03/08/12** 2. Denied 3. Denied 4. Allowed
458PA10-2	State v. Nakia Nickerson	Def's PDR Under N.C.G.S. § 7A-31 (COA09-1511-2)	Denied
458P11-2	State v. Anthony Townsend	1. Def's *Pro Se* PWC to Review the Order of COA (COAP11-1034) 2. Def's *Pro Se* Motion to Appoint Counsel	1. Dismissed 2. Dismissed as Moot **Jackson, J., Recused**
464P11	David Crump and wife, Sharon Crump v. North Carolina Department of Environment and Natural Resources and Caldwell County Health Department	Def's PDR Under N.C.G.S. § 7A-31 (COA10-1138)	Denied
466PA11-2	State v. Heather R. Surratt	Def's PDR Under N.C.G.S. § 7A-31 (COA11-239-2)	Denied
467P11	State v. Levy Jones, III	1. Def's NOA Based Upon a Constitutional Question (COA11-149) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal 4. State's Conditional PDR Under N.C.G.S. § 7A-31	1. —— 2. Denied 3. Allowed 4. Dismissed as Moot

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470P11	State v. William Jackson Neal, Jr.	1. Def's NOA Based Upon a Constitutional Question (COA11-110) 2. Def's PDR Under N.C.G.S. § 7A-31	1. Dismissed *ex Mero Motu* 2. Denied
477P11	State v. Robert Lee Adams Reaves	1. Def's PDR Under N.C.G.S. § 7A-31 (COA10-1246) 2. State's Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 2. Dismissed as Moot
488P11	Deborah Hinton-Lynch v. Bruce Frierson, Carolyn Frierson, and Chesare Horton	Plt's PDR Under N.C.G.S. § 7A-31 (COA10-1309)	Denied
506P11	State v. Lonzell Gregory Smith	1. Def's NOA (COA11-81) 2. Def's PDR Under N.C.G.S. § 7A-31	1. Dismissed *ex Mero Motu* 2. Denied
517P11	State v. Miguel D. Hernandez	1. Def's *Pro Se* Motion for PDR (COAP10-559) 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
518P11	State v. Lucas B. Marshall	Def's PWC to Review Order of COA (COA11-995)	Dismissed
519P11	State v. Anthony Pierce	1. Def's NOA Based Upon a Constitutional Question (COA10-1588) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. —— 2. Denied 3. Allowed
520A11	State v. Ray Nolan Page	1. Def's NOA Based Upon A Constitutional Question (COA11-365) 2. State's Motion to Dismiss Appeal	1. —— 2. Allowed
526P11	Keith Russell Judd v. State Board of Elections of North Carolina, Secretary of State of North Carolina, and State of North Carolina	1. Plt's *Pro Se* Petition for *Writ of Mandamus* 2. Plt's *Pro Se* Motion to Proceed *In Forma Pauperis*	1. Denied 2. Allowed
529A11-2	State v. Felipe Alfaro Rico	1. State's Motion for Temporary Stay (COA10-1536) 2. State's Petition for *Writ of Supersedeas*	1. Allowed **02/03/12** 2. Allowed **02/03/12**

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533P11	Gail Parker Spooner v. Eiford Clemmons, Sr.	Plt's PDR Under N.C.G.S. § 7A-31 (COA11-276)	Denied
537P11	State v. Jason Ryan Smith	Def's PDR Under N.C.G.S. § 7A-31 (COA11-424)	Denied
542P97-2	State v. Terrance L. Wright	Def's *Pro Se* Petition for *Writ of Habeas Corpus*	Denied **02/28/12**
546P11	In the Matter of: J.M.G.	Respondent-Mother's PDR Under N.C.G.S. § 7A-31 (COA11-555)	Denied
547P11	John Andrews v. Becky Andrews	Plt's PDR Under N.C.G.S. § 7A-31 (COA11-433)	Denied
552P11	Alexander Evans and Alice Faye Evans v. David W. Neill, Elizabeth B. Ells, Dorothy Debra, Citifinancial Services, Inc. 309, LLC, and Upton Tyson	1. Plts' PDR Under N.C.G.S. § 7A-31 (COA11-321) 2. Defs' (Neill, Ells, and Debra) Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 2. Dismissed as Moot
558P11	State v. Bruce Lee Griffin	Def's *Pro Se* Motion for PDR (COA10-795)	Denied
559P11	State v. Bruce Lee Griffin	Def's *Pro Se* Motion for PDR (COA10-796)	Denied

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007P12	State v. Brandon Jason Brown	1. State's Motion for Temporary Stay (COA11-709) 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 **01/09/12**; Dissolved the Stay **04/12/12** 2. Denied 3. Denied 4. Dismissed as Moot
019P12	In the Matter of: R.X.M.	Respondent-Father's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA11-913)	Denied
022A02-2	State v. Marcus Douglas Jones	Def's Motion for Extension of Time to File PWC	Allowed **03/15/12**
027P12	State v. Kevin Branch	1. Def's PDR Under N.C.G.S. § 7A-31 (COA11-592) 2. Def's Petition in the Alternative for *Writ of Certiorari* to Review Decision of COA	1. Denied 2. Denied
034P12	Terry Wells, Employee v. Coastal Cardiology Associates, Employer, Selective Insurance Company, Carrier	1. Defs' Motion for Temporary Stay (COA11-648) 2. Defs' Petition for *Writ of Supersedeas* 3. Defs' PDR Under N.C.G.S. § 7A-31	1. Allowed **01/25/12**; Dissolved the Stay **04/12/12** 2. Denied 3. Denied
045A12	State v. Aadil Shahid Khan	1. State's Motion for Temporary Stay (COA11-368) 2. State's Petition for *Writ of Supersedeas* 3. State's NOA Based Upon a Dissent	1. Allowed **02/03/12** 2. Allowed 3. –––
046P12	State v. Marva Denyse Gillis	Def's PWC to Review the Order of COA (COAP11-1049)	Allowed for the Limited Purpose of Remanding to the COA to Consider the Merits of the PWC
047P02-14	State v. George W. Baldwin	1. Def's *Pro Se* PWC to Review Order of Superior Court of Alamance County 2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis* 3. Def's *Pro Se* Motion to Appoint Counsel	1. Denied 2. Allowed 3. Dismissed as Moot

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048P12	State v. Kelly Shawn Hogan	1. State's Motion for Temporary Stay (COA11-580) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **02/06/12**; Dissolved the Stay **04/12/12** 2. Denied 3. Denied
049P12	State v. John Donald Matthews	1. State's Motion for Temporary Stay (COA11-356) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **02/06/12**; Dissolved the Stay **04/12/12** 2. Denied 3. Denied
051P12	APAC-Atlantic, Inc. v. Firemen's Insurance Company of Washington, D.C.	Def's PDR Under N.C.G.S. § 7A-31 (COA11-541)	Denied
053P12	Debra Knowles, Employee v. Wackenhut Corporation, Employer, Gallagher Bassett Services, Inc., Carrier	1. Plt's NOA Based Upon a Constitutional Question (COA11-716) 2. Plt's PDR Under N.C.G.S. § 7A-31 3. Plt's Motion for Temporary Stay 4. Plt's Petition for *Writ of Supersedeas*	1. Dismissed *Ex Mero Motu* 2. Denied 3. Allowed **02/17/2012**; Dissolved the Stay **04/12/12** 4. Denied
054P12	State v. Ronald Wayne Baker	1. Def's *Pro Se* PWC to Review Order of COA (COAP11-1067) 2. Def's *Pro Se* Motion to Appoint Counsel	1. Dismissed 2. Dismissed as Moot
059P12	State v. Arthur Junior Cook	1. Def's NOA Based Upon a Constitutional Question (COA11-767) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. —— 2. Denied 3. Allowed
060P12	Manuel Mosqueda, Teresita Vazquez, Jovanny de Jesus de Mata, and Manuel Mosqueda as Guardian *Ad Litem* of Minor Child Emily Mosqueda v. Maria Mosqueda	1. Plts' NOA Based Upon a Constitutional Question (COA11-629) 2. Plts' PDR Under N.C.G.S. § 7A-31	1. Dismissed *Ex Mero Motu* 2. Denied

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061P12	State v. Traven Marquette Lee	Def's PDR Under N.C.G.S. § 7A-31 (COA11-637)	Allowed
062P12	State v. Derrick Rashad Daniels	Def's PDR Under N.C.G.S. § 7A-31 (COA11-825)	Denied
064P12	State v. David Donnie Luker	Def's PDR Under N.C.G.S. § 7A-31 (COA11-699)	Denied
065P12	In the Matter of: Lorenzo Richardson	Respondent's PDR Under N.C.G.S. § 7A-31 (COA11-616)	Denied
070P12	State v. Keith Wade Kidwell	Def's PDR Under N.C.G.S. § 7A-31 (COA10-1407)	Denied
072P12	State v. Michael Scott Sistler	1. Def's NOA Based Upon a Constitutional Question (COA11-1035) 2. Def's PDR Under N.C.G.S. § 7A-31	1. Dismissed *Ex Mero Motu* 2. Denied
074P12	Harold N. Orban and Victoria L. Orban v. Steven C. Wilkie, Substitute Trustee, and T.D. Bank, N.A.	Plts' *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA11-678, COA11-901)	Denied
075P12	State v. James Edward Wells	Def's PDR Under N.C.G.S. § 7A-31 (COA11-909)	Denied
077P12	State v. Marshall Blackmon	Def's *Pro Se* Motion for PDR (COAP12-50)	Denied **Jackson, J., Recused**
082P12	In the Matter of: Robert Dale Hutchinson	1. State's Motion for Temporary Stay (COA11-757) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Denied **02/28/12** 2. Denied 3. Denied
083A12	Klingstubbins Southeast, Inc. v. 301 Hillsborough Street Partners, LLC and Theodore R. Reynolds	1. Def's (Theodore R. Reynolds) NOA Based Upon a Dissent (COA11-549) 2. Def's (Theodore R. Reynolds) PWC to Review Decision of COA	1. Dismissed *Ex Mero Moto* 2. Allowed

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084P12	Harvey Wilson Johnson, Sean Johnson, Bruce Charles Johnson, Sarah Johnson Tuck, Mark Johnson, Richard M. Johnson, Virginia Fisk Johnson, and Grace Johnson McGoogan v. N.C. Department of Cultural Resources, the North Carolina State Archives, Bradford White Johnson, Herbert S. Harriss, Johnson Harriss, Kirby Harriss Rigsby, Patricia Harriss Holden, and Margaret Harriss	Def's' (N.C. Department of Cultural Resources and North Carolina State Archives) PDR Under N.C.G.S. § 7A-31 (COA12-173)	Denied
085A12	Alvin L. Bess v. County of Cumberland, Board of Commissioners, North Carolina and James Martin, James Lawson, Tomas Lloyd, Richard Heicksen, Individually	1. *Plt's Pro Se* NOA Based Upon a Constitutional Question (COA11-1044) 2. Plt's *Pro Se* PDR Under N.C.G.S. § 7A-31	1. Dismissed *Ex Mero Motu* 2. Denied
087P12	State v. Zachary Paul Greene	1. Def's *Pro Se* PWC to Review Order of COA (COAP12-39) 2. Def's *Pro Se* Motion to Appoint Counsel	1. Dismissed 2. Dismissed as Moot
088P05-4	State v. Gay Eugene Blankenship	Def's *Pro Se* Motion for PDR Under N.C.G.S. § 7A-31 (COAP12-47)	Dismissed
088P12	State v. Hubert Keith Beeson	1. Def's *Pro Se* PWC to Review Order of COA (COAP12-82) 2. Def's *Pro Se* Motion to Appoint Counsel	1. Dismissed 2. Dismissed as Moot
092P12	State v. Donald Ray Oaks, Jr.	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA11-463)	Denied

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093P12	State v. Kevin Wayne Maynard	1. Def's *Pro Se* PWC to Review the Order of the COA (COAP12-67) 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
094P12	State v. Alan James Webster	Def's PDR Under N.C.G.S. § 7A-31 (COA11-862)	Denied
095P12	State v. Dustin Lewis Monti and Joshua L. Thornton	1. State's Motion for Temporary Stay (COA11-836) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **03/12/12** 2. 3.
099P12	State v. James Buchnowski	1. Def's *Pro Se* Motion for NOA (COAP12-135) 2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis* 3. Def's *Pro Se* Motion to Appoint Counsel	1. Dismissed *Ex Mero Motu* 2. Allowed 3. Dismissed as Moot
102P12	George M. Muteff, Executor of the Estate of Virginia C. Miller v. Invacare Corporation and American Mobility, LLC	Plt's PDR Under N.C.G.S. § 7A-31 (COA11-495)	Denied
103A12	Victoria Klotz Greco v. Penn National Security Insurance Company, Penn National Holding Corporation, Pennsylvania National Mutual Casualty Insurance Company, Carolina Home Exteriors, L.L.C., and Donald Joseph McKinnon	1. Defs' (Penn Nat'l Security Ins. Co., Penn Nat'l Holding Corp., and Penn Nat'l Mutual Casualty Ins. Co.) NOA Based Upon a Dissent (COA11-483) 2. Defs' (Penn Nat'l Security Ins. Co., Penn Nat'l Holding Corp., and Penn Nat'l Mutual Casualty Ins. Co.) PDR as to Additional Issues 3. Plt's Conditional PDR as to Additional Issues	1. —— 2. Allowed 3. Allowed
105P12	State v. Deangelo Darne Smith	Def's PDR Under N.C.G.S. § 7A-31 (COA11-139)	Denied

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106P12	State v. Shaylon Monquice Springs	1. State's Motion for Temporary Stay (COA11-799) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **03/14/12** 2. 3.
113P12	State v. Ricky Leander Gamble	1. Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA11-842) 2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis*	1. Denied 2. Allowed
114A12	Neil Allran, et al. v. Wells Fargo, et al.	1. Plts' NOA Based Upon a Constitutional Question (COA11-967) 2. Plt's Motion for Temporary Stay 3. Plts' Petition for *Writ of Supersedeas* 4. Defs' Motion to Dismiss Appeal 5. Defs' Motion to Dissolve Stay	1. —— 2. Allowed **03/20/12**; Dissolved the Stay **04/12/12** 3. Denied 4. Allowed 5. Dismissed as Moot
115P12	State v. Danny Joe Bland	Def's *Pro Se* Motion for PDR (COAP11-219)	Dismissed
116P12	State v. Cornelius Maurice Corey	Def's *Pro Se* PWC to Review the Order of the COA (COAP11-693)	Dismissed
119P12	State v. David Wemyss	1. Def's Motion for Temporary Stay (COA11-947) 2. Def's Petition for *Writ of Supersedeas* 3. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed **03/19/12** 2. 3.
121P12	In the Matter of: K.M.	1. Petitioner's (Mecklenburg County DSS) Motion for Temporary Stay (COA11-837) 2. Petitioner's (Mecklenburg County DSS) Petition for *Writ of Supersedeas* 3. Petitioner's (Mecklenburg County DSS) PDR Under N.C.G.S. § 7A-31	1. Allowed 0**3/22/12** 2. 3.
123P12	Bob Hope III (formerly Ray Newby) v. Sara Wu	Plt's *Pro Se* Petition for *Writ of Mandamus*	Denied **03/23/12**

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124P12	State v. Jerry Lamont Lindsey	1. State's Motion for Temporary Stay (COA11-612) 2. State's Petition for *Writ of Supersedeas*	1. Allowed **03/23/12** 2.
125P12	State v. Stephen Antowean Darden	Def's *Pro Se* Motion for Appropriate Relief	Dismissed
126P10-2	Johnny Max Puckett v. N.C. Dept. of Correction, David Mitchell, Richard L. Terry, Mark Edwards, and Cherry P. Huskins	1. Plt's NOA Based Upon a Constitutional Question (COA10-1341) 2. Plt's PDR Under N.C.G.S. § 7A-31 3. Defs' Motion to Dismiss Appeal 4. N.C. Institute for Constitutional Law's Motion for Leave to File Brief *Amicus Curiae*	1. —— 2. Denied 3. Allowed 4. Dismissed as Moot
126P12	State v. Donnell Freeman	Def's *Pro Se* PWC to Review Order of Superior Court of Cumberland County	Denied
134P12	Moorish American Nation v. Supreme Court of North Carolina	1. Movant's *Pro Se* Motion for Appropriate Relief 2. Movant's *Pro Se* Motion to Proceed *In Forma Pauperis*	1. Dismissed 2. Allowed
136P12	Billy Ray Smith v. The Geo Group, Inc.	Petitioner's *Pro Se* Motion to Exhaust and Transfer 28 U.C.S. § 2254 to U.S. District Court	Denied
138P12	State v. Dartanya Levon Eaton	1. State's Motion for Temporary Stay (COA11-956) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **04/02/12** 2. 3.
145P12	State v. John Braver Friend	1. Def's Motion for Temporary Stay (COA11-572) 2. Def's Petition *for Writ of Supersedeas*	1. Allowed **04/09/12** 2.
148PA11	In the Matter of: M.I.W.	Respondents' Petition for Rehearing	Denied **03/22/12**

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198P11	L&S Water Power, Inc., Brooks Energy, L.L.C., Deep River Hydro, Inc., Hydrodyne Industries, LLC, William Dean Brooks, and Howard Bruce Cox v. Piedmont Triad Regional Water Authority	1. Def's PDR Under N.C.G.S. § 7A-31 (COA10-1063) 2. City of Salisbury's Motion for Leave to File *Amicus* Brief	1. Allowed 2. Allowed
215P08-2	State v. Donald Barnes	Def's *Pro Se* PWC to Review Order of Wake County Superior Court	Dismissed **Jackson, J., Recused**
262P10-2	High Rock Lake Partners, LLC, a North Carolina Limited Liability Company, and John Dolven v. North Carolina Department of Transportation	1. Petitioners' NOA Based Upon a Constitutional Question (COA11-309) 2. Petitioners' Petition in the Alternative for PDR Under N.C.G.S. § 7A-31 3. Respondent's Motion to Dismiss Appeal	1. —— 2. Allowed 3. Allowed
273P10-2	State v. Charles D. Dickerson	1. Def's *Pro Se* PWC to Review Order of COA (COAP11-968) 2. Def's *Pro Se* Motion to Appoint Counsel	1. Dismissed 2. Dismissed as Moot
273P11-2	State v. Anthony Junior Barnhill	Def's *Pro Se* Motion for PDR	Dismissed **Jackson, J., Recused**
278P05-2	In re: William Van Trusell	1. Def's *Pro Se* Petition for *Writ of Mandamus* 2. Def's *Pro Se* Petition for *Writ of Mandamus*	1. Dismissed 2. Dismissed **Jackson, J., Recused**
280P09-7	Bobby Joe Reid, Jr. v. Scotland Correctional Superintendant (sic)	Petitioner's *Pro Se* Petition for *Writ of Habeas Corpus*	Denied **03/22/12**

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281P06-8	Joseph E. Teague, Jr., P.E., C.M. v. North Carolina Department of Transportation, et al.	Plt's *Pro Se* Petition for Rehearing	Dismissed **Edmunds, J., Recused**
287P11	Lloyd G. Brown, Nancy L. Blackwood, Chad Brandon, Richard C. Cockerham, Carolyn M. Dawson, Trent William Duncan, Roger J. Hart, Lisa Hartrick, Kevin Harvell, Alan W. Hill, Adam Huffman, Chris Liv, John McRae McBryde, Roger V. Miller, Ronald J. Myers, Jr., William Pickens, William S. Powell, Laura Prevatte, Dennis K. Register, Joseph Swartz, Sara Ellis Thompson, Eric P. Welker, Stephen L. Williams, David Amaral, Jody Brady, Richard Chellberg, Gary M. Curcio, Shane Hardee, James M. Hendricks, William R. Hildreth, John P. Howard, Anthony Russell Meadows, James Schlenker, Peter C. Steponkus, on Behalf of Themselves and All Others Similarly Situated v. N. C. Dept. of Environment and Natural Resources, an Agency of the State of N.C Dee Freeman, Secretary of the N.C. Dept. of Environment and Natural Resources, in his Official Capacity; and the State of N.C.	Defs' PDR Under N.C.G.S. § 7A-31 (COA10-315)	Denied

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304P11-2	State v. James Anderson, Jr.	Def's *Pro Se* Petition for *Writ of Mandamus*	Dismissed
305P11	William "Bill" H. Wilson v. City of Mebane Board of Adjustment and The Crown Companies, LLC, Intervenor	Respondents' PDR Under N.C.G.S. § 7A-31 (COA10-971)	Denied
313PA10	Cheyenne Saleena Stark, a Minor, Cody Brandon Stark, a Minor, by Their Guardian *ad Litem* Nicole Jacobsen v. Ford Motor Company, a Delaware Corporation	1. Def's PDR Under N.C.G.S. § 7A-31 (COA09-286) 2. Motion for Cary Silverman to be Admitted *Pro Hac Vice* 3. Motion for Mark A. Behrens to be Admitted *Pro Hac Vice* 4. Motion by the National Association of Manufacturers, et al., for Leave to File *Amici Curiae* Brief 5. Motion by NC Association of Defense Attorneys, et al., for Leave to File *Amici Curiae* Brief 6. Motion by Product Liability Advisory Council for Leave to File *Amicus* Brief 7. Motion by Defendant to Admit Robert L. Wise and Sandra Giannone Ezell *Pro Hac Vice* 8. Motion by Defendant to Amend ROA 9. Motion, in the alternative, by Plaintiff to Amend ROA 10. Plt's Motion to Reconsider Motion for Leave to File *Amici Curiae* Brief of Former Legislators 11. Plt's Motion to Strike *Amicus* Brief of Former Legislators	1. Allowed **02/03/11** 2. Dismissed **03/10/11** 3. Dismissed **03/10/11** 4. Dismissed Without Prejudice to Refile Pursuant to 28(i) N.C. R. App. P. **02/03/11** 5. Dismissed Without Prejudice to Refile Pursuant to 28(i) N.C. R. App. P. **02/03/11** 6. Dismissed Without Prejudice to Refile Pursuant to 28(i) N.C. R. App. P. **02/03/11** 7. Allowed **03/02/11** 8. Allowed 9. Allowed 10. Denied **04/07/11** 11. Denied

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313PA10, cont'd		10. Plt's Motion to Reconsider Motion for Leave to File *Amici Curiae* Brief of Former Legislators 11. Plt's Motion to Strike *Amicus* Brief of Former Legislators 12. Motion by K. Edward Green for Admission of James L. Gilbert *Pro Hac Vice* 13. The Covenant with North Carolina's Children and KidsandCars.org's Motion for Leave to File *Amicus* Brief 14. Advocates for Justice's Motion for Leave to File *Amicus* Brief	10. Denied **04/07/11** 11. Denied 12. Allowed **04/04/11** 13. Allowed **04/05/11** 14. Allowed **04/05/11**
356P99-2	State v. Robert Allen Sartori	Def's *Pro Se* PWC to Review Order of COA (COAP11-709)	Denied
384P08-2	State v. Yul V. Bannerman	Def's *Pro Se* Motion for PDR (COAP11-787)	Dismissed
402P11-2	State v. Sylvester Eugene Harding, III	Def's *Pro Se* Motion for Appropriate Relief (COA11-161)	Dismissed
412P11	State v. Eric Anthony Morales	1. Def's PDR Under N.C.G.S. § 7A-31 (COA10-1572) 2. Def's Motion to Strike State's Untimely PDR Response 3. State's Motion to Deem Response to PDR Timely Filed	1. Denied 2. Denied 3. Allowed
436P11	State v. Freddie Lawrence McDowell, Jr.	1. Def's NOA Based Upon a Constitutional Question (COA10-1553) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. —— 2. Denied 3. Allowed
441P92-6	State v. Johnnie L. Harrington	Def's *Pro Se* Motion for Appropriate Relief	Dismissed

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459P11	Nelson W. Taylor, III, and Patricia V. Taylor v. Marilyn Miller	Plts' PDR Under N.C.G.S. § 7A-31 (COA10-1535)	Denied
460P11	Thomas Jefferson Classical Academy d/b/a Thomas Jefferson Classical Academy Charter School v. The Rutherford County Board of Education, d/b/a Rutherford County Schools	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA10-1121) 2. Def's NOA Based Upon a Constitutional Question 3. Def's PDR Under N.C.G.S. § 7A-31	1. Denied 2. Dismissed *ex Mero Motu* 3. Denied
480P11	State v. John Franklin Hester	1. Def's NOA Based Upon a Constitutional Question (COA11-190) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. —— 2. Denied 3. Allowed
487P11	Joey Tedder v. CSX Transportation, Inc., and Sidney Earl Williams, II	Plt's PDR Under N.C.G.S. § 7A-31 (COA10-1497)	Denied
504P11	Alice A. Bryan (formerly Mattick) v. Michael J. Mattick	1. Def's PDR Under N.C.G.S. § 7A-31 (COA11-427) 2. Def's Petition in the Alternative for *Writ of Certiorari* to Review Decision of COA	1. Denied 2. Denied
508P11	In the Matter of: C.G.R. and M.A.C.R	.Respondent-Mother's PDR Under N.C.G.S. § 7A-31 (COA11-263)	Denied
521P11	Michael I. Cinoman, M.D. and Medical Mutual Insurance Company of North Carolina v. The University of North Carolina; The University of North Carolina Healthcare System d/b/a The University of North Carolina Hospitals at Chapel Hill; The University of North Carolina d/b/a The School of Medicine of the University of North Carolina at	1. Defs' (UNC; UNC Healthcare System d/b/a UNC Hospitals at Chapel Hill; UNC d/b/a School of Medicine of UNC-CH; UNC d/b/a The UNC Liability Trust Fund; William L. Roper; and Brian Goldstein) PDR Under N.C.G.S. § 7A-31 (COA11-160) 2. Plts' Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 2. Dismissed as Moot

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521P11, cont'd	Chapel Hill; The University of North Carolina d/b/a The University of North Carolina Liability Insurance Trust Fund; William L. Roper in His Capacity as Dean of the School of Medicine of The University of North Carolina Chapel Hill; Brian Goldstein in His Capacity as Chairman of The University of North Carolina Liability Insurance Trust Council; and Thomas M. Stern, as Guardian *ad Litem* for Armani Wakefall		**Timmons-Goodson, J., Recused**
525P11	Robert Edward Bell v. James W. Mozley, Jr.	Plt's PDR Under N.C.G.S. § 7A-31 (COA11-393)	Denied
542P03-2	State v. Robert Howard Dixon	Def's *Pro Se* Petition for *Writ of Mandamus*	Denied **03/22/12**
554P11	In the Matter of the Foreclosure of a Deed of Trust Executed by Tonya R. Bass in the Original Amount of $139,988.00, Dated October 12, 2005, Recorded in Book 4982, Page 86, Durham County Registry Substitute Trustee Services, Inc., as Substitute Trustee	Petitioner's (U.S. Bank) PDR Under N.C.G.S. § 7A-31 (COA11-565)	Allowed
580P05-2	In Re: David Lee Smith	1. Def's *Pro Se* Petition for *Writ of Mandamus* 2. Def's *Pro Se* Petition for *Writ of Mandamus*	1. Denied **03/22/12** 2. Denied **03/22/12**
580P05-3	In Re: David Lee Smith	Def's *Pro Se* Petition for *Writ of Mandamus* (COAP12-176)	Denied **04/11/12**

APPENDIXES

JUSTICE BEASLEY'S INVESTITURE SPEECH

AMENDMENT TO THE NORTH CAROLINA RULES OF APPELLATE PROCEDURE EFFECTIVE 15 MARCH 2012

AMENDMENTS TO THE NORTH CAROLINA RULES OF APPELLATE PROCEDURE EFFECTIVE 15 APRIL 2013

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING DISCIPLINE AND DISABILITY OF ATTORNEYS

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING LEGAL SPECIALIZATION

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING MEMBERSHIP

AMENDMENTS TO THE NORTH CAROLINA STATE BAR RULES OF PROFESSIONAL CONDUCT

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING REINSTATEMENT

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING CONTINUING LEGAL EDUCATION

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING CERTIFICATION OF PARALEGALS

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING IOLTA

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING PREPAID LEGAL SERVICES PLANS

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING THE ELECTION OF STATE BAR COUNCILORS

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING DISCIPLINE AND DISABILITY OF ATTORNEYS

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING FEE DISPUTES

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING NON-COMPLIANCE WITH MEMBERSHIP OBLIGATIONS

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING THE LAWYER ASSISTANCE PROGRAM

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING CONTINUING PARALEGAL EDUCATION

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA BOARD OF LAW EXAMINERS

AMENDMENTS TO THE RULES FOR COURT-ORDERED ARBITRATION

AMENDMENTS TO THE RULES IMPLEMENTING MEDIATION IN MATTERS BEFORE THE CLERK OF SUPERIOR COURT

AMENDMENTS TO THE RULES IMPLEMENTING MEDICATION IN MATTERS PENDING IN DISTRICT CRIMINAL COURT

AMENDMENTS TO THE RULES IMPLEMENTING PRELITIGATION FARM NUISANCE MEDIATION PROGRAM

AMENDMENTS TO THE RULES IMPLEMENTING SETTLEMENT PROCEDURES IN EQUITABLE DISTRIBUTION AND OTHER FAMILY FINANCIAL CASES

AMENDMENTS TO THE RULES IMPLEMENTING STATEWIDE MEDIATED SETTLEMENT CONFERENCES AND OTHER SETTLEMENT PROCEDURES IN SUPERIOR COURT ACTIONS

AMENDMENTS TO THE RULES OF THE NORTH CAROLINA SUPREME COURT FOR THE DISPUTE RESOLUTION

AMENDMENTS TO THE STANDARDS OF PROFESSIONAL CONDUCT FOR MEDIATORS

AMENDMENTS TO THE RULES GOVERNING THE ADMISSION TO PRACTICE LAW IN NORTH CAROLINA

Justice Beasley's Investiture Speech

Chief Justice and Associate Justices of the Supreme Court of North Carolina, and to each of you here. Thank you. I am so grateful to each of you for being a part of this ceremony.

I am so excited for the opportunity to serve on our State's highest court. I am deeply grateful to Governor Bev Perdue for appointing me to serve as Associate Justice of the Supreme Court of North Carolina. It is an honor that she placed her confidence in my abilities to render fair and just decisions. Her recognition of my years of judicial service and my ability to serve the people of the state on the highest court is sincerely humbling.

It is the custom of this Court that the outgoing justice decline to participate in or attend the Investiture of the incoming justice. I would be remiss however if I did not acknowledge Justice Patricia Timmons-Goodson. Justice Timmons-Goodson has served in the judiciary for 28 years with distinction. She has been a trailblazer as a jurist and is well-respected across the state and nationally. Her contributions to this State are laudable. Justice Timmons-Goodson has served with integrity and met the highest of ethical standards. I am glad to call her my friend.

I have always believed that my path is guided by the Holy Spirit. The opportunity to serve is a blessing and I am thankful. As the only child of Dr. Lou Beasley and William James Beasley, I am truly grateful to both of my parents. As a graduate social work educator and administrator, my mother was passionate about life. Early on, she taught me the value of service. There is not a time in my life that my mother was not active professionally and civically in advancing the plight of disenfranchised persons. My mother was smart and headstrong. I am grateful that she instilled in me the importance of faith, hard work and drive. My desire to serve is a testament to her commitment to making our communities stronger. Both of my parents would be very proud today.

To Curt, thank you for your unwavering love and support now and always. We met as young people in college. We had no way of knowing what life would bring. Sharing this life with you and embracing each turn together has made every step of the way a joy. Matthew and Thomas, I thank God that Curt and I are blessed with wonderful, smart and loving sons. Curt, Thomas, and Matthew, thank you very much for accepting the winds in the road with optimism and a yearning to greet what awaits behind every bend. Onward!!

Thanks to each of you for being here on this occasion. You have been good family, friends, mentors, and colleagues. You have encouraged, advised, celebrated and sometimes ribbed me, and I am grateful.

I accept this honor, the honor to serve on our state's highest court, to render fair and impartial decisions and to give every case before me the greatest consideration. In my years of service, I'm ever mindful that holding public office is an honor and privilege, never to be taken for granted.

To my colleagues on the North Carolina Court of Appeals, I appreciate the opportunity to serve with each of you. I shall forever value the experience and am confident that the experience has prepared me for service at the Supreme Court.

Chief Justice, and Associate Justices of this Court. I value the opportunity to work with each of you and serve the people of this State. I am well aware that this Court considers matters of great importance. I will work hard. As the decisions in all cases and matters before the Court are far reaching, I shall always remember that following the rule of law is paramount to assuring that justice is afforded to all and appreciate the gravity of decisions before the Court. I am prepared for the challenges and welcome the opportunity.

To each of you here, thank you so much for being a part of this special day. Happy New Year and God Bless You.

IN THE SUPREME COURT OF NORTH CAROLINA

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ORDER ADOPTING AMENDMENT TO THE NORTH CAROLINA RULES OF APPELLATE PROCEDURE

Rule 25 of the North Carolina Rules of Appellate Procedure is hereby amended as described below:

Rule 25(b) is amended to read as follows:

(b) **Sanctions for Failure to Comply with Rules.** A court of the appellate division may, on its own initiative or motion of a party, impose a sanction against a party or attorney or both when the court determines that such a party or attorney or both substantially failed to comply with these appellate rules, including failure to pay any filing or printing fees or costs when due. The court may impose sanctions of the type and in the manner prescribed by Rule 34 for frivolous appeals.

This amendment to the North Carolina Rules of Appellate Procedure shall be effective on 15 March 2012.

This amendment shall be promulgated by publication in the Advance Sheets of the Supreme Court and the Court of Appeals. These amendments also shall be published as quickly as practicable on the North Carolina Judicial Branch of Government Home Page (http://www.nccourts.org/).

s/Jackson, J.
For the Court

IN THE SUPREME COURT OF NORTH CAROLINA

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ORDER ADOPTING AMENDMENTS TO THE NORTH CAROLINA RULES OF APPELLATE PROCEDURE

Amendment to Rule 28(h)

Rule 28(h) of the North Carolina Rules of Appellate Procedure is hereby stricken and rewritten as follows:

(h) **Reply Briefs.** Within fourteen days after an appellee's brief has been served on an appellant, the appellant may file and serve a reply brief, subject to the length limitations set forth in Rule 28(j). Any reply brief which an appellant elects to file shall be limited to a concise rebuttal of arguments set out in the appellee's brief and shall not reiterate arguments set forth in the appellant's principal brief. Upon motion of the appellant, the Court may extend the length limitations on such a reply brief to permit the appellant to address new or additional issues presented for the first time in the appellee's brief. Otherwise, motions to extend reply brief length limitations or to extend the time to file a reply brief are disfavored.

Amendments to Rule 13(a)

The last sentence of Rule 13(a)(1) of the North Carolina Rules of Appellate Procedure is hereby amended as follows:

. . . ~~If permitted by Rule 28(h), the appellant may serve and file a reply brief as provided in that rule.~~ An appellant may file and serve a reply brief as provided in Rule 28(h).

The last sentence of Rule 13(a)(2) is hereby amended to read as follows:

. . . ~~If permitted by Rule 28(h), the appellant may serve and file a reply brief as provided in that rule, except that reply briefs filed pursuant to Rule 28(h)(2) or (h)(3) shall be filed and served within twenty-one days after service of the appellee's brief.~~ An appellant may file and serve a reply brief as provided in Rule 28(h).

Amendment to Rule 14(d)(1)

The last sentence of the first paragraph of Rule 14(d)(1) of the North Carolina Rules of Appellate Procedure is hereby amended as follows:

. . . ~~If permitted by Rule 28(h), the appellant may serve and file a reply brief as provided in that rule.~~ An appellant may file and serve a reply brief as provided in Rule 28(h).

Amendment to Rule 15(g)(2)

The last sentence of Rule 15(g)(2) of the North Carolina Rules of Appellate Procedure is hereby amended to read as follows:

. . . ~~If permitted by Rule 28(h), the appellant may serve and file a reply brief as provided in that rule.~~ An appellant may file and serve a reply brief as provided in Rule 28(h).

Amendment to Rule 28(j)(2)(A)

The second sentence of Rule 28(j)(2)(A) of the North Carolina Rules of Appellate Procedure is amended to read as follows:

. . . ~~The page limit for a reply brief permitted by Rule 28(h)(1), (2), or (3) is fifteen pages, and the page limit for a reply brief permitted by Rule 28(h)(4) is twelve pages.~~ The page limit for a reply brief is fifteen pages.

Amendment to Rule 28(j)(2)(B)

The second sentence of Rule 28(j)(2)(B) of the North Carolina Rules of Appellate Procedure is hereby amended to read as follows:

~~A reply brief permitted by Rule 28(h)(1), (2), or (3) may contain no more than 3,750 words, and a reply brief permitted by Rule 28(h)(4) may contain no more than 3,000 words.~~ A reply brief may contain no more than 3,750 words.

Amendment to Rule 27(b)

Rule 27(b) of the North Carolina Rules of Appellate Procedure is hereby amended to read as follows:

(b) **Additional Time After Service ~~by Mail~~.** Except as to filing of notice of appeal pursuant to Rule 3(c), whenever a party has the right to do some act or take some proceedings within a prescribed period after the service of a notice or other paper and the notice or paper is served by mail, or by electronic mail if allowed by these rules, three days shall be added to the prescribed period.

Amendment to Rule 9(d)

Rule 9(d) of the North Carolina Rules of Appellate Procedure is hereby stricken and rewritten as follows:

(d) Exhibits.

Any exhibit filed, served, submitted for consideration, admitted, or made the subject of an offer of proof may be made a part of the record on appeal if a party believes that its inclusion is necessary to understand an issue on appeal.

(1) Documentary Exhibits Included in the Printed Record on Appeal. A party may include a documentary exhibit in the printed record on appeal if it is of a size and nature to make inclusion possible without impairing the legibility or original significance of the exhibit.

(2) Exhibits Not Included in the Printed Record on Appeal. A documentary exhibit that is not included in the printed record on appeal can be made a part of the record on appeal by filing three copies with the clerk of the appellate court. The three copies shall be paginated. If multiple exhibits are filed, an index must be included in the filing. Copies that impair the legibility or original significance of the exhibit may not be filed. An exhibit that is a tangible object or is an exhibit that cannot be copied without impairing its legibility or original significance can be made a part of the record on appeal by having it delivered by the clerk of superior court to the clerk of the appellate court. When a party files a written request with the clerk of superior court that the exhibit be delivered to the appellate court, the clerk must promptly have the exhibit delivered to the appellate court in a manner that ensures its security and availability for use in further trial proceedings. The party requesting delivery of the exhibit to the appellate court shall not be required to move in the appellate court for delivery of the exhibit.

(3) Exclusion of Social Security Numbers from Exhibits. Social security numbers must be deleted or redacted from copies of exhibits.

(4) Removal of Exhibits from Appellate Court. All models, diagrams, and exhibits of material placed in the custody of the clerk of the appellate court must be taken away by the parties within ninety days after the mandate of the Court has issued or the case has otherwise been closed by withdrawal, dismissal, or other order of the Court, unless notified otherwise by the clerk. When this is not done, the clerk shall notify counsel to remove the articles forthwith; and if they are not removed within a reasonable time after such notice, the clerk shall destroy them, or make such other disposition of them as to the clerk may seem best.

These amendments to the North Carolina Rules of Appellate Procedure shall be effective on 15 April 2013.

These amendments shall be promulgated by publication in the Advance Sheets of the Supreme Court and the Court of Appeals. These amendments also shall be published as quickly as practicable on the North Carolina Judicial Branch of Government Home Page (http://www.nccourts.org/).

s/Beasley, J.

For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING DISCIPLINE AND DISABILITY OF ATTORNEYS

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on January 21, 2011.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning discipline and disability of attorneys, as particularly set forth in 27 N.C.A.C. 1B, Section .0100, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1B, Discipline and Disability Rules, Section .0100, Discipline and Disability of Attorneys

.0105 Chairperson of the Grievance Committee: Powers and Duties

(a) The chairperson of the Grievance Committee will have the power and duty

(1) . . .

(17) except in cases involving possible misappropriation of entrusted funds, criminal conduct, dishonesty, fraud, misrepresentation, or deceit, or other cases deemed inappropriate by the chair, in his or her discretion to refer lawyers who are found during random auditing or otherwise to be significantly out of compliance with the Rules of Professional Conduct to a trust accounting supervisory program administered by the State Bar on terms and conditions approved by the council.

~~(17)~~ (18) . . .[re-numbering remaining paragraphs]

(b) Absence of Chairperson and Delegation of Duties . . . .

.0112 Investigations: Initial Determination

(a) Investigation Authority . . . .

(l) Referral to Trust Accounting Supervisory Program—The chair of the Grievance Committee, in his or her sole discretion, may refer a lawyer whose trust account record keeping is found, during random auditing or otherwise, to be significantly out of compliance with the Rules of Professional Conduct into a super-

visory program for two years. During the lawyer's two-year participation in the program, the lawyer must provide to the Office of Counsel quarterly proof of compliance with all provisions of Rule 1.15 of the Rules of Professional Conduct. Such proof shall be in a form satisfactory to the Office of Counsel. If a lawyer agrees to enter the supervisory program, timely complies with all rules of the program, and successfully completes the program, the Grievance Committee will not open a grievance file on the issue of the lawyer's pre-referral noncompliance with trust account record—keeping rules. If the lawyer does not agree to enter the program or agrees to enter the program but does not successfully complete it, a grievance file will be opened and the disciplinary process will proceed. The chair of the Grievance Committee will not refer to the program any case involving possible misappropriation of entrusted funds, criminal conduct, dishonesty, fraud, misrepresentation, or deceit, or any other case the chair deems inappropriate for referral. If the Office of Counsel or the Grievance Committee discovers evidence that a lawyer who is participating in the program may have misappropriated entrusted funds, engaged in criminal conduct, or engaged in conduct involving dishonesty, fraud, misrepresentation, or deceit, the chair will terminate the lawyer's participation in the program and will instruct the Office of Counsel to open a grievance file. Referral to the Trust Accounting Supervisory Program is not a defense to allegations that a lawyer misappropriated entrusted funds, engaged in criminal conduct, or engaged in conduct involving dishonesty, fraud, misrepresentation, or deceit, and it does not immunize a lawyer from the disciplinary consequences of such conduct.

NORTH CAROLINA WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on January 21, 2011.

Given over my hand and the Seal of the North Carolina State Bar, this the 28th day of January, 2011.

s/L. Thomas Lunsford, II
L. Thomas Lunsford, II, Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted by the

Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 10th day of March, 2011.

s/Sarah Parker
Sarah Parker, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 10th day of March, 2011.

s/Jackson J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING DISCIPLINE AND DISABILITY OF ATTORNEYS

The following amendment to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar was duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on October 29, 2010.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning discipline and disability of attorneys, as particularly set forth in 27 N.C.A.C. 1B, Section .0100 and 27 N.C.A.C. 1D, Section 900, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1B, Discipline and Disability Rules, Section .0100 Discipline and Disability of Attorneys

.0125 Reinstatement

(a) After disbarment . . . .

(b) After suspension

(1) Restoration . . . .

(3) Reinstatement Requirements—Any suspended attorney seeking reinstatement must file a verified petition with the secretary,

a copy of which the secretary will transmit to the counsel. The petitioner will have the burden of proving the following by clear, cogent, and convincing evidence:

(A) . . . .

(J) Payment of Fees and Assessments—payment of all membership fees, Client Security Fund assessments, and late fees due and owing to the North Carolina State Bar, including any reinstatement fee due under Rule .0904 or Rule .1524 of subchapter 1D of these rules, as well as all attendee fees and late penalties due and owing to the Board of Continuing Legal Education at the time of suspension.

(4) Investigation and Response . . . .

(8) Reinstatement Order—The hearing panel will determine whether the petitioner's license should be reinstated and enter an appropriate order, which may include additional sanctions in the event violations of the petitioner's order of suspension are found. In any event, the hearing panel must include in its order findings of fact and conclusions of law in support of its decision and tax such costs as it deems appropriate for the necessary expenses attributable to the investigation and processing of the petition against the petitioner.

(c) . . . .

27 N.C.A.C. 1D, Rules of the Standing Committees of the North Carolina State Bar, Section .0900 Procedures for Administrative Committee

.0904 Compliance after Suspension for Failure to Fulfill Obligations of Membership

(a) Reinstatement Within 30 Days of Service of Suspension Order . . . .

(f) Reinstatement from Disciplinary Suspension.

Notwithstanding the procedure for reinstatement set forth in the preceding paragraphs of this Rule, if an order of reinstatement from disciplinary suspension is granted to a member pursuant to Rule .0125 of subchapter 1B of these rules, any outstanding order granting inactive status or suspending the same member for failure to fulfill the obligations of membership under this section shall be dissolved and the member shall be reinstated to active status.

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendment to the Rules and Regulations of the North Carolina State Bar was duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on October 29, 2010.

Given over my hand and the Seal of the North Carolina State Bar, this the 31st day of January, 2011.

s/L. Thomas Lunsford, II
L. Thomas Lunsford, II, Secretary

After examining the foregoing amendment to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same is not inconsistent with Article 4, Chapter 84, of the General Statutes.

This the 10th day of March, 2011.

s/Sarah Parker
Sarah Parker, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendment to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that it be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 10th day of March, 2011.

s/Jackson J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING DISCIPLINE AND DISABILITY OF ATTORNEYS

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on July 15, 2011.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning discipline and disability of attorneys, as particularly set forth in 27 N.C.A.C. 1B, Section .0100, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1B, Section .0100 Discipline and Disability of Attorneys

.0112 Investigations: Initial Determination; Notice and Response; Committee Referrals

(a) Investigation Authority—Subject to the policy supervision of the council and the control of the chair~~person~~ of the Grievance Committee, the counsel, or other personnel under the authority of the counsel, will investigate the grievance and submit to the ~~chairperson of the Grievance Committee~~ a report detailing the findings of the investigation.

(b) Grievance Committee Action on Initial or Interim Reports—As soon as practicable after the receipt of the initial or any interim report of the counsel concerning any grievance, the chair~~person~~ of the Grievance Committee may

(1) treat the report as a final report;

(2) direct the counsel to conduct further investigation, including contacting the respondent in writing or otherwise; or

(3) direct the counsel to send a letter of notice to the respondent.

(c) Letter of Notice, Respondent's Response, and Request for Copy of Grievance—If the counsel serves a letter of notice upon the respondent, ~~a letter of notice is sent to the respondent,~~ it will be served by certified mail and will direct that a response be ~~made~~ provided within 15 days of ~~receipt~~ service of the letter of notice upon the respondent. ~~Such response will be~~ The response to the letter of notice shall include a full and fair disclosure of all ~~the~~ facts and circumstances pertaining to the alleged misconduct. The response must be in writ-

ing and signed by the respondent. If the respondent requests it, the ~~The~~ counsel will provide the respondent with a copy of the written grievance ~~upon request~~, ~~except where~~ unless the complainant requests ~~to remain anonymous~~ anonymity pursuant to Rule .0111(d) of this subchapter.

(d) Request for Copy of Respondent's Response—The counsel may provide to the complainant a copy of the respondent's ~~response(s)~~ response to the letter of notice ~~to the complaining party~~ unless the respondent objects thereto in writing.

(e) Termination of Further Investigation—After the Grievance Committee receives the ~~a~~ response to a letter of notice ~~is received~~, the counsel may conduct further investigation or terminate the investigation, subject to the control of the chair~~person~~ of the Grievance Committee.

(f) Subpoenas—For reasonable cause, the chair~~person~~ of the Grievance Committee may issue subpoenas to compel the attendance of witnesses, including the respondent, for examination concerning the grievance and may compel the production of books, papers, and other documents or writings which the chair deems ~~deemed~~ necessary or material to the inquiry. Each subpoena will be issued by the chair~~person of the Grievance Committee,~~ or by the secretary at the direction of the chair~~person~~. The counsel, deputy counsel, investigator~~,~~ or any members of the Grievance Committee designated by the chair~~person~~ may examine any such witness under oath or otherwise.

(g) Grievance Committee Action on Final Reports—The Grievance Committee will consider the grievance as ~~As~~ soon as practicable after ~~the receipt of~~ it receives the final report of the counsel ~~or the termination of an investigation, the chairperson will convene the Grievance Committee to consider the grievance~~, except as otherwise provided in these rules.

(h) Failure of Complainant to Sign and Dismissal Upon Request of Complainant—The investigation into ~~the conduct of an attorney~~ alleged misconduct of the respondent will not be abated by ~~the~~ failure of the complainant to sign a grievance, by settlement~~,~~ or compromise of a dispute between the complainant and the respondent, or by the respondent's payment of, ~~or~~ restitution. The chair~~person~~ of the Grievance Committee may dismiss a grievance upon request of the complainant and with consent of the counsel where it appears that there is no probable cause to believe that the respondent ~~has~~ violated the ~~Revised~~ Rules of Professional Conduct.

(i) Referral to Law Office Management Training—If at any time prior to a finding of probable cause~~,~~ the chair~~person~~ of the Grievance

Committee, upon the recommendation of the counsel or of the Grievance Committee, determines that the alleged misconduct is primarily attributable to the respondent's failure to employ sound law office management techniques and procedures, the chair~~person of the Grievance Committee~~ may, with the respondent's consent, refer the case to a program of law office management training approved by the State Bar. The respondent will then be required to complete a course of training in law office management prescribed by the chair~~person of the Grievance Committee~~ which may include a comprehensive site audit of the respondent's records and procedures as well as attendance at continuing legal education seminars. ~~If the respondent successfully completes the rehabilitation program, the~~ The Grievance Committee ~~can~~ may consider the respondent's successful completion of the law office management training ~~that~~ as a mitigating ~~factor~~ circumstance and may, ~~for good cause shown~~, but is not required to, dismiss the grievance for good cause shown. If the respondent fails to successfully complete the program of law office management training as agreed, ~~cooperate with the training program's employees or fails to complete the prescribed training, that will be reported to the chairperson of the Grievance Committee and the investigation of the original grievance shall resume~~ the grievance will be included on the Grievance Committee's agenda for consideration of imposition of discipline at the Grievance Committee's next quarterly meeting.

(j) Referral to Lawyer Assistance Program— ~~If at any time before a finding of probable cause, the Grievance Committee determines that the alleged misconduct is primarily attributable to the respondent's substance abuse or mental health problem, the Committee may refer the matter to the Lawyer Assistance Program Board. The respondent must consent to the referral and must waive any right of confidentiality that the respondent might otherwise have had regarding communications with persons acting under the supervision of the Lawyer Assistance Program Board.~~

(1) If at any time before a finding of probable cause the Grievance Committee determines that the alleged misconduct is primarily attributable to the respondent's substance abuse or mental health problem, the committee may offer the respondent an opportunity to voluntarily participate in a rehabilitation program under the supervision of the Lawyer Assistance Program Board before the committee considers discipline.

If the respondent accepts the committee's offer to participate in a rehabilitation program, the respondent must provide the committee with a written acknowledgement of the referral on a form approved by the chair. The acknowledgement of the referral must

include the respondent's waiver of any right of confidentiality that might otherwise exist to permit the Lawyer Assistance Program to provide the committee with the information necessary for the committee to determine whether the respondent is in compliance with the rehabilitation program.

(2) Completion of Rehabilitation Program—If the respondent successfully completes the rehabilitation program, the Grievance Committee may consider successful completion of the program as a mitigating circumstance and may, but is not required to, dismiss the grievance for good cause shown. If the respondent fails to complete the rehabilitation program or fails to cooperate with the Lawyer Assistance Program Board, the Lawyer Assistance Program will report that failure to the counsel and the grievance will be included on the Grievance Committee's agenda for consideration of imposition of discipline at the Grievance Committee's next quarterly meeting.

~~(k) Completion of Rehabilitation Program. If the respondent successfully completes the rehabilitation program, the Grievance Committee can consider that as a mitigating factor and may, for good cause shown, dismiss the grievance. If the respondent fails to complete the rehabilitation program or fails to cooperate with the Lawyer Assistance Program Board, the failure will be reported to the chairperson of the Grievance Committee and the investigation of the grievance will resume.~~

~~(l)~~ (k) Referral to Trust Accounting Supervisory Program—. . . .

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on July 15, 2011.

Given over my hand and the Seal of the North Carolina State Bar, this the 28th day of July, 2011.

L. Thomas Lunsford, II
L. Thomas Lunsford, II, Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 25th day of August, 2011.

Sarah Parker
Sarah Parker, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 25th day of August, 2011.

Jackson, J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING DISCIPLINE AND DISABILITY OF ATTORNEYS

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on January 25, 2013.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning discipline and disability of attorneys, as particularly set forth in 27 N.C.A.C. 1B, Section .0100, be amended by deleting existing Rule .0118 and replacing it with a new proposed rule as follows:

27 N.C.A.C. 1B, Section .0100, Discipline and Disability of Attorneys

.0118 Disability

(a) Transfer by Secretary where Member Judicially Declared Incompetent—Where a member of the North Carolina State Bar has been judicially declared incapacitated, incompetent, or mentally ill by a North Carolina court or by a court of any other jurisdiction, the secretary, upon proper proof of such declaration, will enter an order transferring the member to disability inactive status effective immediately and for an indefinite period until further order of the Disciplinary Hearing Commission. A copy of the order transferring the member to disability inactive status will be served upon the member, the member's guardian, or the director of any institution to which the member is committed.

(b) Transfer to Disability Inactive Status by Consent—The chairperson of the Grievance Committee may transfer a member to disability inactive status upon consent of the member and the counsel.

(c) Initiation of Disability Proceeding

(1) Disability Proceeding Initiated by the North Carolina State Bar

(A) Evidence a Member has Become Disabled—When the North Carolina State Bar obtains evidence that a member has become disabled, the Grievance Committee will conduct an inquiry which substantially complies with the procedures set forth in Rule .0113 (a)-(h) of this subchapter. The Grievance Committee will determine whether there is probable cause to believe that the

member is disabled within the meaning of Rule .0103(19) of this subchapter. If the Grievance Committee finds probable cause, the counsel will file with the commission a complaint in the name of the North Carolina State Bar, signed by the chairperson of the Grievance Committee, alleging disability. The chairperson of the commission shall appoint a hearing panel to determine whether the member is disabled.

(B) Disability Proceeding Initiated While Disciplinary Proceeding is Pending—If, during the pendency of a disciplinary proceeding, the counsel receives evidence constituting probable cause to believe the defendant is disabled within the meaning of Rule .0103(19) of this subchapter, the chairperson of the Grievance Committee may authorize the counsel to file a motion seeking a determination that the defendant is disabled and seeking the defendant's transfer to disability inactive status. The hearing panel appointed to hear the disciplinary proceeding will hear the disability proceeding.

(C) Pleading in the Alternative—When the Grievance Committee has found probable cause to believe a member has committed professional misconduct and the Grievance Committee or the chairperson of the Grievance Committee has found probable cause to believe the member is disabled, the State Bar may file a complaint seeking, in the alternative, the imposition of professional discipline for professional misconduct or a determination that the defendant is disabled.

(2) Initiated by Hearing Panel During Disciplinary Proceeding—If, during the pendency of a disciplinary proceeding, a majority of the members of the hearing panel find probable cause to believe that the defendant is disabled, the panel will, on its own motion, enter an order staying the disciplinary proceeding until the question of disability can be determined. The hearing panel will instruct the Office of Counsel of the State Bar to file a complaint alleging disability. The chairperson of the commission will appoint a new hearing panel to hear the disability proceeding. If the new panel does not find the defendant disabled, the disciplinary proceeding will resume before the original hearing panel.

(3) Disability Proceeding where Defendant Alleges Disability in Disciplinary Proceeding—If, during the course of a

disciplinary proceeding, the defendant contends that he or she is disabled within the meaning of Rule .0103(19) of this subchapter, the defendant will be immediately transferred to disability inactive status pending conclusion of a disability hearing. The disciplinary proceeding will be stayed pending conclusion of the disability hearing. The hearing panel appointed to hear the disciplinary proceeding will hear the disability proceeding.

(d) Disability Hearings

(1) Burden of Proof

(A) In any disability proceeding initiated by the State Bar or by the commission, the State Bar bears the burden of proving the defendant's disability by clear, cogent, and convincing evidence.

(B) In any disability proceeding initiated by the defendant, the defendant bears the burden of proving the defendant's disability by clear, cogent, and convincing evidence.

(2) Procedure—The disability hearing will be conducted in the same manner as a disciplinary proceeding under Rule .0114 of this subchapter. The North Carolina Rules of Civil Procedure and the North Carolina Rules of Evidence apply, unless a different or more specific procedure is specified in these rules. The hearing will be open to the public.

(3) Medical Examination—The hearing panel may require the member to undergo psychiatric, physical, or other medical examination or testing by qualified medical experts selected or approved by the hearing panel.

(4) Appointment of Counsel—The hearing panel may appoint a lawyer to represent the defendant in a disability proceeding if the hearing panel concludes that justice so requires.

(5) Order

(A) When Disability is Proven—If the hearing panel finds that the defendant is disabled, the panel will enter an order continuing the defendant's disability inactive status or transferring the defendant to disability inactive status. An order transferring the defendant to disability inactive status is effective when it is entered. A copy of the order shall be served upon the defendant or the defendant's guardian or lawyer of record.

(B) When Disability is Not Proven—When the hearing panel finds that it has not been proven by clear, cogent, and convincing evidence that the defendant is disabled, the hearing panel shall enter an order so finding. If the defendant had been transferred to disability inactive status pursuant to paragraph (c)(3) of this rule, the order shall also terminate the defendant's disability inactive status.

(e) Stay/Resumption of Pending Disciplinary Matters

(1) Stay or Abatement—When a member is transferred to disability inactive status, any proceeding then pending before the Grievance Committee or the commission against the member shall be stayed or abated unless and until the member's disability inactive status is terminated.

(2) Preservation of Evidence—When a disciplinary proceeding against a member has been stayed because the member has been transferred to disability inactive status, the counsel may continue to investigate allegations of misconduct. The counsel may seek orders from the chairperson of the commission, or the chairperson of a hearing panel if one has been appointed, to preserve evidence of any alleged professional misconduct by the member, including orders which permit the taking of depositions. The chairperson of the commission, or the chairperson of a hearing panel if one has been appointed, may appoint counsel to represent the member when necessary to protect the interests of the member during the preservation of evidence.

(3) Termination of Disability Inactive Status—Upon termination of disability inactive status, all disciplinary proceedings pending against the member shall resume. The State Bar may immediately pursue any disciplinary proceedings that were pending when the member was transferred to disability inactive status and any allegations of professional misconduct that came to the State Bar's attention while the member was in disability inactive status. Any disciplinary proceeding pending before the commission that had been stayed shall be set for hearing by the chairperson of the commission.

(f) Fees and Costs—The hearing panel may direct the member to pay the costs of the disability proceeding, including the cost of any medical examination and the fees of any lawyer appointed to represent the member.

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on January 25, 2013.

Given over my hand and the Seal of the North Carolina State Bar, this the 4th day of February, 2013.

s/L. Thomas Lunsford, II
L. Thomas Lunsford II, Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 7th day of March, 2013.

s/Sarah Parker
Sarah Parker, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 8th day of March, 2013.

s/Beasley, J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING LEGAL SPECIALIZATION

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on October 29, 2010.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning legal specialization, as particularly set forth in 27 N.C.A.C. 1D, Section .1700, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1D, Rules of the Standing Committees of the North Carolina State Bar, Section .1700, The Plan of Legal Specialization

.1719 Specialty Committees

(a) The board shall establish a separate specialty committee for each specialty in which specialists are to be certified. . . .

(b) Each specialty committee shall advise and assist the board in carrying out the board's objectives and in the implementation and regulation of this plan in that specialty . . . Each specialty committee shall be charged with actively administering the plan in its specialty and with respect to that specialty shall:

(1) ~~after public hearing on due notice,~~ recommend to the board reasonable and nondiscriminatory standards applicable to that specialty;

(2) . . . .

(c) The board may appoint advisory members to a specialty committee to assist with the development, administration, and grading of the examination, the drafting of standards for a subspecialty, and any other activity set forth in paragraph (b) of this rule. Advisory members shall be non-voting except as to any specific activity delegated to the advisory members by the board or by the chair of the specialty committee, including the evaluation of applications for certification. No more than five advisory members may be appointed to a specialty committee. Advisory members shall be lawyers licensed and currently in good standing to practice law in this state who, in the judgment of the board, are competent in the field of law to be covered by the specialty. Advisory members shall hold office for an initial term

of three years and shall thereafter serve at the discretion of the board for not more than two additional three-year terms. Appointment by the board to a vacancy shall be for the remaining term, if any, of the advisory member being replaced.

.1720 Minimum Standards for Certification of Specialists

(a) To qualify for certification as a specialist, a lawyer applicant must pay any required fee, comply with the following minimum standards, and meet any other standards established by the board for the particular area of specialty.

(1) . . . .

(4) The applicant must make a satisfactory showing, as determined by the board after advice from the appropriate specialty committee, of qualification in the specialty through peer review by providing, as references, the names of at least five lawyers, all of whom are licensed and currently in good standing to practice law in this state, or in any state, or judges, who are familiar with the competence and qualification of the applicant as a specialist. None of the references may be persons related to the applicant or, at the time of application, a partner of or otherwise associated with the applicant in the practice of law. The applicant by his or her application consents to confidential inquiry by the board or appropriate disciplinary body and other persons regarding the applicants competence and qualifications to be certified as a specialist.

(5) The applicant must achieve a satisfactory score on a written examination designed to test the applicant's knowledge and ability in the specialty for which certification is applied. The examination must be applied uniformly to all applicants within each specialty area. The board shall assure that the contents and grading of the examination are designed to produce a uniform level of competence among the various specialties.

(b) . . .

(c) The board may adopt uniform rules waiving the requirements of Rules .1720(a)(4) and (5) above for members of a specialty committee, including advisory members, at the time that the initial written examination for that specialty or any subspecialty of the specialty is given, and permitting said members to file applications to become a board certified specialist in that specialty upon compliance with all other required minimum standards for certification of specialists.

(d) . . . .

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on October 29, 2010.

Given over my hand and the Seal of the North Carolina State Bar, this the 28th day of January, 2011.

s/L. Thomas Lunsford, II
L. Thomas Lunsford, II, Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 10th day of March, 2011.

s/Sarah Parker
Sarah Parker, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 10th day of March, 2011.

s/Jackson J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING LEGAL SPECIALIZATION

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on October 29, 2010.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning legal specialization, as particularly set forth in 27 N.C.A.C. 1D, Section .2500, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1D, Rules of the Standing Committees of the North Carolina State Bar, Section .2500 Certification Standards for the Criminal Law Specialty

.2501 Establishment of Specialty Field

The North Carolina State Bar Board of Legal Specialization (the board) hereby designates criminal law, including the ~~subspecialties of criminal appellate practice and~~ subspecialty of state criminal law, as a field of law for which certification of specialists under the North Carolina Plan of Legal Specialization (*see* Section .1700 of this subchapter) is permitted.

.2502 Definition of Specialty

The specialty of criminal law is the practice of law dealing with the defense or prosecution of those charged with misdemeanor and felony crimes in state and federal trial ~~and appellate~~ courts. ~~Subspecialties~~ The subspecialty in the field ~~are~~ is identified and defined as follows:

~~(a) Criminal Appellate Practice - The practice of criminal law at the appellate court level~~;

~~(b)~~ State Criminal Law—The practice of criminal law in state trial and appellate courts.

.2503 Recognition as a Specialist in Criminal Law

A lawyer may qualify as a specialist by meeting the standards set for criminal law or the ~~subspecialties of criminal appellate practice or~~ subspecialty of state criminal law. If a lawyer qualifies as a specialist by meeting the standards set for the criminal law specialty, the lawyer shall be entitled to represent that he or she is a "Board Certified Specialist in Criminal Law." ~~If a lawyer qualifies as a specialist by~~

~~meeting the standards set for the subspecialty of criminal appellate practice, the lawyer shall be entitled to represent that he or she is a "Board Certified Specialist in Criminal Appellate Practice."~~ If a lawyer qualifies as a specialist by meeting the standards set for the subspecialty of state criminal law, the lawyer shall be entitled to represent that he or she is a "Board Certified Specialist in State Criminal Law." ~~If a lawyer qualifies as a specialist by meeting the standards set for both criminal law and the subspecialty of criminal appellate practice, the lawyer shall be entitled to represent that he or she is a "Board Certified Specialist in Criminal Law and Criminal Appellate Practice."~~

.2505 Standards for Certification as a Specialist

Each applicant for certification as a specialist in criminal law~~,~~ or the subspecialty of state criminal law, ~~or the subspecialty of criminal appellate practice~~ shall meet the minimum standards set forth in Rule .1720 of this subchapter. In addition, each applicant shall meet the following standards for certification:

(a) Licensure and Practice. . . .

(b) Substantial Involvement—An applicant shall affirm to the board that the applicant has experience through substantial involvement in the practice of criminal law.

(1) . . . .

~~(4) For the subspecialty of criminal appellate practice, the applicant must have been engaged in the active practice of criminal appellate law for at least five years prior to certification during which the applicant devoted an average of at least 500 hours a year to the practice of criminal law (in both trial and appellate courts), but not less than 400 hours in any one year. The board may require an applicant to show substantial involvement in criminal appellate law by providing information regarding the applicant's participation, during the five years prior to application, in activities such as brief writing, motion practice, oral arguments, and the preparation and argument of extraordinary writs.~~

(c) Continuing Legal Education

~~(1)~~ In the specialty of criminal law, and the state criminal law subspecialty, ~~and the criminal appellate practice subspecialty,~~ an applicant must have earned no less than 40 hours of accredited continuing legal education credits in criminal law during the three years preceding the application, which 40 hours must include the following:

(1) ~~(A)~~ at least 34 hours in skills pertaining to criminal law, such as evidence, substantive criminal law, criminal procedure, criminal trial advocacy~~,~~ and criminal trial tactics~~, and appellate advocacy~~;

(2) ~~(B)~~ . . . .

~~(2) In order to be certified as a specialist in both criminal law and the subspecialty of criminal appellate law, an applicant must have earned no less than 46 hours of accredited continuing legal education credits in criminal law during the three years preceding application, which 46 hours must include the following:~~

~~(A) at least 40 hours in skills pertaining to criminal law, such as evidence, substantive criminal law, criminal procedure, criminal trial advocacy, and criminal trial tactics, and appellate advocacy;~~

~~(B) at least 6 hours in the areas of ethics and criminal law.~~

(d) Peer Review

(1) Each applicant for certification as a specialist in criminal law~~,~~ and the subspecialty of state criminal law~~, and the subspecialty of criminal appellate~~ practice, must make a satisfactory showing of qualification through peer review.

(2) . . . .

(e) Examination—The applicant must pass a written examination designed to test the applicant's knowledge and ability.

(1) Terms . . . .

(2) Subject Matter

The examination shall cover the applicant's knowledge in the following topics in criminal law, and/or in the subspecialty of state criminal law, ~~and/or in the subspecialty of criminal appellate practice~~, as the applicant has elected:

(A) the North Carolina and Federal Rules of Evidence;

(B) . . .

~~(G) the North Carolina Rules of Appellate Procedure~~.

(3) Required Examination Components.

(A) Criminal Law Specialty . . . .

(B) State Criminal Law Subspecialty . . . .

~~(C) Criminal Appellate Practice Subspecialty~~

~~An applicant for certification in the subspecialty of criminal appellate practice must pass the criminal appellate practice examination in addition to passing part I of the criminal law examination (on general topics in criminal law) and passing part II (on federal and state criminal law) or part III (on state criminal law) of the examination. If an applicant for certification in criminal appellate practice is already certified as a specialist in the specialty of criminal law or the subspecialty of state criminal law, the applicant is only required to take and pass the criminal appellate practice examination.~~

.2507 Applicability of Other Requirements

The specific standards set forth herein for certification of specialists in criminal law~~,~~ and the subspecialty of state criminal law ~~and the subspecialty of criminal appellate practice~~ are subject to any general requirement, standard, or procedure adopted by the board applicable to all applicants for certification or continued certification.

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on October 29, 2010.

Given over my hand and the Seal of the North Carolina State Bar, this the 28th day of January, 2011.

s/L. Thomas Lunsford, II
L. Thomas Lunsford, II, Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 10th day of March, 2011.

s/Sarah Parker
Sarah Parker, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they

be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 10th day of March, 2011.

s/Jackson J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING LEGAL SPECIALIZATION

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on October 29, 2010.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning legal specialization, as particularly set forth in 27 N.C.A.C. 1D, Section .2700, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1D, Rules of the Standing Committees of the North Carolina State Bar, Section .2700 Certification Standards for the Workers' Compensation Law Specialty

.2705 Standards for Certification as a Specialist in Workers' Compensation Law

Each applicant for certification as a specialist in workers' compensation law shall meet the minimum standards set forth in Rule .1720 of this subchapter. In addition, each applicant shall meet the following standards for certification in workers' compensation law:

(a) Licensure and Practice . . . .

(c) Continuing Legal Education—An applicant must earn no less than 36 hours of accredited continuing legal education (CLE) credits in workers' compensation law and related fields during the three years preceding application, with not less than six credits earned in courses on workers' compensation law in any one year. ~~Of the 36 hours of CLE, at least 18 hours shall be in workers' compensation law, and the balance~~ The remaining 18 hours may be earned in courses on workers' compensation law or any of ~~may be in~~ the following related fields: civil trial practice and procedure; evidence; mediation; medical in-

juries, medicine, or anatomy; labor and employment law; ~~and~~ Social Security disability law; and the law relating to long-term disability or Medicaid/Medicare claims.

(d) Peer Review . . . .

.2706 Standards for Continued Certification as a Specialist

The period of certification is five years . . . . each applicant for continued certification as a specialist shall comply with the specific requirements set forth below in addition to any general standards required by the board of all applicants for continued certification.

(a) Substantial Involvement . . . .

(b) Continuing Legal Education—The specialist must earn no less than 60 hours of accredited continuing legal education (CLE) credits in workers' compensation law and related fields during the five years preceding application. Not less than six credits may be earned in any one year. Of the 60 hours of CLE, at least 30 hours shall be in workers' compensation law, and the balance may be in the following related fields: civil trial practice and procedure; evidence; mediation; medical injuries, medicine, or anatomy; labor and employment law; ~~and~~ Social Security disability law; and the law relating to long-term disability or Medicaid/Medicare claims. Effective [date of adoption], the specialist must earn not less than six credits in courses on workers' compensation law each year and the balance of credits may be earned in courses on workers' compensation law or any of the related fields previously listed.

(c) Peer Review . . . .

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on October 29, 2010.

Given over my hand and the Seal of the North Carolina State Bar, this the 28th day of January, 2011.

s/L. Thomas Lunsford, II
L. Thomas Lunsford, II, Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted by the Council

of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 10th day of March, 2011.

s/Sarah Parker
Sarah Parker, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 10th day of March, 2011.

s/Jackson J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING LEGAL SPECIALIZATION

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on October 29, 2010.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning legal specialization, as particularly set forth in 27 N.C.A.C. 1D, Section .2800, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1D, Rules of the Standing Committees of the North Carolina State Bar, Section .2800, Certification Standards for the Social Security Disability Law Specialty

.2805 Standards for Certification as a Specialist in Social Security Disability Law

Each applicant for certification as a specialist in Social Security disability law shall meet the minimum standards set forth in Rule .1720 of this subchapter. In addition, each applicant shall meet the following standards for certification in Social Security disability law:

(a) Licensure and Practice . . . .

(b) Substantial Involvement . . . .

(c) Continuing Legal Education—An applicant must earn no less than 36 hours of accredited continuing legal education (CLE) credits in Social Security disability law and related fields during the three years preceding application, with not less than six credits earned in any one year. Of the 36 hours of CLE, at least 18 hours shall be in Social Security disability law, and the balance may be in the following related fields: trial skills and advocacy; practice management; medical injuries, medicine, or anatomy; ERISA; labor and employment law; elder law; workers' compensation law; veterans' disability law; and the law relating to long term disability or Medicaid/Medicare claims.

(d) Peer Review . . . .

.2806 Standards for Continued Certification as a Specialist

The period of certification is five years . . . . each applicant for continued certification as a specialist shall comply with the specific requirements set forth below in addition to any general standards required by the board of all applicants for continued certification.

(a) Substantial Involvement . . . .

(b) Continuing Legal Education—The specialist must earn no less than 60 hours of accredited continuing legal education credits in Social Security disability law and related fields during the five years preceding application. Not less than six of the credits may be earned in any one year. Of the 60 hours of CLE, at least 20 hours shall be in Social Security disability law, and the balance may be in the following related fields: trial skills and advocacy; practice management; medical injuries, medicine, or anatomy; ERISA; labor and employment law; elder law; workers' compensation law; veterans' disability law; and the law relating to long term disability or Medicaid/Medicare claims.

(c) Peer Review . . . .

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on October 29, 2010.

Given over my hand and the Seal of the North Carolina State Bar, this the 27th day of January, 2011.

s/L. Thomas Lunsford, II
L. Thomas Lunsford, II, Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 10th day of March, 2011.

s/Sarah Parker
Sarah Parker, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 10th day of March, 2011.

s/Jackson J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING LEGAL SPECIALIZATION

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on January 21, 2011.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning legal specialization, as particularly set forth in 27 N.C.A.C. 1D, Section .2900, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1D, Rules of the Standing Committees of the North Carolina State Bar, Section .2900 Certification Standards for the Elder Law Specialty

.2905 Standards for Certification as a Specialist in Elder Law

Each applicant for certification as a specialist in elder law shall meet the minimum standards set forth in Rule .1720 of this subchapter. In addition, each applicant shall meet the following standards for certification in elder law:

(a) Licensure and Practice . . . .

(d) Continuing Legal Education–An applicant must earn ~~no less than~~ forty-five (45) hours of accredited continuing legal education (CLE) credits in elder law and related fields, as specified in this rule, during the three full calendar years preceding application and the year of application, with not less than nine (9) credits earned in any of the three calendar years. Of the 45 CLE credits, at least ten (10) credits must be earned attending elder law–specific CLE programs. Related fields shall include the following: estate planning and administration, trust law, health and long-term care planning, public benefits, surrogate decision-making, older persons' legal capacity, social security disability, Medicaid/Medicare claims, special needs planning, and taxation. No more than ~~twenty four (24)~~ twenty (20) credits may be earned in the related fields of estate taxation or estate administration.

(e) Peer Review . . . .

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on January 21, 2011.

Given over my hand and the Seal of the North Carolina State Bar, this the 27th day of January, 2011.

s/L. Thomas Lunsford, II
L. Thomas Lunsford, II, Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 10th day of March, 2011.

s/Sarah Parker
Sarah Parker, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 10th day of March, 2011.

s/Jackson J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING LEGAL SPECIALIZATION

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on October 29, 2010.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning legal specialization, as particularly set forth in 27 N.C.A.C. 1D, be amended by adding the following new section:

27 N.C.A.C. 1D, Rules of the Standing Committees of the North Carolina State Bar, Section .3000 Certification Standards for the Appellate Practice Specialty

.3001 Establishment of Specialty Field

The North Carolina State Bar Board of Legal Specialization (the board) hereby designates appellate practice as a field of law for which certification of specialists under the North Carolina Plan of Legal Specialization (see Section .1700 of this subchapter) is permitted.

.3002 Definition of Specialty

The specialty of appellate practice is the practice of law relating to appeals to the Appellate Division of the North Carolina General Courts of Justice, as well as appeals to appellate-level courts of any state or territory of the United States, the Supreme Court of the United States, the United States Courts of Appeals, the United States Court of Appeals for the Armed Forces and the United States Courts of Criminal Appeals for the armed forces, and any tribal appellate court for a federally recognized Indian tribe (hereafter referred to as

a "state or federal appellate court" or collectively as "state and federal appellate courts").

.3003 Recognition as a Specialist in Appellate Practice

If a lawyer qualifies as a specialist in appellate practice by meeting the standards for the specialty, the lawyer shall be entitled to represent that he or she is a "Board Certified Specialist in Appellate Practice." Any lawyer who is entitled to represent that he or she is a "Board Certified Specialist in Criminal Appellate Practice" (having been certified as such under the standards set forth in Section .2500 of this subchapter) at the time of the adoption of these standards shall also be entitled to represent that he or she is a "Board Certified Specialist in Appellate Practice" and shall thereafter meet the standards for continued certification under Rule .3006 of this section in lieu of the standards for continued certification under Rule .2506 of Section .2500 of this subchapter.

.3004 Applicability of Provisions of the North Carolina Plan of Legal Specialization

Certification and continued certification of specialists in appellate practice shall be governed by the provisions of the North Carolina Plan of Legal Specialization (*see* Section .1700 of this subchapter) as supplemented by these standards for certification.

.3005 Standards for Certification as a Specialist in Appellate Practice

Each applicant for certification as a specialist in appellate practice shall meet the minimum standards set forth in Rule .1720 of this subchapter. In addition, each applicant shall meet the following standards for certification in appellate practice:

(a) Licensure and Practice—An applicant shall be licensed and in good standing to practice law in North Carolina as of the date of application. An applicant shall continue to be licensed and in good standing to practice law in North Carolina during the period of certification.

Substantial Involvement—An applicant shall affirm to the board that the applicant has experience through substantial involvement in appellate practice.

(1) Substantial involvement shall mean that during the five years immediately preceding the application, the applicant devoted an average of at least 400 hours a year, and not less than 100 hours in any one year, to appellate practice. "Practice" shall mean substantive legal work done primarily for the purpose of providing legal advice or representation including activities described in

paragraph (2) below, or a practice equivalent as described in paragraph (3) below.

(2) Substantive legal work in appellate practice includes, but is not limited to, the following: preparation of a record on appeal or joint appendix for filing in any state or federal appellate court; researching, drafting, or editing of a legal brief, motion, petition, or response for filing in any state or federal appellate court; participation in or preparation for oral argument before any state or federal appellate court; appellate mediation, either as the representative of a party or as a mediator, in any state or federal appellate court; consultation on issues of appellate practice including consultation with trial counsel for the purpose of preserving a record for appeal; service on a committee or commission whose principal focus is the study or revision of the rules of appellate procedure of the North Carolina or federal courts; authoring a treatise, text, law review article, or other scholarly work relating to appellate practice; teaching appellate advocacy at an ABA accredited law school; and coaching in appellate moot court programs.

(3) "Practice equivalent" shall include the following activities:

(A) Service as a trial judge for any North Carolina General Court of Justice, United States Bankruptcy Court, or United States District Court, including service as a magistrate judge, for one year or more may be substituted for one year of experience toward the five-year requirement set forth in Rule .3005(b)(1).

(B) Service as a full-time, compensated law clerk for any North Carolina or federal appellate court for one year or more may be substituted for one year of experience toward the five-year requirement set forth in Rule .3005(b)(1).

(C) Service as an appellate judge for any North Carolina or federal appellate court may be substituted for the equivalent years of experience toward the five-year requirement set forth in Rule .3005(b)(1) as long as the applicant's experience, before the applicant took the bench, included substantial involvement in appellate practice (as defined in paragraph (b)(1)) for two years before the applicant's service as an appellate judge.

(4) An applicant must also demonstrate substantial involvement in appellate practice by providing information regarding the applicant's participation during his or her legal career in the following:

(A) Five (5) oral arguments to any state or federal appellate court; and

(B) Principal authorship of ten (10) briefs submitted to any state or federal appellate court.

(c) Continuing Legal Education—An applicant must earn no fewer than 36 hours of accredited continuing legal education (CLE) credits in appellate practice and related fields during the three years preceding application, with no less than six credits to be earned in any one year. Of the 36 hours of CLE, at least 18 hours shall be in appellate practice, and the balance may be in the following related fields: trial advocacy; civil trial practice and procedure; criminal trial practice and procedure; evidence; legal writing; legal research; and mediation. An applicant may ask the specialty committee to recognize an additional field as related to appellate practice for the purpose of meeting the CLE standard. An applicant who uses authorship of a treatise, text, law review article, or other scholarly work relating to appellate practice or the teaching of appellate advocacy at an ABA-accredited law school to satisfy the substantial involvement requirement in paragraph (b) of this rule may not use the same experience to satisfy the CLE requirements of this paragraph (c).

(d) Peer Review—An applicant must make a satisfactory showing of qualification through peer review. An applicant must provide the names of ten lawyers or judges who are familiar with the competence and qualification of the applicant in the specialty field. Written peer reference forms will be sent by the board or the specialty committee to each of the references. Completed peer reference forms must be received from at least five of the references. All references must be licensed and in good standing to practice law and must have significant legal or judicial experience in appellate practice. An applicant consents to confidential inquiry by the board or the specialty committee to the submitted references and other persons concerning the applicant's competence and qualification.

(1) A reference may not be related by blood or marriage to the applicant nor may the reference be a colleague at the applicant's place of employment at the time of the application.

(2) The references shall be given on standardized forms mailed by the board to each reference. These forms shall be returned to the board and forwarded by the board to the specialty committee.

(e) Examination—An applicant must pass an examination designed to allow the applicant to demonstrate sufficient knowledge, skills, and proficiency in the field of appellate practice to justify the repre-

sentation of special competence to the legal profession and the public. The examination shall be given annually and shall be administered and graded uniformly by the specialty committee. The exam shall include a written component which may be take-home and may include an oral argument before a moot court.

(1) Subject Matter—The examination shall cover the applicant's knowledge and application of the following:

(A) The North Carolina Rules of Appellate Procedure;

(B) North Carolina General Statutes relating to appeals;

(C) The Federal Rules of Appellate Procedure;

(D) Federal statutes relating to appeals;

(E) The Local Rules and Internal Operating Procedures of the United States Court of Appeals for the Fourth Circuit;

(F) The Rules of the United States Supreme Court; (G) Brief writing;

(H) Oral argument; and

(I) Principles of appellate jurisdiction.

.3006 Standards for Continued Certification as a Specialist

The period of certification is five years. Prior to the expiration of the certification period, a certified specialist who desires continued certification must apply for continued certification within the time limit described in Rule .3006(d) below. No examination will be required for continued certification. However, each applicant for continued certification as a specialist shall comply with the specific requirements set forth below in addition to any general standards required by the board of all applicants for continued certification.

(a) Substantial Involvement—The specialist must demonstrate that, for each of the five years preceding application for continuing certification, he or she has had substantial involvement in the specialty as defined in Rule .3005(b) of this subchapter.

(b) Continuing Legal Education—The specialist must earn no less than 60 hours of accredited CLE credits in appellate practice and related fields during the five years preceding application for continuing certification. No less than six of the credits may be earned in any one year. Of the 60 hours of CLE, at least 20 hours shall be in appellate practice, and the balance may be in the related fields set forth in Rule .3005(c).

(c) Peer Review—The specialist must comply with the requirements of Rule .3005(d) of this subchapter.

(d) Time for Application—Application for continued certification shall be made not more than 180 days, nor less than 90 days, prior to the expiration of the prior period of certification.

(e) Lapse of Certification—Failure of a specialist to apply for continued certification in a timely fashion will result in a lapse of certification. Following such a lapse, recertification will require compliance with all requirements of Rule .3005 of this subchapter, including the examination.

(f) Suspension or Revocation of Certification—If an applicant's certification has been suspended or revoked during the period of certification, the application shall be treated as if it were for initial certification under Rule .3005 of this subchapter.

.3007 Applicability of Other Requirements

The specific standards set forth herein for certification of specialists in appellate practice are subject to any general requirement, standard, or procedure, adopted by the board, that applies to all applicants for certification or continued certification.

.3008 Advisory Members of the Appellate Practice Specialty Committee

The board may appoint former chief justices of the North Carolina Supreme Court to serve as advisory members of the Appellate Practice Specialty Committee. Notwithstanding any other provision in The Plan of Legal Specialization (Section .1700 of this subchapter) or this Section .3000, the board may waive the requirements of Rule .3005(d) and (e) above if an advisory committee member has served at least one year on the North Carolina Supreme Court and may permit the advisory member to file an application to become a board certified specialist in appellate practice upon compliance with all other required standards for certification in the specialty. Advisory members shall hold office for an initial term of three years and shall thereafter serve at the discretion of the board.

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were

duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on October 29, 2010.

Given over my hand and the Seal of the North Carolina State Bar, this the 28th day of January, 2011.

s/L. Thomas Lunsford, II
L. Thomas Lunsford, II, Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 10th day of March, 2011.

s/Sarah Parker
Sarah Parker, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 10th day of March, 2011.

s/Jackson J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING LEGAL SPECIALIZATION

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on July 15, 2011.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning legal specialization, as particularly set forth in 27 N.C.A.C. 1D, Section .2500, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1D, Rules of the Standing Committees of the North Carolina State Bar, Section .2500, Certification Standards for the Criminal Law Specialty

.2501 Establishment of Specialty Field

The North Carolina State Bar Board of Legal Specialization (the board) hereby designates criminal law (encompassing both federal and state criminal law), including the subspecialties of state criminal law and juvenile delinquency law, as a field of law for which certification of specialists under the North Carolina Plan of Legal Specialization (*see* Section .1700 of this subchapter) is permitted.

.2502 Definition of Specialty

The specialty of criminal law is the practice of law dealing with the defense or prosecution of those charged with misdemeanor and felony crimes in state and federal trial courts. Subspecialties in the field are identified and defined as follows:

(a) State Criminal Law—The practice of criminal law in state trial courts.

(b) Juvenile Delinquency Law—The practice of law in state juvenile delinquency courts. The standards for the subspecialty are set forth in Rules .2508 - .2509.

.2503 Recognition as a Specialist in Criminal Law

A lawyer may qualify as a specialist by meeting the standards ~~set~~ for criminal law or the subspecialties of state criminal law or juvenile delinquency law. If a lawyer qualifies as a specialist by meeting the standards ~~set~~ for the criminal law specialty, the lawyer shall be entitled to represent that he or she is a "Board Certified Specialist in

Criminal Law." If a lawyer qualifies as a specialist by meeting the standards ~~set~~ for the subspecialty of state criminal law, the lawyer shall be entitled to represent that he or she is a "Board Certified Specialist in State Criminal Law." If a lawyer qualifies as a specialist by meeting the standards for the subspecialty of juvenile delinquency law, the lawyer shall be entitled to represent that he or she is a "Board Certified Specialist in Criminal Law—Juvenile Delinquency."

. . . .

.2507 Applicability of Other Requirements

The specific standards set forth herein for certification of specialists in criminal law, ~~and~~ the subspecialty of state criminal law and the subspecialty of juvenile delinquency law are subject to any general requirement, standard, or procedure adopted by the board applicable to all applicants for certification or continued certification.

.2508 Standards for Certification as a Specialist in Juvenile Delinquency Law

Each applicant for certification as a specialist in juvenile delinquency law shall meet the minimum standards set forth in Rule .1720 of this subchapter. In addition, each applicant shall meet the following standards for certification:

(a) Licensure and Practice—An applicant shall be licensed and in good standing to practice law in North Carolina as of the date of the application. During the period of certification an applicant shall continue to be licensed and in good standing to practice law in North Carolina.

(b) Substantial Involvement—An applicant shall affirm to the board that the applicant has experience through substantial involvement in the practice of juvenile delinquency law.

(1) Substantial involvement shall mean during the five years immediately preceding the application, the applicant devoted an average of at least 500 hours a year to the practice of juvenile delinquency law, but not less than 400 hours in any one year. "Practice" shall mean substantive legal work, specifically including representation of juveniles or the state in juvenile delinquency court, done primarily for the purpose of providing legal advice or representation, or a practice equivalent.

(2) "Practice equivalent" shall mean:

(A) Service for one year or more as a state district court judge responsible for presiding over juvenile delinquency court for

250 hours each year may be substituted for one year of experience to meet the five-year requirement set forth in Rule .2508(b)(1) above;

(B) Service on or participation in the activities of local, state, or national civic, professional or government organizations that promote juvenile justice may be used to meet the requirement set forth in Rule .2508(b)(1) but not to exceed 100 hours for any year during the five years.

(3) An applicant shall also demonstrate substantial involvement during the five years prior to application unless otherwise noted by providing information that demonstrates the applicant's significant juvenile delinquency court experience such as:

(A) Representation of juveniles or the state during the applicant's entire legal career in juvenile delinquency hearings concluded by disposition;

(B) Representation of juveniles or the state in juvenile delinquency felony cases;

(C) Court appearances in other substantive juvenile delinquency proceedings in juvenile court;

(D) Representation of juveniles or the state through transfer to adult court; and

(E) Representation of juveniles or the state in appeals of juvenile delinquency decisions.

(c) Continuing Legal Education—An applicant must have earned no less than 40 hours of accredited continuing legal education (CLE) credits in criminal and juvenile delinquency law during the three years preceding application. Of the 40 hours of CLE, at least 12 hours shall be in juvenile delinquency law, and the balance may be in the following related fields: substantive criminal law, criminal procedure, trial advocacy, and evidence.

(d) Peer Review –

(1) Each applicant for certification as a specialist in juvenile delinquency law must make a satisfactory showing of qualification through peer review.

(2) All references must be licensed and in good standing to practice in North Carolina and must be familiar with the competence and qualifications of the applicant in the specialty field. The applicant consents to the confidential inquiry by

the board or the specialty committee of the submitted references and other persons concerning the applicant's competence and qualifications.

(3) Written peer reference forms will be sent by the board or the specialty committee to the references. Completed peer reference forms must be received from at least five of the references. The board or the specialty committee may contact in person or by telephone any reference listed by an applicant.

(4) Each applicant must provide for reference and independent inquiry the names and addresses of ten lawyers and judges who practice in the field of juvenile delinquency law or criminal law or preside over juvenile delinquency or criminal law proceedings and who are familiar with the applicant's practice.

(5) A reference may not be related by blood or marriage to the applicant nor may the reference be a partner or associate of the applicant at the time of the application.

(e) Examination—An applicant must pass a written examination designed to demonstrate sufficient knowledge, skills, and proficiency in the field of juvenile delinquency law to justify the representation of special competence to the legal profession and the public.

(1) Terms—The examination shall be given annually in written form and shall be administered and graded uniformly by the specialty committee.

(2) Subject Matter—The examination shall cover the applicant's knowledge in the following topics:

(A) North Carolina Rules of Evidence;

(B) State criminal substantive law;

(C) Constitutional law as it relates to criminal procedure and juvenile delinquency law;

(D) State criminal procedure;

(E) North Carolina Juvenile Code, Subchapters II and III, and related case law; and

(F) North Carolina caselaw as it relates to juvenile delinquency law.

(3) Examination Components—An applicant for certification in the subspecialty of juvenile delinquency law must pass

part I of the criminal law examination on general topics in criminal law and part IV of the examination on juvenile delinquency law.

.2509 Standards for Continued Certification as a Specialist in Juvenile Delinquency Law

The period of certification is five years. A certified specialist who desires continued certification must apply for continued certification within the time limit described in Rule .2509(d) below. No examination will be required for continued certification. However, each applicant for continued certification as a specialist shall comply with the specific requirements set forth below in addition to any general standards required by the board of all applicants for continued certification.

(a) Substantial Involvement—The specialist must demonstrate that for the five years preceding reapplication he or she has had substantial involvement in the specialty or subspecialty as defined in Rule .2508(b).

(b) Continuing Legal Education—The specialist must have earned no less than 65 hours of accredited continuing legal education credits in criminal law and juvenile delinquency law with not less than six credits earned in any one year. Of the 65 hours, at least 20 hours shall be in juvenile delinquency law, and the balance may be in the following related fields: substantive criminal law, criminal procedure, trial advocacy, and evidence.

(c) Peer Review—The specialist must comply with the requirements of Rule .2508(d) of this subchapter.

(d) Time for Application—Application for continuing certification shall be made not more than 180 days nor less than 90 days prior to the expiration of the prior period of certification.

(e) Lapse of Certification—Failure of a specialist to apply for continued certification in a timely fashion will result in a lapse of certification. Following such lapse, recertification will require compliance with all requirements of Rule .2508 of this subchapter, including the examination.

(f) Suspension or Revocation of Certification—If an applicant's certification has been suspended or revoked during the period of certification, then the application shall be treated as if it were for initial certification under Rule .2508 of this subchapter.

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on July 15, 2011.

Given over my hand and the Seal of the North Carolina State Bar, this the 28th day of July, 2011.

L. Thomas Lunsford, II
L. Thomas Lunsford, II, Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 25th day of August, 2011.

Sarah Parker
Sarah Parker, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 25th day of August, 2011.

Jackson, J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING LEGAL SPECIALIZATION

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on October 21, 2011.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning legal specialization, as particularly set forth in 27 N.C.A.C. 1D, Section .1700, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1D, Rules of the Standing Committees of the North Carolina State Bar, Section .1700 The Plan of Legal Specialization

.1720 Minimum Standards for Certification of Specialists

(a) To qualify for certification as a specialist, a lawyer applicant must pay any required fee, comply with the following minimum standards, and meet any other standards established by the board for the particular area of specialty.

(1) ….

(4) The applicant must make a satisfactory showing, as determined by the board after advice from the appropriate specialty committee, of qualification in the specialty through peer review by providing, as references, the names of at least five lawyers, all of whom are licensed and currently in good standing to practice law in this state, or in any state, or judges, who are familiar with the competence and qualification of the applicant as a specialist. None of the references may be persons related to the applicant or, at the time of application, a partner of or otherwise associated with the applicant in the practice of law. The applicant by his or her application consents to confidential inquiry by the board or appropriate disciplinary body and other persons regarding the applicant's competence and qualifications to be certified as a specialist.

(A) Each specialty committee shall evaluate the information provided by an applicant's references to make a recom-

mendation to the board as to the applicant's qualification in the specialty through peer review. The evaluation shall include a determination of the weight to be given to each peer review and shall take into consideration a reference's years of practice, primary practice areas and experience in the specialty, and the context in which a reference knows the applicant.

(5) ....

(b) ....

.1721 Minimum Standards for Continued Certification of Specialists

(a) The period of certification as a specialist shall be five years....To qualify for continued certification as a specialist, a lawyer applicant must pay any required fee, must demonstrate to the board with respect to the specialty both continued knowledge of the law of this state and continued competence, and must comply with the following minimum standards.

(1) The specialist must make a satisfactory showing, as determined by the board after advice from the appropriate specialty committee, of substantial involvement ~~(which shall be determined in accordance with the principles set forth in Rule .1720(a)(2) of this subchapter)~~ in the specialty during the entire period of certification as a specialist. Substantial involvement for continued certification shall be determined in accordance with the principles set forth in Rule .1720(a)(2) of this subchapter and the specific standards for each specialty. In addition, unless prohibited or limited by the standards for a particular specialty, the following judicial service may be substituted for the equivalent years of practice experience if the applicant's judicial service included presiding over cases in the specialty: service as a full-time state or federal trial, appellate, or bankruptcy judge (including service as a federal magistrate judge); service as a judge for the courts of a federally recognized Indian tribe; service as an administrative law judge for the Social Security Administration; and service as a commissioner or deputy commissioner of the Industrial Commission.

(2) ….

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on October 21, 2011.

Given over my hand and the Seal of the North Carolina State Bar, this the 16th day of February, 2012.

s/L. Thomas Lunsford, II
L. Thomas Lunsford, II, Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 8th day of March, 2012.

s/Sarah Parker
Sarah Parker, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 8th day of March, 2012.

s/Jackson, J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING LEGAL SPECIALIZATION

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on January 27, 2012.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning legal specialization, as particularly set forth in 27 N.C.A.C. 1D, Section .1700, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1D, Rules of the Standing Committees of the North Carolina State Bar, Section .1700 The Plan of Legal Specialization

.1725 Areas of Specialty

There are hereby recognized the following specialties:

(1) bankruptcy law
  (a) consumer bankruptcy law
  (b) business bankruptcy law

(2) estate planning and probate law

(3) real property law
  (a) real property—residential
  (b) real property—business, commercial, and industrial

(4) family law

(5) criminal law
  (a) ~~criminal appellate practice~~
  ~~(b)~~ state criminal law
  (b) juvenile delinquency law

(6) immigration law

(7) workers' compensation

(8) Social Security disability law

(9) elder law

(10) appellate practice.

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on January 27, 2012.

Given over my hand and the Seal of the North Carolina State Bar, this the 16th day of February, 2012.

s/L. Thomas Lunsford, II
L. Thomas Lunsford, II, Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 8th day of March, 2012.

s/Sarah Parker
Sarah Parker, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 8th day of March, 2012.

s/Jackson, J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING LEGAL SPECIALIZATION

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on January 27, 2012.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning legal specialization, as particularly set forth in 27 N.C.A.C. 1D, Section .2900, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1D, Rules of the Standing Committees of the North Carolina State Bar, Section .2900 Certification Standards for the Elder Law Specialty

.2905 Standards for Certification as a Specialist in Elder Law

Each applicant for certification as a specialist in elder law shall meet the minimum standards set forth in Rule .1720 of this subchapter. In addition, each applicant shall meet the following standards for certification in elder law:

(a) Licensure and Practice ….

(d) Continuing Legal Education—An applicant must earn ~~no less than~~ forty-five (45) hours of accredited continuing legal education (CLE) credits in elder law and related fields, as specified in this rule, during the three full calendar years preceding application and the year of application, with not less than nine (9) credits earned in any of the three calendar years. Of the forty-five CLE credits, at least ten (10) credits must be earned attending elder law—specific CLE programs. Related fields shall include the following: estate planning and administration, trust law, health and long term care planning, public benefits, veterans' benefits, surrogate decision-making, older persons' legal capacity, social security disability, Medicaid/Medicare claims, special needs planning and taxation. No more than twenty (20) credits may be earned in the related fields of estate taxation or estate administration

(e) Peer Review ….

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on January 27, 2012.

Given over my hand and the Seal of the North Carolina State Bar, this the 16th day of March, 2012.

s/L. Thomas Lunsford, II
L. Thomas Lunsford, II, Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 8th day of March, 2012.

s/Sarah Parker
Sarah Parker, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 8th day of March, 2012.

s/Jackson, J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING LEGAL SPECIALIZATION

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on January 25, 2013.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning legal specialization, as particularly set forth in 27 N.C.A.C. 1D, Section .2500, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1D, Section .2500, Certification Standards for the Criminal Law Specialty

.2505 Standards for Certification as a Specialist

(a)….

(b) Substantial Involvement—An applicant shall affirm to the board that the applicant has experience through substantial involvement in the practice of criminal law.

(1) Substantial involvement shall mean during the five years immediately preceding the application, the applicant devoted an average of at least 500 hours a year to the practice of criminal law, but not less than 400 hours in any one year. "Practice" shall mean substantive legal work, specifically including representation in criminal jury trials, done primarily for the purpose of providing legal advice or representation, or a practice equivalent.

(2) ….

(3) For the specialty of criminal law and the subspecialty of state criminal law, the board shall require an applicant to show substantial involvement by providing information that demonstrates the applicant's significant criminal trial experience such as:

(A) representation during the applicant's entire legal career in criminal trials concluded by jury verdict;

(B) representation as principal counsel of record in federal felony cases or state felony cases (Class G or higher);

(C) court appearances in other substantive criminal proceedings in criminal courts of any jurisdiction; and

(D) representation in appeals of decisions to the North Carolina Court of Appeals, the North Carolina Supreme Court, or any federal appellate court.

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on January 25, 2013.

Given over my hand and the Seal of the North Carolina State Bar, this the 31st day of January, 2013.

s/L. Thomas Lunsford, II
L. Thomas Lunsford II, Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 7th day of March, 2013.

s/Sarah Parker
Sarah Parker, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 8th day of March, 2013.

s/Beasley, J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING LEGAL SPECIALIZATION

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on October 26, 2012.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning legal specialization, as particularly set forth in 27 N.C.A.C. 1D, be amended by adding the following new section:

27 N.C.A.C. 1D, Section .3100, Certification Standards for the Trademark Law Specialty

.3101 Establishment of Specialty Field

The North Carolina State Bar Board of Legal Specialization (the board) hereby designates trademark law as a specialty for which certification of specialists under the North Carolina Plan of Legal Specialization (see Section .1700 of this subchapter) is permitted.

.3102 Definition of Specialty

The specialty of trademark law is the practice of law devoted to commercial symbols, and typically includes the following: advising clients regarding creating and selecting trademarks; conducting and/or analyzing trademark searches; prosecuting trademark applications; enforcing and protecting trademark rights; and counseling clients on matters involving trademarks. Practitioners regularly practice before the United States Patent and Trademark Office (USPTO), the Trademark Trial and Appeal Board (TTAB), the Trademark Division of the NC Secretary of State's Office, and the North Carolina and/or federal courts.

.3103 Recognition as a Specialist in Trademark Law

If a lawyer qualifies as a specialist in trademark law by meeting the standards set for the specialty, the lawyer shall be entitled to represent that he or she is a "Board Certified Specialist in Trademark Law."

.3104 Applicability of Provisions of the North Carolina Plan of Legal Specialization

Certification and continued certification of specialists in trademark law shall be governed by the provisions of the North Carolina Plan of Legal Specialization (see Section .1700 of this subchapter) as supplemented by these standards for certification.

.3105 Standards for Certification as a Specialist in Trademark Law

Each applicant for certification as a specialist in trademark law shall meet the minimum standards set forth in Rule .1720 of this subchapter. In addition, each applicant shall meet following standards for certification in trademark law:

(a) Licensure and Practice—An applicant shall be licensed and in good standing to practice law in North Carolina as of the date of application. An applicant shall continue to be licensed and in good standing to practice law in North Carolina during the period of certification.

(b) Substantial Involvement—An applicant shall affirm to the board that the applicant has experience through substantial involvement in trademark law.

(1) Substantial involvement shall mean that during the five years immediately preceding the application, the applicant devoted an average of at least 500 hours a year to the practice of trademark law, but not less than 400 hours in any one year.

(2) Practice shall mean substantive legal work in trademark law done primarily for the purpose of legal advice or representation or a practice equivalent.

(3) "Practice equivalent" shall mean:

(A) Service as a law professor concentrating in the teaching of trademark law which may be substituted for up to two years of experience to meet the five-year requirement set forth in Rule .3105(b)(1).

(B) Service as a trademark examiner at the USPTO or a functionally equivalent trademark office for any state or foreign government which may be substituted for up to two years of experience to meet the five-year requirement set forth in Rule .3105(b)(1).

(C) Service as an administrative law judge for the TTAB which may be substituted for up to three years of experience to meet the five-year requirement set forth in Rule .3105(b)(1).

(4) The board may, in its discretion, require an applicant to provide additional information as evidence of substantial involvement in trademark law, including information regarding

the applicant's participation, during his or her legal career, in the following: portfolio management, prosecution of trademark applications, search and clearance of trademarks, licensing, due diligence, domain name selection and dispute resolution, TTAB litigation, state court trademark litigation, federal court trademark litigation, trademark dispute resolution, and interna tional trademark law.

(c) Continuing Legal Education—To be certified as a specialist in trademark law, an applicant must have earned no less than 36 hours of accredited continuing legal education credits in trademark law during the three years preceding application. The 36 hours must include at least 20 hours in trademark law and the remaining 16 hours in related courses including: business transactions, copyright, franchise law, internet law, sports and entertainment law, trade secrets, and unfair competition.

(d) Peer Review—An applicant must make a satisfactory showing of qualification through peer review. An applicant must provide the names of ten lawyers or judges who are familiar with the competence and qualification of the applicant in the specialty field. Written peer reference forms will be sent by the board or the specialty committee to each of the references. Completed peer reference forms must be received from at least five of the references. All references must be licensed and in good standing to practice law and must have significant legal or judicial experience in trademark law. An applicant consents to confidential inquiry by the board or the specialty committee to the submitted references and other persons concerning the applicant's competence and qualification.

(1) A reference may not be related by blood or marriage to the applicant nor may the reference be a colleague at the applicant's place of employment at the time of the application.

(2) The references shall be given on standardized forms mailed by the board to each reference. These forms shall be returned to the board and forwarded by the board to the specialty committee.

(e) Examination—An applicant must pass a written examination designed to demonstrate sufficient knowledge, skills, and proficiency in the field of trademark law to justify the representation of special competence to the legal profession and the public.

(1) Terms—The examination shall be given annually in written form and shall be administered and graded uniformly by the specialty committee.

(2) Subject Matter—The examination shall cover the applicant's knowledge and application of trademark law and rules of practice, and may include the following statutes and related case law:

(A) The Lanham Act (15 USC §1501 et seq.)

(B) Trademark Regulations (37 CFR Part 2)

(C) Trademark Manual of Examining Procedure (TMEP)

(D) Trademark Trial and Appeal Board Manual of Procedure (TBMP)

(E) The Trademark Counterfeiting Act of 1984 (18 USC §2320 et seq.)

(F) North Carolina Trademark Act (N.C. Gen. Stat. Chap. 80).

.3106 Standards for Continued Certification as a Specialist

The period of certification is five years. Prior to the expiration of the certification period, a certified specialist who desires continued certification must apply for continued certification within the time limit described in Rule .3106(d). No examination will be required for continued certification. However, each applicant for continued certification as a specialist shall comply with the specific requirements set forth below in addition to any general standards required by the board of all applicants for continued certification.

(a) Substantial Involvement—The specialist must demonstrate that, for each of the five years preceding application for continuing certification, he or she has had substantial involvement in the specialty as defined in Rule .3105(b) of this subchapter.

(b) Continuing Legal Education—The specialist must earn no less than 60 hours of accredited CLE credits in trademark law and related fields during the five years preceding application for continuing certification. No less than six of the credits may be earned in any one year. Of the 60 hours of CLE, at least 34 hours shall be in trademark law, and the balance of 26 hours may be in the related fields set forth in Rule .3105(c) of this subchapter.

(c) Peer Review—The specialist must comply with the requirements of Rule .3105(d) of this subchapter.

(d) Time for Application—Application for continued certification shall be made not more than 180 days, nor less than 90 days, prior to the expiration of the prior period of certification.

(e) Lapse of Certification—Failure of a specialist to apply for continued certification in a timely fashion will result in a lapse of certification. Following such a lapse, recertification will require compliance with all requirements of Rule .3105 of this subchapter, including the examination.

(f) Suspension or Revocation of Certification—If an applicant's certification has been suspended or revoked during the period of certification, the application shall be treated as if it were for initial certification under Rule .3105 of this subchapter.

.3107 Applicability of Other Requirements

The specific standards set forth herein for certification of specialists in trademark law are subject to any general requirement, standard, or procedure adopted by the board applicable to all applicants for certification or continued certification.

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on October 26, 2012.

Given over my hand and the Seal of the North Carolina State Bar, this the 31st day of January, 2013.

s/L. Thomas Lunsford, II
L. Thomas Lunsford II, Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 7th day of March, 2013.

s/Sarah Parker
Sarah Parker, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 8th day of March, 2013.

s/Beasley, J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING MEMBERSHIP

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on October 29, 2010.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning membership, as particularly set forth in 27 N.C.A.C. 1D, Section .0900, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1D, Rules of the Standing Committees of the North Carolina State Bar, Section .0900 Procedures for Administrative Committee

.0902 Reinstatement from Inactive Status

(a) Eligibility to Apply for Reinstatement

. . .

(b) Contents of Reinstatement Petition

The petition shall set out facts showing the following:

(1) that the member has provided all information requested in an application form prescribed by the council and has signed the form under oath;

(2) unless the member was exempt from such requirements pursuant to Rule .1517 of this subchapter or is subject to the requirements in paragraph (b)(6) of this rule, that the member satisfied the minimum continuing legal education requirements, as set forth in Rule .1518 of this subchapter, for the calendar year immediately preceding the year in which the member was transferred to inactive status (the "subject year"), including any deficit from a prior year that was carried forward and recorded in the member's CLE record for the subject year,

(3) . . . .

(4) [this provision shall be effective for all members who are transferred to inactive status on or after January 1, 1996 through the effective date of these amendments] if ~~2 or~~ more than 2 years (as used in this rule, a year is measured in 12-month increments

and does not refer to a calendar year) have elapsed between the date of the entry of the order transferring the member to inactive status and the date the petition is filed ~~with the secretary of the State Bar~~, that within one year prior to filing the petition, the member completed 15 hours of continuing legal education (CLE) approved by the Board of Continuing Legal Education pursuant to Rule .1519 of this subchapter. Of the required 15 CLE hours, 3 hours must be earned by attending courses in the areas of professional responsibility and/or professionalism; ~~and~~

(5) [this provision shall be effective for all members who are transferred to inactive status on or after the effective date of these amendments] if more than 1 but less than 7 years have elapsed between the date of the entry of the order transferring the member to inactive status and the date that the petition is filed, that during the period of inactivity and within 2 years prior to filing the petition, the member has completed 12 hours of approved CLE for each year that the member was inactive. For each 12-hour increment, 4 hours may be taken online; 2 hours must be earned by attending courses in the areas of professional responsibility and/or professionalism; and 5 hours must be earned by attending courses determined to be practical skills courses by the Board of Continuing Legal Education or its designee; provided, if during the period of inactivity the member complied with mandatory CLE requirements of another state where the member is licensed, those CLE credit hours may be applied to the requirements under this provision;

(6) [this provision shall be effective for all members who are transferred to inactive status on or after the effective date of these amendments] if 7 years or more have elapsed between the date of the entry of the order transferring the member to inactive status and the date that the petition is filed, the member has obtained a passing grade on a regularly scheduled North Carolina bar examination; provided, each year of active licensure in another state during the period of suspension shall offset one year of suspension for the purpose of calculating the 7 years necessary to actuate this provision; and

~~(5)~~(7) . . . .

(c) Service of Reinstatement Petition. . . .

(e) Recommendation of Administrative Committee

After any investigation of the petition by the counsel is complete, the Administrative Committee will consider the petition at its next meet-

ing and shall make a recommendation to the council regarding whether the petition should be granted. The chair of the Administrtive Committee may appoint a panel composed of at least three members of the committee to consider any petition for reinstatement and, on behalf of the Administrative Committee, to make a recommendation to the council regarding whether the petition should be granted.

(f) Hearing Upon Denial of Petition for Reinstatement . . . .

(g) Reinstatement by Secretary of the State Bar.

Notwithstanding paragraph (e) of this rule, an inactive member may petition for reinstatement pursuant to paragraphs (a) and (b) of this rule and may be reinstated by the secretary of the State Bar upon a finding that the inactive member has complied with or fulfilled the conditions for reinstatement set forth in this rule; there are no issues relating to the inactive member's character or fitness; and the inactive member has paid all fees owed to the State Bar including the reinstatement fee. Reinstatement by the secretary is discretionary. If the secretary declines to reinstate a member, the member's petition shall be submitted to the Administrative Committee at its next meeting and the procedure for review of the reinstatement petition shall be as set forth in paragraph (e) of this rule.

.0904 Compliance after Suspension for Failure to Fulfill Obligations of Membership

(a) Reinstatement Within 30 Days of Service of Suspension Order.

. . . .

(b) Reinstatement More than 30 Days after Service of Suspension Order.

. . . .

(c) Contents of Reinstatement Petition

The petition shall set out facts showing the following:

(1) that the member has provided all information requested in a form to be prescribed by the council and has signed the form under oath;

(2) unless the member was exempt from such requirements pursuant to Rule .1517 of this subchapter or is subject to the requirements in paragraph (c)(4) of this rule, that the member satisfied the minimum continuing legal education (CLE) requirements, as

set forth in Rule .1518 of this subchapter, for the calendar year immediately preceding the year in which the member was suspended (the "subject year"), including any deficit from a prior year that was carried forward and recorded in the member's CLE record for the subject year ~~and~~;

(3) if ~~two or~~ more than 1 ~~years~~ but less than 7 years (as used in this rule, a year is measured in 12-month increments and does not refer to a calendar year) have elapsed between the effective date of the suspension order and the date upon which the reinstatement petition is filed, that during the period of suspension and within ~~one year~~ 2 years prior to filing the petition, the member has completed ~~15~~ 12 hours of approved CLE ~~accredited pursuant to Rule .1519 of this subchapter, including at least 3 hours of instruction in the areas of professional responsibility and/or professionalism~~ for each year that the member was suspended. For each 12-hour increment, 4 hours may be taken online; 2 hours must be earned by attending courses in the areas of professional responsibility and/or professionalism; and 5 hours must be earned by attending courses determined to be practical skills courses by the Board of Continuing Legal Education or its designee; provided, if during the period of suspension the member complied with mandatory CLE requirements of another state where the member is licensed, those CLE credit hours may be applied to the requirements under this provision;

(4) if 7 years or more have elapsed between the effective date of the suspension order and the date that the petition is filed, the member has obtained a passing grade on a regularly scheduled North Carolina bar examination; provided, each year of active licensure in another state during the period of suspension shall offset one year of suspension for the purpose of calculating the 7 years necessary to actuate this provision;

~~(3)~~(5) . . .;

~~(4)~~(6)

~~(5) that the member has filed a certificate of insurance coverage for the current year;~~

[re-numbering remaining paragraphs]

(d) . . . .

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on October 29, 2010.

Given over my hand and the Seal of the North Carolina State Bar, this the 21st day of January, 2011.

s/L. Thomas Lunsford, II
L. Thomas Lunsford, II, Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 10th day of March, 2011.

s/Sarah Parker
Sarah Parker, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 10th day of March, 2011.

s/Jackson J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING MEMBERSHIP

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on January 27, 2012.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning membership, as particularly set forth in 27 N.C.A.C. 1A, Section .0200, be amended by adding the following rule.

27 N.C.A.C. 1A, Organization of the North Carolina State Bar, Section .0200 Membership—Annual Membership Fees

.0204 "Good Standing" Definition and Certificates

(a) Definition

A lawyer who is an active member of the North Carolina State Bar and who is not subject to a pending administrative or disciplinary suspension or disbarment order or an order of suspension that has been stayed is in good standing with the North Carolina State Bar. An administrative or disciplinary suspension or disbarment order is "pending" if the order has been announced in open court by a state court of competent jurisdiction or by the Disciplinary Hearing Commission, or if the order has been entered by a state court of competent jurisdiction, by the Council or by the Disciplinary Hearing Commission but has not taken effect. "Good standing" makes no reference to delinquent membership obligations, prior discipline, or any disciplinary charges or grievances that may be pending.

(b) Certificate of Good Standing for Active Member

Upon application and payment of the prescribed fee, the Secretary of the North Carolina State Bar shall issue a certificate of good standing to any active member of the State Bar who is in good standing and who is current on all payments owed to the North Carolina State Bar. A certificate of good standing will not be issued unless the member pays any delinquency shown on the financial records of the North Carolina State Bar including outstanding judicial district bar dues. If the member contends that there is good cause for non-payment of some or all of the amount owed, the member may subsequently demonstrate good cause to the Administrative Committee pursuant to the procedure set forth in Rule .0903(e)(1) of subchapter 1D of these rules. If the member shows good cause, the contested amount shall be refunded to the member.

(c) Certificate of Good Standing for Inactive Member

Upon application, the Secretary of the North Carolina State Bar shall issue a certificate of good standing to any inactive member of the State Bar who was in good standing at the time that the member was granted inactive status and who is not subject to any disciplinary order or pending disciplinary order. The certificate shall state that the member is inactive and is ineligible to practice law in North Carolina.

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on January 27, 2012.

Given over my hand and the Seal of the North Carolina State Bar, this the 16th day of February, 2012.

s/L. Thomas Lunsford, II
L. Thomas Lunsford, II, Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 8th day of March, 2012.

s/Sarah Parker
Sarah Parker, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 8th day of March, 2012.

s/Jackson, J.
For the Court

AMENDMENTS TO THE NORTH CAROLINA STATE BAR RULES OF PROFESSIONAL CONDUCT

The following amendments to the Rules of Professional Conduct were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on April 21, 2011.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules of Professional Conduct, as particularly set forth in 27 N.C.A.C. 2, be amended as follows (additions are underlined, deletions are interlined):

Rule 7.3, Direct Contact with Potential Clients

(a) . . . .

(c) Targeted Communications. Unless the recipient of the communication is a person specified in paragraphs (a)(1) or (a)(2), every written, recorded, or electronic communication from a lawyer soliciting professional employment from a potential client known to be in need of legal services in a particular matter shall include the statement, in capital letters, "THIS IS AN ADVERTISEMENT FOR LEGAL SERVICES" (the advertising notice) subject to the following requirements:

(1) Written Communications. Written communications shall be mailed in an envelope. The advertising notice shall be printed on the front of the envelope, in a font that is as large as any other printing on the envelope. The front of the envelope shall contain no printing other than the name of the lawyer or law firm and return address, the name and address of the recipient, and the advertising notice. The advertising notice shall also be printed at the beginning of the body of the letter in a font as large as or larger than any other printing contained in the letter ~~the lawyer's or law firm's name in the letterhead or masthead~~.

(2) Electronic Communications. The advertising notice shall appear in the "in reference" block of the address section of the communication. No other statement shall appear in this block. The advertising notice shall also appear, at the beginning and ending of the electronic communication, in a font as large as or larger than any other printing ~~the lawyer's or law firm's name~~ in the body of the communication or in any masthead on the communication.

(3) Recorded Communications. The advertising notice shall be clearly articulated at the beginning and ending of the recorded communication.

(d) . . . .
Comment

[1]. . . .

[7] Paragraph (c) of this rule requires that all ~~direct~~ targeted mail solicitations of potential clients must be mailed in an envelope on which the statement, "THIS IS AN ADVERTISEMENT FOR LEGAL SERVICES," appears in capital letters. The statement must appear on the front of the envelope with no other distracting extraneous written statements other than the name and address of the recipient and the name and return address of the lawyer or firm. Postcards may not be used for ~~direct~~ targeted mail solicitations. No embarrassing personal information about the recipient may appear on the back of the envelope. The advertising notice must also appear at the beginning of an enclosed letter or electronic communication in a font that is at least as large as the font used ~~for the lawyer's or law firm's name in the letterhead or masthead~~ for any other printing in the letter or electronic communication. The font size requirement does not apply to a brochure enclosed with the letter if the letter contains the required notice. As explained in 2007 Formal Ethics Opinion 15, the font size requirement does not apply to an insignia or border used in connection with a law firm's name if the insignia or border is used consistently by the firm in official communications on behalf of the firm. The advertising notice ~~It~~ must also appear in the "in reference to" section of an email communication. The requirement that certain communications be marked, "THIS IS AN ADVERTISEMENT FOR LEGAL SERVICES," does not apply to communications sent in response to requests of potential clients or their spokespersons or sponsors. General announcements by lawyers, including changes in personnel or office location, do not constitute communications soliciting professional employment from a client known to be in need of legal services within the meaning of this Rule.

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules of Professional Conduct were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on April 21, 2011.

Given over my hand and the Seal of the North Carolina State Bar, this the 28th day of July, 2011.

L. Thomas Lunsford, II
L. Thomas Lunsford, II, Secretary

After examining the foregoing amendments to the Rules of Professional Conduct as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 25th day of August, 2011.

Sarah Parker
Sarah Parker, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules of Professional Conduct be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 25th day of August, 2011.

Jackson, J.
For the Court

AMENDMENTS TO THE NORTH CAROLINA STATE BAR RULES OF PROFESSIONAL CONDUCT

The following amendments to the Rules of Professional Conduct of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on July 20, 2012.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules of Professional Conduct, as particularly set forth in 27 N.C.A.C. 2, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 2, Rules of Professional Conduct, Rule 1.15, Safekeeping Property

Rule 1.15-1, Definitions

(a) ….

(d) "Demand deposit" denotes any account from which deposited funds can be withdrawn at any time without notice to the depository institution.

[Re-lettering remaining paragraphs.]

Rule 1.15-2, General Rules

(a) ….

(k) Bank Directive.

Every lawyer maintaining a trust account or fiduciary account with demand deposit at a bank or other financial institution shall file with the bank or other financial institution a written directive requiring the bank or other financial institution to report to the executive director of the North Carolina State Bar when an instrument drawn on the account is presented for payment against insufficient funds. No trust account or fiduciary account shall be maintained in a bank or other financial institution that does not agree to make such reports.

(l)….

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules of Professional Conduct were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on July 20, 2012.

Given over my hand and the Seal of the North Carolina State Bar, this the 16th day of August, 2012.

s/L. Thomas Lunsford, II
L. Thomas Lunsford, II, Secretary

After examining the foregoing amendments to the Rules of Professional Conduct as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 23rd day of August, 2012.

s/Sarah Parker
Sarah Parker, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules of Professional Conduct be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 23rd day of August, 2012.

s/Jackson, J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING REINSTATEMENT

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 15, 2011.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning reinstatement, as particularly set forth in 27 N.C.A.C. 1D, Section .0900, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1D Rules of the Standing Committees of the North Carolina State Bar, Section .0900 Procedures for Administrative Committee

.0902 Reinstatement from Inactive Status

(a) Eligibility to Apply for Reinstatement

. . . .

(b) Contents of Reinstatement Petition. The petition shall set out facts showing the following:

(1) . . . .

(6) [this provision shall be effective for all members who are transferred to inactive status on or after January 1, 2011] if seven years or more have elapsed between the date of the entry of the order transferring the member to inactive status and the date that the petition is filed, the member has obtained a passing grade on a regularly scheduled North Carolina bar examination; provided, each year of active licensure in another United States jurisdiction during the period of ~~suspension~~ inactive status shall offset one year of ~~suspension~~ inactive status for the purpose of calculating the seven years necessary to actuate this provision; and

(7) . . . .

(c) Service of Reinstatement Petition

. . . .

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on July 15, 2011.

Given over my hand and the Seal of the North Carolina State Bar, this the 28th day of July, 2011.

L. Thomas Lunsford, II
L. Thomas Lunsford, II, Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 25th day of August, 2011.

Sarah Parker
Sarah Parker, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 25th day of August, 2011.

Jackson, J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING REINSTATEMENT

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on January 27, 2012.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning reinstatement from inactive status, as particularly set forth in 27 N.C.A.C. 1D, Section .0900, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1D, Rules of the Standing Committees of the North Carolina State Bar, Section .0900 Procedures for Administrative Committee

.0902 Reinstatement from Inactive Status

(a) Eligibility to Apply for Reinstatement

Any member who has been transferred to inactive status may petition the council for an order reinstating the member as an active member of the North Carolina State Bar.

(b) Definition of "Year".

As used in this rule, a year is a 365 day period of time unless a calendar year is specified.

~~(b)~~ (c) ~~Contents of Reinstatement Petition~~ Requirements for Reinstatement. ~~The petition shall set out facts showing the following:~~

(1) Completion of Petition.

~~that the~~ The member ~~has provided~~ must provide ~~all~~ the information requested ~~in an application~~ on a petition form prescribed by the council and ~~has signed~~ must sign the ~~form~~ petition under oath~~;~~

(2) CLE Requirements for Calendar Year Before Inactive.

~~unless~~ Unless the member was exempt from such requirements pursuant to Rule .1517 of this subchapter or is subject to the requirements in paragraph ~~(b)~~ (c)(6) of this rule, ~~that~~ the member ~~satisfied~~ must satisfy the minimum continuing legal education requirements, as set forth in Rule .1518 of this subchapter, for the calendar year immediately preceding the

calendar year in which the member was transferred to inactive status, (the "subject year"), including any deficit from a prior calendar year that was carried forward and recorded in the member's CLE record for the subject year~~,~~.

(3) Character and Fitness to Practice.

~~that the~~ The member ~~has~~ must have the moral qualifications, competency and learning in the law required for admission to practice law in the state of North Carolina, and must show that the member's resumption of the practice of law within this state will be neither detrimental to the integrity and standing of the Bar or the administration of justice nor subversive of the public interest~~;~~.

(4) CLE Requirements For Members Granted Inactive Status Prior to March 10, 2011.

~~[this provision shall be effective~~ Effective for all members who are transferred to inactive status on or after January 1, 1996, through ~~the effective date of these amendments~~ March 9, 2011.] ~~if~~ If more than 2 years ~~(as used in this rule, a year is measured in 12 month increments and does not refer to a calendar year)~~ have elapsed between the date of the entry of the order transferring the member to inactive status and the date the petition is filed, ~~that within one year prior to filing the petition~~, the member ~~completed~~ must complete 15 hours of continuing legal education (CLE) approved by the Board of Continuing Legal Education pursuant to Rule .1519 of this subchapter. Of the required 15 CLE hours, 3 hours must be earned by attending courses in the areas of professional responsibility and/or professionalism~~;~~. The CLE hours must be completed within one year prior to the filing of the petition.

(5) CLE Requirements If Inactive Less Than 7 Years.

~~[this provision shall be effective~~ Effective for all members who are transferred to inactive status on or after ~~the effective date of these amendments~~ March 10, 2011.] ~~if~~ If more than 1 but less than 7 years have elapsed between the date of the entry of the order transferring the member to inactive status and the date that the petition is filed, ~~that during the period of inactivity and within 2 years prior to filing the petition~~, the member ~~has completed~~ must complete 12 hours of approved CLE for each year that the member was inactive. The CLE

hours must be completed within 2 years prior to filing the petition. For each 12-hour increment, 4 hours may be taken online; 2 hours must be earned by attending courses in the areas of professional responsibility and/or professionalism; and 5 hours must be earned by attending courses determined to be practical skills courses by the Board of Continuing Legal Education or its designee;. ~~provided, if~~ If during the period of inactivity the member complied with mandatory CLE requirements of another state where the member is licensed, those CLE credit hours may be applied to the requirements under this provision;.

(6) Bar Exam Requirement If Inactive 7 or More Years.

[~~this provision shall be effective~~ Effective for all members who are transferred to inactive status on or after ~~the effective date of these amendments~~ March 10, 2011.] ~~if~~ If 7 years or more have elapsed between the date of the entry of the order transferring the member to inactive status and the date that the petition is filed, the member ~~has obtained~~ must obtain a passing grade on a regularly scheduled North Carolina bar examination~~, provided, each~~.

(A) Active Licensure in Another State. Each year of active licensure in another state during the period of inactive status shall offset one year of inactive status for the purpose of calculating the 7 years necessary to actuate this provision. If the member is not required to pass the bar examination as a consequence of offsetting, the member shall satisfy the CLE requirements set forth in paragraph (c)(5) for each year that the member was inactive.

(B) Military Service. Each calendar year in which an inactive member served on full-time, active military duty, whether for the entire calendar year or some portion thereof, shall offset one year of inactive status for the purpose of calculating the 7 years necessary to actuate the requirement of this paragraph. If the member is not required to pass the bar examination as a consequence of offsetting, the member shall satisfy the CLE requirements set forth in paragraph (c)(5).

(7) Payment of Fees, Assessments and Costs.

~~that the~~ The member ~~has paid~~ must pay all of the following:

(A) a $125.00 reinstatement fee;

(B) the membership fee, ~~and~~ Client Security Fund assessment and the judicial surcharge for the year in which the application is filed;

(C) the annual membership fee, if any, of the member's district bar for the year in which the application is filed and any past due annual membership fees for any district bar with which the member was affiliated prior to transfering to inactive status;

(D) all attendee fees owed the Board of Continuing Legal Education for CLE courses taken to satisfy the requirements of ~~Rule .0902(b)(2) and (4)~~ paragraphs (c)(2), (4), and (5);

(E) any costs previously assessed against the member by the chairperson of the Grievance Committee, the Disciplinary Hearing Commission; and/or the secretary or council of the North Carolina State Bar; and

(F) all costs incurred by the North Carolina State Bar in investigating and processing the application for reinstatement.

~~The reinstatement fee, costs, and any past due district bar annual membership fees shall be retained; however, the State Bar and district bar membership fees assessed for the year in which the application is filed shall be refunded if the petition is denied~~.

(d) ~~(c)~~ Service of Reinstatement Petition….

[re-lettering paragraphs (d) through (g)]

(i) Denial of Petition.

When a petition for reinstatement is denied by the council in a given calendar year, the member may not petition again until the following calendar year. The reinstatement fee, costs, and any fees paid pursuant to paragraph (c)(7) shall be retained.

However, the State Bar membership fee, Client Security Fund assessment, judicial surcharge and district bar membership fee assessed for the year in which the application is filed shall be refunded.

.0904 ~~Compliance~~ Reinstatement from ~~After~~ Suspension ~~for Failure to Fulfill Obligations of Membership~~

(a) ~~Reinstatement~~ Compliance Within 30 Days of Service of Suspension Order.

A member who receives an order of suspension for failure to comply with an obligation of membership may preclude the order from becoming effective and shall not be required to file a formal reinstatement petition or pay the reinstatement fee ~~by submitting a written request and satisfactory showing~~ if the member shows within 30 days after service of the suspension order that the member has ~~complied with or fulfilled~~ done the following:

(1) fulfilled the obligations of membership set forth in the order; ~~and~~

(2) ~~has~~ paid the ~~costs of the suspension and reinstatement procedure~~ administrative fees associated with the issuance of the suspension order~~,~~ including the costs of service;

(3) paid any other delinquency shown on the financial records of the State Bar including outstanding judicial district bar dues;

(4) signed and filed CLE annual report forms as required by Rule .1522 of this subchapter;

(5) completed CLE hours as required by Rules .1518 and .1522 of this subchapter; and

(6) filed any IOLTA certification required by Rule .1319 of this subchapter. ~~Such member shall not be required to file a formal reinstatement petition or pay the reinstatement fee.~~

(b) Reinstatement More than 30 Days after Service of Suspension Order.

At any time more than 30 days after service of an order of suspension on a member, a member who has been suspended for failure to com-

ply with an obligation of membership may petition the council for an order of reinstatement.

(c) Definition of "Year".

As used in this rule, a year is a 365 day period of time unless a calendar year is specified.

~~(c)~~ ~~(d)~~ Requirements for Reinstatement ~~Petition~~. ~~The petition shall set out facts showing the following:~~

(1) Completion of Petition.

~~that the~~ The member ~~has provided~~ must provide ~~all~~ the information requested ~~in a~~ on a petition form prescribed by the council and ~~has signed~~ must sign the ~~form~~ petition under oath~~;~~.

(2) CLE Requirements for Calendar Years Before Suspended.

~~unless~~ Unless the member was exempt from such requirements pursuant to Rule .1517 of this subchapter or is subject to the requirements in paragraph ~~(c)~~(d)(4) of this rule, ~~that~~ the member ~~satisfied~~ must satisfy the minimum continuing legal education (CLE) requirements, as set forth in Rule .1518 of this subchapter, for the calendar year immediately preceding the year in which the member was suspended (the "subject year"), including any deficit from a prior year that was carried forward and recorded in the member's CLE record for the subject year~~;~~. The member shall also sign and file any delinquent CLE annual report form.

(3) CLE Requirement If Suspended Less Than 7 Years.

~~if~~ If more than 1 but less than 7 years ~~(as used in this rule, a year is measured in 12-month increments and does not refer to a calendar year)~~ have elapsed between the effective date of the suspension order and the date upon which the reinstatement petition is filed, ~~that during the period of suspension and within 2 years prior to filing the petition,~~ the member ~~has completed~~ must complete 12 hours of approved CLE for each year that the member was suspended. The CLE must be completed within 2 years prior to filing the petition. For each 12-hour increment, 4 hours may be taken online; 2 hours must be earned by attending courses in the areas of professional responsibility and/or professionalism; and 5 hours must be

earned by attending courses determined to be practical skills courses by the Board of Continuing Legal Education or its design~~ee; provided,~~. ~~if~~ If during the period of suspension the member complied with mandatory CLE requirements of another state where the member is licensed, those CLE credit hours may be applied to the requirements under this provision~~;~~.

(4) Bar Exam Requirement If Suspended 7 or More Years.

~~if~~ If 7 years or more have elapsed between the effective date of the suspension order and the date that the petition is filed, the member ~~has obtained~~ must obtain a passing grade on a regularly scheduled North Carolina bar examination~~; provided, each~~.

(A) Active Licensure in Another State. Each year of active licensure in another state during the period of suspension shall offset one year of suspension for the purpose of calculating the 7 years necessary to actuate this provision. If the member is not required to pass the bar examination as a consequence of offsetting, the member shall satisfy the CLE requirements set forth in paragraph (d)(3) for each year that the member was suspended.

(B) Military Service. Each calendar year in which a suspended member served on full-time, active military duty, whether for the entire calendar year or some portion thereof, shall offset one year of suspension for the purpose of calculating the 7 years necessary to actuate the requirement of this paragraph. If the member is not required to pass the bar examination as a consequence of offsetting, the member shall satisfy the CLE requirements set forth in paragraph (d)(3).

(5) Character and Fitness to Practice.

~~that the~~ The member ~~has~~ must have the moral qualifications, competency and learning in the law required for admission to practice law in the state of North Carolina, and must show that the member's resumption of the practice of law will be neither detrimental to the integrity and standing of the Bar or the administration of justice nor subversive of the public interest~~;~~.

(6) Payment of Fees, Assessments and Costs.
~~that the~~ The member ~~has paid~~ must pay all of the following:

(A) a $125.00 reinstatement fee or $250.00 reinstatement fee if suspended for failure to comply with CLE requirements;

(B) all membership fees, Client Security Fund assessments, judicial surcharges and late fees owed at the time of suspesion and owed for the year in which the reinstatement petition is filed;

(C) all district bar annual membership fees owed at the time of suspension and owed for the year in which the reinstatement petition is filed;

(D) all attendee fees, fines and penalties owed the Board of Continuing Legal Education at the time of suspension and attendee fees for CLE courses taken to satisfy the requirements of ~~Rule .0904(c)~~ paragraphs (d)(2) and (3) above;

(E) any costs assessed against the member by the chairperson of the Grievance Committee, the Disciplinary Hearing Commission, and/or the secretary or council of the North Carolina State Bar; and

(F) all costs incurred by the North Carolina State Bar in suspending the member, including the costs of service, and in investigating and processing the application for reinstatement.

(7) Pro Hac Vice Registration Statements.

~~that the~~ The member ~~has filed~~ must file any overdue pro hac vice registration statement for which the member was responsible ~~;~~. ~~and~~

(8) IOLTA Certification.

The member must complete any IOLTA certification required by Rule .1319 of this subchapter.

~~(8)~~ (9) Wind Down of Law Practice During Suspension.

~~that, during the 30 day period after the effective date of the order of suspension, the~~ The member must demonstrate that the mem-

ber fulfilled the obligations of a disbarred or suspended member set forth in Rule .0124 of Subchapter 1B~~,~~ during the 30 day period after the effective date of the order of suspension, or that such obligations do not apply to the member due to the nature of the member's legal employment.

(e) ~~(d)~~ Procedure for Review of Reinstatement Petition.

....

[re-lettering paragraphs (e) and (f)]

(h) Denial of Petition.

When a petition for reinstatement is denied by the council in a given calendar year, the member may not petition again until the following calendar year. The reinstatement fee, costs, and any fees paid pursuant to paragraph (d)(6) shall be retained. However, the State Bar membership fee, Client Security Fund assessment, judicial surcharge and district bar membership fee assessed for the year in which the application is filed shall be refunded.

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on January 27, 2012.

Given over my hand and the Seal of the North Carolina State Bar, this the 16th day of March, 2012.

s/L. Thomas Lunsford, II
L. Thomas Lunsford, II, Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 8th day of March, 2012.

s/Sarah Parker
Sarah Parker, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 8th day of March, 2012.

s/Jackson, J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING REINSTATEMENT FROM INACTIVE STATUS OR ADMINISTRATIVE SUSPENSION

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on October 26, 2012.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning reinstatement from inactive status or administrative suspension, as particularly set forth in 27 N.C.A.C. 1D, Section .0900, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1D, Section .0900, Procedures for Administrative Committee

.0902 Reinstatement from Inactive Status

(a) Eligibility to Apply for Reinstatement

....

(c) Requirements for Reinstatement

(1) Completion of Petition.

....

(5) CLE Requirements If Inactive Less Than 7 Years.

[Effective for all members who are transferred to inactive status on or after March 10, 2011.] If more than 1 but less than 7 years have elapsed between the date of the entry of the order transferring the member to inactive status and the date that the petition is filed, the member must complete 12 hours of approved CLE for each year that the member was inactive. The CLE hours must be completed within 2 years prior to filing the petition. For each 12-hour increment, 4 hours may be taken online; 2 hours must be earned by attending courses in the areas of professional responsibility and/or professionalism; and 5 hours must be earned by attending courses determined to be practical skills courses by the Board of Continuing Legal Education or its designee. If during the period of inactivity the member complied with mandatory CLE requirements of another state where the member is licensed, those CLE credit hours may be applied to the requirements under this provision without regard to whether they were taken during the 2 years prior to filing the petition.

(6) Bar Exam Requirement If Inactive 7 or More Years.

[Effective for all members who are transferred to inactive status on or after March 10, 2011.] If 7 years or more have elapsed between the date of the entry of the order transferring the member to inactive status and the date that the petition is filed, the member must obtain a passing grade on a regularly scheduled North Carolina bar examination.

(A) Active Licensure in Another State. Each year of active licensure in another state during the period of inactive status shall offset one year of inactive status for the purpose of calculating the 7 years necessary to actuate this provision. If the member is not required to pass the bar examination as a consequence of offsetting, the member shall satisfy the CLE requirements set forth in paragraph (c)(5) for each year that the member was inactive up to a maximum of 7 years.

(B) Military Service. Each calendar year in which an inactive member served on full-time, active military duty, whether for the entire calendar year or some portion thereof, shall offset one year of inactive status for the purpose of calculating the 7 years necessary to actuate the requirement of this paragraph. If the member is not required to pass the bar examination as a consequence of offsetting, the member shall satisfy the CLE requirements set forth in paragraph (c)(5) for each year that the member was inactive up to a maximum of 7 years.

(7) Payment of Fees, Assessments, and Costs.

.0904 Reinstatement from Suspension

(a) Compliance Within 30 Days of Service of Suspension Order.

....

(d) Requirements for Reinstatement

(1) Completion of Petition

....

(3) CLE Requirement If Suspended Less Than 7 Years

If more than 1 but less than 7 years have elapsed between the effective date of the suspension order and the date upon which the reinstatement petition is filed, the member must complete 12 hours of approved CLE for each year that the member was sus-

pended. The CLE must be completed within 2 years prior to filing the petition. For each 12-hour increment, 4 hours may be taken online; 2 hours must be earned by attending courses in the areas of professional responsibility and/or professionalism; and 5 hours must be earned by attending courses determined to be practical skills courses by the Board of Continuing Legal Education or its designee. If during the period of suspension the member complied with mandatory CLE requirements of another state where the member is licensed, those CLE credit hours may be applied to the requirements under this provision without regard to whether they were taken during the 2 years prior to filing the petition.

(4) Bar Exam Requirement If Suspended 7 or More Years

If 7 years or more have elapsed between the effective date of the suspension order and the date that the petition is filed, the member must obtain a passing grade on a regularly scheduled North Carolina bar examination.

(A) Active Licensure in Another State. Each year of active licensure in another state during the period of suspension shall offset one year of suspension for the purpose of calculating the 7 years necessary to actuate this provision. If the member is not required to pass the bar examination as a consequence of offsetting, the member shall satisfy the CLE requirements set forth in paragraph (d)(3) for each year that the member was suspended up to a maximum of 7 years.

(B) Military Service. Each calendar year in which a suspended member served on full-time, active military duty, whether for the entire calendar year or some portion thereof, shall offset one year of suspension for the purpose of calculating the 7 years necessary to actuate the requirement of this paragraph. If the member is not required to pass the bar examination as a consequence of offsetting, the member shall satisfy the CLE requirements set forth in paragraph (d)(3) for each year that the member was suspended up to a maximum of 7 years.

(5) Character and Fitness to Practice

....

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly-adopted by the Council of the North Carolina State Bar at a regularly called meeting on October 26, 2012.

Given over my hand and the Seal of the North Carolina State Bar, this the 4th day of February, 2013.

s/L. Thomas Lunsford, II
L. Thomas Lunsford II, Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 7th day of March, 2013.

s/Sarah Parker
Sarah Parker, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 8th day of March, 2013.

s/Beasley, J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING CONTINUING LEGAL EDUCATION

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on July 15, 2011.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning continuing legal education, as particularly set forth in 27 N.C.A.C. 1D, Section .1500, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1D, Rules of the Standing Committees of the North Carolina State Bar, Section .1500 Regulations Governing the Administration of the Continuing Legal Education Program

.1501 Scope, Purpose and Definitions

(a) Scope . . . .

(b) Purpose. . . .

(c) Definitions

(1) "Accredited sponsor" shall mean . . . .

(13) "Professional responsibility" shall mean those courses or segments of courses devoted to a) the substance, underlying rationale, and practical application of the Rules of Professional Conduct; b) the professional obligations of the lawyer to the client, the court, the public, and other lawyers; ~~and~~ c) moral philosophy and ethical decision-making in the context of the practice of law; and d) the effects of stress, substance abuse, and chemical dependency, or debilitating mental conditions on a lawyer's professional responsibilities and the prevention, detection, treatment, and etiology of stress, substance abuse, chemical dependency, and debilitating mental conditions. This definition shall be interpreted consistent with the provisions of Rule .1501(c)(4) or (6) above.

(14) "Professionalism" courses are . . . .

.1518 Continuing Legal Education Program

(a) Annual Requirement. . . . .

(e) The board shall determine the process by which credit hours are allocated to lawyers' records to satisfy deficits. The allocation shall be applied uniformly to the records of all affected lawyers and may not be appealed by an affected lawyer.

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on July 15, 2011.

Given over my hand and the Seal of the North Carolina State Bar, this the 28th day of July, 2011.

L. Thomas Lunsford, II
L. Thomas Lunsford, II, Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 25th day of August, 2011.

Sarah Parker
Sarah Parker, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 25th day of August, 2011.

Jackson, J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING CONTINUING LEGAL EDUCATION

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on July 20, 2012.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning continuing legal education, as particularly set forth in 27 N.C.A.C. 1D, Section .1600, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1D, Section .1600, Regulations Governing the Administration of the Continuing Legal Education Program

.1605 Computation of Credit

(a) Computation Formula

....

(d) Teaching Law Courses

(1) Law School Courses. If a member is not a full-time teacher at a law school in North Carolina who is eligible for the exemption in Rule .1517(b) of this subchapter, the member may earn CLE credit for teaching ~~courses~~ a course or a class in a quarter or semester-long course at an ABA accredited law school. A member may also earn CLE credit by teaching ~~courses~~ a course or a class at a law school licensed by the Board of Governors of the University of North Carolina, provided the law school is actively seeking accreditation from the ABA. If ABA accreditation is not obtained by a law school so licensed within three years of the commencement of classes, CLE credit will no longer be granted for teaching courses at the school.

(2) Graduate School Courses. Effective January 1, 2012, a member may earn CLE credit by teaching a course on substantive law or a class on substantive law in a quarter or semester-long course at a graduate school of an accredited university.

~~(2)~~ (3) Courses at Paralegal Schools or Programs. Effective January 1, 2006, a member may earn CLE credit by teaching a paralegal or

substantive law ~~courses~~ course or a class in a quarter or semester-long course at an approved paralegal school or program.

~~(3)~~ (4) Credit Hours. Credit for teaching ~~courses~~ activities described in Rule .1605(d)(1) ~~and (2)~~ – (3) above may be earned without regard to whether the course is taught online or in a classroom. Credit will be calculated according to the following formula:

(A) Teaching a Course. 3.5 Hours of CLE credit for every quarter hour of credit assigned to the course by the educational institution, or 5.0 Hours of CLE credit for every semester hour of credit assigned to the course by the educational institution. (For example: a 3-semester hour course will qualify for 15 hours of CLE credit).

(B) Teaching a Class. 1.0 Hour of CLE credit for every 50-60 minutes of teaching.

~~(4)~~ (5) Other Requirements. ….

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on July 20, 2012.

Given over my hand and the Seal of the North Carolina State Bar, this the 16th day of August, 2012.

s/L. Thomas Lunsford, II
L. Thomas Lunsford, II, Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 23rd day of August, 2012.

s/Sarah Parker
Sarah Parker, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 23rd day of August, 2012.

s/Jackson , J.

For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING CERTIFICATION OF PARALEGALS

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on April 21, 2011.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning the certification of paralegals, as particularly set forth in 27 N.C.A.C. 1G, Section .0100, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1G, Certification of Paralegals, Section .0100 The Plan for Certification of Paralegals

.0105 Appointment of Members; When; Removal

(a) Appointment. The council shall appoint the members of the board, provided, however, after the appointment of the initial members of the board, each paralegal member shall be selected by the council from two nominees determined by a vote by mail or online of all active certified paralegals in an election conducted by the board.

(b) Procedure for Nomination of Candidates for Paralegal Members.

(1) Composition of Nominating Committee. . . .

(2) Selection of Candidates. The nominating committee shall meet within 30 days of its appointment to select five (5) certified paralegals as candidates for each paralegal member vacancy on the board for inclusion on the ballot to be mailed to all active certified paralegals.

(3) Vote of Certified Paralegals. At least 30 days prior to the meeting of the council at which a paralegal member appointment to the board will be made, a ballot shall be mailed or a notice of online voting shall be emailed or mailed to all active certified paralegals at each certified paralegal's physical or email address of record on file with the North Carolina State Bar. The ballot or notice shall be accompanied by written instructions, and shall state how many paralegal member positions on the board are subject to appointment, the names of the candidates selected by the nominating committee for each such position, and when and where the ballot should be returned. If balloting will be online,

the notice shall explain how to access the ballot on the State Bar's paralegal website and the method for voting online. Write-in candidates shall be permitted and the instructions shall so state. Each ballot sent by mail shall be sequentially numbered with a red identifying numeral in the upper right hand corner of the ballot. Online balloting shall be by secure log-in to the State Bar's paralegal website using the certified paralegal's identification number and personal password. Any certified paralegal who does not have an email address on file with the State Bar shall be mailed a ballot. The board shall maintain appropriate records respecting how many ballots ~~were mailed~~ or notices are sent to prospective voters in each election as well as how many ballots are returned. Only original ballots will be accepted by mail. Ballots received after the deadline stated on the ballot or the email notice will not be counted. The names of the two candidates receiving the most votes for each open paralegal member position shall be the nominees submitted to the council.

(c) Time of Appointment. . . . .

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on April 21, 2011.

Given over my hand and the Seal of the North Carolina State Bar, this the 28th day of July, 2011.

L. Thomas Lunsford, II
L. Thomas Lunsford, II, Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 25th day of August, 2011.

Sarah Parker
Sarah Parker, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they

be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 25th day of August, 2011.

Jackson, J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING CERTIFICATION OF PARALEGALS

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on April 26, 2012.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning certification of paralegals, as particularly set forth in 27 N.C.A.C. 1G, Section .0100, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1G, Section .0100, The Plan for Certification of Paralegals

.0123 Inactive Status Upon Demonstration of Hardship

(a) Inactive Status

The board shall transfer a certified paralegal to inactive status upon receipt of a petition, on a form approved by the board, demonstrating hardship as defined in paragraph (b) of this rule and upon payment of any fees owed to the board at the time of the petition unless waived by the board.

(1) The period of inactive status shall be one year from the deignated renewal date.

(2) On or before the expiration of inactive status, a paralegal on inactive status must file a petition for (continued) inactive status or seek reinstatement to active status by filing a renewal application pursuant to Rule .0120 of this subchapter. Failure to petition for continued inactive status or renewal shall result in lapse of certification.

(3) A paralegal may be inactive for not more than a total of five consecutive years.

(4) During a period of inactive status, a paralegal is not required to pay the renewal fee or to complete continuing legal education.

(5) During a period of inactive status, a paralegal shall not be entitled to represent that he or she is a North Carolina cer-

tified paralegal or to use any of the designations set forth in Rule .0117(4) of this subchapter.

(b) Hardship

The following conditions shall qualify as hardship justifying a transfer to inactive status:

(1) Financial inability to pay the annual renewal fee and to pay for continuing legal education courses due to unemployment or underemployment of the paralegal for a period of three months or more;

(2) Disability or serious illness for a period of three months or more;

(3) Active military service; and

(4) Transfer of the paralegal's active duty military spouse to a location outside of North Carolina.

(c) Reinstatement before Expiration of Inactive Status

To be reinstated as a certified paralegal, the paralegal must petition the board for reinstatement by filing a renewal application prior to the expiration of the inactive status period and must pay the annual renewal fee. If the paralegal was inactive for a period of two consecutive calendar years or more during the year prior to the filing of the petition, the paralegal must complete 12 hours of credit in board-approved continuing paralegal education, or its equivalent. Of the 12 hours, at least 2 hours shall be devoted to the areas of professional responsibility or professionalism, or any combination thereof.

(d) Certification after Expiration of Inactive Status Period

If the inactive status period expires before the paralegal petitions for reinstatement, certification shall lapse, and the paralegal cannot again be certified unless the paralegal qualifies upon application made as if for initial certification.

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments

to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on April 26, 2012.

Given over my hand and the Seal of the North Carolina State Bar, this the 16th day of August, 2012.

s/L. Thomas Lunsford, II
L. Thomas Lunsford, II, Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 23rd day of August, 2012.

s/Sarah Parker
Sarah Parker, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 23rd day of August, 2012.

s/Jackson, J.
For the Court

AMENDMENT TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING CERTIFICATION OF PARALEGALS

The following amendment to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar was duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on October 26, 2012.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning the certification of paralegals, as particularly set forth in 27 N.C.A.C. 1G, Section .0100, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1G, Section .0100, The Plan for Certification of Paralegals

.0122 Right to Review and Appeal to Council

(a) An individual who is denied certification or continued certification as a paralegal or whose certification is suspended or revoked shall have the right to a review before the board pursuant to the procedures set forth below and, thereafter, the right to appeal the board's ruling thereon to the council under such rules and regulations as the council may prescribe.

(b) Notification of the Decision of the Board.

….

(d) Review by the Board.

A three-member panel of the board shall be appointed by the chair of the board to reconsider the board's decision and take action by a majority of the panel….

(1) Review on the Record.

….

(3) Decision of the Panel.

The individual shall be notified in writing of the decision of the panel and, if unfavorable, the right to appeal the decision to the council under such rules and regulations as the council may prescribe. To exercise this right, the individual must file an appeal to the council in writing within 30 days of the mailing of the notice of the decision of the panel.

(e) Failure of Written Examination.

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendment to the Rules and Regulations of the North Carolina State Bar was duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on October 26, 2012.

Given over my hand and the Seal of the North Carolina State Bar, this the 31st day of January, 2013.

s/L. Thomas Lunsford, II
L. Thomas Lunsford II, Secretary

After examining the foregoing amendment to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same is not inconsistent with Article 4, Chapter 84, of the General Statutes.

This the 7th day of March, 2013.

s/Sarah Parker
Sarah Parker, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendment to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that it be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 8th day of March, 2013.

s/Beasley, J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING IOLTA

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on October 21, 2011.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning IOLTA, as particularly set forth in 27 N.C.A.C. 1D, Section .1300, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1D, Rules of the Standing Committees of the North Carolina State Bar, Section .1300, Rules Governing the Administration of the Plan for Interest on Lawyers' Trust Accounts (IOLTA)

.1301 Purpose

The IOLTA Board of Trustees (board) shall carry out the provisions of the Plan for Interest on Lawyers' Trust Accounts and administer the IOLTA program (NC IOLTA). Any funds remitted to the North Carolina State Bar from banks by reason of interest earned on general trust accounts established by lawyers pursuant to Rule 1.15-2(b) of the Rules of Professional Conduct or interest earned on trust or escrow accounts maintained by settlement agents pursuant to N.C.G.S. 45A-9 shall be deposited by the North Carolina State Bar through the board in a special account or accounts which shall be segregated from other funds of whatever nature received by the State Bar.

....

.1312 Source of Funds

Funding for the program carried out by the board shall come from funds remitted from depository institutions by reason of interest earned on trust accounts established by lawyers pursuant to Rule 1.15 of the Rules of Professional Conduct and Rule .1316 of this subchapter or interest earned on trust or escrow accounts maintained by settlement agents pursuant to N.C.G.S. 45A-9; voluntary contributions from lawyers; and interest, dividends, or other proceeds earned on the board's funds from investments or from other sources intended for the provision of legal services to the indigent and the improvement of the administration of justice.

.1316 IOLTA Accounts

(a) IOLTA Account Defined. Pursuant to order of the North Carolina Supreme Court, every general trust account, as defined in the Rules

of Professional Conduct, must be an interest or dividend-bearing account. (As used herein, "interest" shall refer to both interest and dividends.) Funds deposited in a general, interest-bearing trust account must be available for withdrawal upon request and without delay (subject to any notice period that the bank is required to reserve by law or regulation). Additionally, pursuant to N.C.G.S. 45A-9, a settlement agent who maintains a trust or escrow account for the purposes of receiving and disbursing closing funds and loan funds shall direct that any interest earned on funds held in that account be paid to the NC State Bar to be used for the purposes authorized under the Interest on Lawyers' Trust Account Program according to rule .1316(d) below. For the purposes of these rules, all such accounts shall be known as "IOLTA Accounts" (also referred to as "Accounts").

(b) Eligible Banks. Lawyers may maintain one or more IOLTA Account(s) only at banks and savings and loan associations chartered under North Carolina or federal law, as required by Rule 1.15 of the Rules of Professional Conduct, that offer and maintain IOLTA Accounts that comply with the requirements set forth in this subchapter (Eligible Banks). Settlement agents shall maintain any IOLTA Account as defined by N.C.G.S. 45A-9 and Rule .1316(a) above only at an Eligible Bank. The determination of whether a bank is eligible shall be made by NC IOLTA, which shall maintain a list of participating Eligible Banks available to all members of the State Bar and to all settlement agents. A bank that fails to meet the requirements of this subchapter shall be subject only to termination of its eligible status by NC IOLTA. A violation of this rule shall not be the basis for civil liability.

(c) Notice Upon Opening or Closing IOLTA Account. Every lawyer/, ~~or~~ law firm, or settlement agent maintaining IOLTA Accounts shall advise NC IOLTA of the establishment or closing of each IOLTA Account. Such notice shall include (i) the name of the bank where the account is maintained, (ii) the name of the account, (iii) the account number, and (iv) the name and bar number of the lawyer(s) in the firm and/or the name(s) of any non-lawyer settlement agent(s) maintaining the account. The North Carolina State Bar shall furnish to each lawyer/, ~~or~~ law firm, or settlement agent maintaining an IOLTA Accounts a suitable plaque explaining the program, which plaque shall be exhibited in the office of the lawyer/, ~~or~~ law firm, or settlement agent.

(d) Directive to Bank. Every lawyer or law firm and every settlement agent maintaining a North Carolina IOLTA Account shall direct any bank in which an IOLTA Account is maintained to:

(1) remit interest, less any deduction for allowable reasonable bank service charges or fees, (as used herein, "service charges" shall include any charge or fee charged by a bank on an IOLTA Account) as defined in paragraph (e), at least quarterly to NC IOLTA;

(2) transmit with each remittance to NC IOLTA a statement showing for each account: (i) the name of the law firm/, ~~or~~ lawyer, or settlement agent maintaining the account, (ii) the lawyer's/, ~~or~~ law firm's, or settlement agent's IOLTA Account number, (iii) the earnings period, (iv) the average balance of the account for the earnings period, (v) the type of account, (vi) the rate of interest applied in computing the remittance, (vii) the amount of any service charges for the earnings period, and (viii) the net remittance for the earnings period; and

(3) transmit to the law firm/, ~~or~~ lawyer, or settlement agent maintaining the account a report showing the amount remitted to NC IOLTA, the earnings period, and the rate of interest applied in computing the remittance.

(e) Allowable Reasonable Service Charges. Eligible Banks may elect to waive any or all service charges on IOLTA Accounts. If a bank does not waive service charges on IOLTA Accounts, allowable reasonable service charges may be assessed but only against interest earned on the IOLTA Account or funds deposited by the lawyer/, ~~or~~ law firm, or settlement agent in the IOLTA Account for the purpose of paying such charges. Allowable reasonable service charges may be deducted from interest on an IOLTA Account only at the rates and in accordance with the bank's standard practice for comparable non-IOLTA accounts.…

.1318 Confidentiality

(a) As used in this rule, "confidential information" means all information regarding IOLTA account(s) other than (1) a lawyer's/, ~~or~~ law firm's, or settlement agent's status as a participant, former participant, or non-participant in NC IOLTA, and (2) information regarding the policies and practices of any bank in respect of IOLTA trust

accounts, including rates of interest paid, service charge policies, the number of IOLTA accounts at such bank, the total amount on deposit in all IOLTA accounts at such bank, the total amounts of interest paid to NC IOLTA, and the total amount of service charges imposed by such bank upon such accounts.

(b) Confidential information shall not be disclosed by the staff or trustees of NC IOLTA to any person or entity, except that confidential information may be disclosed (1) to any chairperson of the Grievance Committee, staff attorney, or investigator of the North Carolina State Bar upon his or her written request specifying the information requested and stating that the request is made in connection with a grievance complaint or investigation regarding one or more trust accounts of a lawyer/, ~~or~~ law firm, or settlement agent; or (2) in response to a lawful order or other process issued by a court of competent jurisdiction, or a subpoena, investigative demand, or similar notice issued by a federal, state, or local law enforcement agency.

.1319 Certification

Every lawyer admitted to practice in North Carolina shall certify annually on or before June 30 to the North Carolina State Bar that all general trust accounts maintained by the lawyer or his or her law firm are established and maintained as IOLTA accounts as prescribed by Rule 1.15 of the Rules of Professional Conduct and Rule .1316 of this subchapter or that the lawyer is exempt from this provision because he or she does not maintain any general trust account(s) for North Carolina client funds. Any lawyer acting as a settlement agent who maintains a trust or escrow account used for the purpose of receiving and disbursing closing and loan funds shall certify annually on or before June 30 to the North Carolina State Bar that such accounts are established and maintained as IOLTA accounts as prescribed by N.C.G.S. 45A-9 and Rule .1316 of this subchapter.

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on October 21, 2011.

Given over my hand and the Seal of the North Carolina State Bar, this the 16th day of February, 2012.

s/ L. Thomas Lunsford, II
L. Thomas Lunsford, II, Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 8th day of March, 2012.

s/Sarah Parker
Sarah Parker, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 8th day of March, 2012.

s/Jackson, J.
For the Court

AMENDMENT TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING PREPAID LEGAL SERVICES PLANS

The following amendment to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar was duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on January 27, 2012.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning prepaid legal services plans, as particularly set forth in 27 N.C.A.C. 1E, Section .0300, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1E, Regulations for Organizations Practicing Law, Section .0300 Rules Concerning Prepaid Legal Services Plans

.0308 Registration Fee

The initial and annual registration fees for each prepaid legal services plan shall be $100. The fee is nonrefundable.

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendment to the Rules and Regulations of the North Carolina State Bar was duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on January 27, 2012.

Given over my hand and the Seal of the North Carolina State Bar, this the 16th day of February, 2012.

s/L. Thomas Lunsford, II
L. Thomas Lunsford, II, Secretary

After examining the foregoing amendment to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same is not inconsistent with Article 4, Chapter 84, of the General Statutes.

This the 8th day of March, 2012.

s/Sarah Parker
Sarah Parker, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendment to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that it be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 8th day of March, 2012.

s/Jackson, J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING THE ELECTION OF STATE BAR COUNCILORS

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on April 26, 2012.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning the election of State Bar councilors, as particularly set forth in 27 N.C.A.C. 1A, Section .0800, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1A, Section .0800, Election and Appointment of State Bar Councilors

.0804 Procedures Governing Elections by Mail

(a) Judicial district bars may adopt bylaws permitting elections by mail, in accordance with procedures approved by the N.C. State Bar Council and as set out in this section.

....

(f) Only original ballots will be accepted. No photocopied or faxed ballots will be accepted. ~~Voting by computer or electronic mail will not be permitted.~~

.0805 <u>Procedures Governing Elections by Electronic Vote</u>

<u>(a) Judicial district bars may adopt bylaws permitting elections by electronic vote in accordance with procedures approved by the N.C. State Bar Council and as set out in this section.</u>

<u>(b) Only active members of the judicial district bar may participate in elections conducted by electronic vote.</u>

<u>(c) In districts which permit elections by electronic vote, the notice sent to members referred to in Rule .0802(e) of this subchapter shall advise that the election will be held by electronic vote and shall identify how and to whom nominations may be made before the election. The notice shall explain when the ballot will be available, how to access the ballot, and the method for voting online. The notice shall also list locations where computers will be available for active members to access the online ballot in the event they do not have personal online access.</u>

(d) Write-in candidates shall be permitted and the instructions shall so state.

(e) Online balloting procedures must ensure that only one vote is cast per active member of the judicial district bar and that all members have access to a ballot.

~~.0805~~ .0806 Vacancies

[rule is unchanged]

~~.0806~~ .0807 Bylaws Providing for Geographical Rotation or Division of Representation

[rule is unchanged]

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on April 26, 2012.

Given over my hand and the Seal of the North Carolina State Bar, this the 16th day of August, 2012.

s/L. Thomas Lunsford, II
L. Thomas Lunsford, II, Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 23rd day of August, 2012.

s/Sarah Parker
Sarah Parker, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the Advance Sheets as pro-

vided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 23rd day of August, 2012.

s/Jackson, J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING DISCIPLINE AND DISABILITY OF ATTORNEYS

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on July 20, 2012.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning discipline and disability of attorneys, as particularly set forth in 27 N.C.A.C. 1B, Section .0100, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1B, .0100 Discipline and Disability of Attorneys

.0105 Chairperson of the Grievance Committee: Powers and Duties

(a) The chairperson of the Grievance Committee will have the power and duty

(1) ….;

~~(16) in his or her discretion, to refer grievances primarily attributable to unsound law office management to a program of law office management training approved by the State Bar and to so notify the complainant;~~

~~(17) except in cases involving possible misappropriation of entrusted funds, criminal conduct, dishonesty, fraud, misrepresentation, or deceit, or other cases deemed inappropriate by the chair, in his or her discretion to refer lawyers who are found during random auditing or otherwise to be significantly out of compliance with the Rules of Professional Conduct to a trust accounting supervisory program administered by the State Bar on terms and conditions approved by the council.~~

[Re-numbering remaining paragraphs.]

(b) **….**

.**0106 Grievance Committee: Powers and Duties**

The Grievance Committee will have the power and duty…

(1) ….

(13) in its discretion to refer grievances primarily attributable to the respondent's failure to employ sound trust accounting techniques to the trust account supervisory program in accordance with Rule .0112(k) of this subchapter.

.0112 Investigations: Initial Determination; Notice and Response; Committee Referrals

(a) Investigative Authority

…

(i) Referral to Law Office Management Training –

(1) If, at any time before ~~prior to~~ a finding of probable cause, ~~the chair of~~ the Grievance Committee~~, upon the recommendation of the counsel or of the Grievance Committee,~~ determines that the alleged misconduct is primarily attributable to the respondent's failure to employ sound law office management techniques and procedures, the ~~chair~~ committee may ~~;~~ ~~with the respondent's consent, refer the case to a program of~~ offer the respondent an opportunity to voluntarily participate in a law office management training program approved by the State Bar before the committee considers discipline.

If the respondent accepts the committee's offer to participate in the program, ~~T~~the respondent will then be required to complete a course of training in law office management prescribed by the chair which may include a comprehensive site audit of the respondent's records and procedures as well as attendance at continuing legal education seminars. If the respondent does not accept the committee's offer, the grievance will be returned to the committee's agenda for consideration of imposition of discipline.

(2) Completion of Law Office Management Training Program–If the respondent successfully completes the law office management training program, ~~T~~the ~~Grievance C~~committee may consider the respondent's successful completion of the law office management training program as a mitigating circumstance and may, but is not required to, dismiss the grievance for good cause shown. If the respondent fails to successfully complete the ~~program of~~ law office management training program as agreed, the grievance will be returned to the com-

mittee's agenda for consideration of imposition of discipline ~~at the Grievance Committee's next quarterly meeting~~. The requirement that a respondent complete law office management training pursuant to this rule shall be in addition to the respondent's obligation to satisfy the minimum continuing legal education requirements contained in 27 N.C.A.C. 1D .1517.

(j) Referral to Lawyer Assistance Program

(1) If, at any time before ~~prior to~~ a finding of probable cause, the Grievance Committee determines that the alleged misconduct is primarily attributable to the respondent's substance abuse or mental health problem, the committee may offer the respondent an opportunity to voluntarily participate in a rehabilitation program under the supervision of the Lawyer Assistance Program Board before the committee considers discipline.

If the respondent accepts the committee's offer to participate in a rehabilitation program, the respondent must provide the committee with a written acknowledgement of the referral on a form approved by the chair. The acknowledgement of the referral must include the respondent's waiver of any right of confidentiality that might otherwise exist to permit the Lawyer Assistance Program to provide the committee with the information necessary for the committee to determine whether the respondent is in compliance with the rehabilitation program. If the respondent does not accept the committee's offer, the grievance will be returned to the committee's agenda for consideration of imposition of discipline.

(2) Completion of Rehabilitation Program—If the respondent successfully completes the rehabilitation program, the ~~Grievance Committee~~ committee may consider successful completion of the program as a mitigating circumstance and may, but is not required to, dismiss the grievance for good cause shown. If the respondent fails to complete the rehabilitation program or fails to cooperate with the Lawyer Assistance Program Board, the Lawyer Assistance Program will report that failure to the counsel and the grievance will be returned to ~~included on~~ the ~~Grievance Committee's~~ committee's agenda for consideration of imposition of discipline ~~at the Grievance Committee's next quarterly meeting~~.

(k) Referral to Trust Account~~ing~~ Supervisory Program—

(1) If, at any time before a finding of probable cause, the Grievance Committee determines that the alleged misconduct is primarily attributable to the respondent's failure to employ sound trust accounting techniques, the committee may offer the respondent an opportunity to voluntarily participate in the State Bar's trust account supervisory program for up to two years before the committee considers discipline. ~~The chair of the Grievance Committee, in his or her sole discretion, may refer a lawyer whose trust account record keeping is found, during random auditing or otherwise, to be significantly out of compliance with the Rules of Professional Conduct into a supervisory program for two years.~~

If the respondent accepts the committee's offer to participate in the supervisory program, ~~During the lawyer's two year participation in the program,~~ the ~~lawyer~~ respondent must fully cooperate with the Trust Account Compliance Counsel and must provide to the Office of Counsel quarterly proof of compliance with all provisions of Rule 1.15 of the Rules of Professional Conduct. Such proof shall be in a form satisfactory to the Office of Counsel. If the respondent does not accept the committee's offer, the grievance will be returned to the committee's agenda for consideration of imposition of discipline.

(2) Completion of Trust Account Supervisory Program—If ~~a lawyer~~ the respondent ~~agrees to enter the supervisory program, timely complies with all rules of the program, and~~ successfully completes the program, the ~~Grievance Committee will not open a grievance file on the issue of the lawyer's pre-referral noncompliance with trust account record keeping rules~~ committee may consider successful completion of the program as a mitigating circumstance and may, but is not required to, dismiss the grievance for good cause shown. If the ~~lawyer~~ respondent does not fully cooperate with the Trust Account Compliance Counsel and/or ~~does not agree to enter the program or agrees to enter the program but~~ does not successfully complete ~~it~~ the program, the grievance will be returned to the ~~Grievance Committee's~~ committee's agenda for consideration of imposition of discipline. ~~a grievance file will be opened and the disciplinary process will proceed.~~

(3) The ~~chair of the Grievance Committee~~ committee will not refer to the program any case involving possible misappropriation of entrusted funds, criminal conduct, dishonesty, fraud, misrepresentation, or deceit, or any other case the ~~chair~~ committee deems inappropriate for referral. The committee will not refer to the program any respondent who has not cooperated fully and timely with the committee's investigation. If the Office of Counsel or the ~~Grievance Committee~~ committee discovers evidence that a ~~lawyer~~ respondent who is participating in the program may have misappropriated entrusted funds, engaged in criminal conduct, or engaged in conduct involving dishonesty, fraud, misrepresentation, or deceit, the chair will terminate the ~~lawyer's~~ respondent's participation in the program and the disciplinary process will proceed. ~~will instruct the Office of Counsel to open a grievance file.~~ Referral to the Trust Accounting Supervisory Program is not a defense to allegations that a lawyer misappropriated entrusted funds, engaged in criminal conduct, or engaged in conduct involving dishonesty, fraud, misrepresentation, or deceit, and it does not immunize a lawyer from the disciplinary consequences of such conduct.

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on July 20, 2012.

Given over my hand and the Seal of the North Carolina State Bar, this the 16th day of August, 2012.

s/L. Thomas Lunsford, II
L. Thomas Lunsford, II, Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 23rd day of August, 2012.

s/Sarah Parker
Sarah Parker, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 23rd day of August, 2012.

s/Jackson, J.

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING FEE DISPUTES

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 20, 2012.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning fee disputes, as particularly set forth in 27 N.C.A.C. 1D, Section .0700, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1D, Section .0700, Procedures for Fee Dispute Resolution

.0702 Jurisdiction

(a) The [committee] has jurisdiction over a disagreement arising out of a client-lawyer relationship concerning the fees and expenses charged or incurred for legal services provided by a lawyer licensed to practice law in North Carolina.

(b) The committee does not have jurisdiction over the following:

(1) a dispute concerning fees or expenses established by a court, federal or state administrative agency, or federal or state official, or private arbitrator or arbitration panel;

(2) ….

(3) a dispute over fees or expenses that are or were the subject of litigation or arbitration unless

(i) a court, arbitrator, or arbitration panel directs the matter to the State Bar for resolution ~~mediation~~, or

(ii) both parties to the dispute agree to dismiss the litigation or arbitration without prejudice and pursue resolution through the State Bar's Fee Dispute Resolution program ~~mediation~~;

(4) ….

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on July 20, 2012.

Given over my hand and the Seal of the North Carolina State Bar, this the 16th day of August, 2012.

s/L. Thomas Lunsford, II
L. Thomas Lunsford, II, Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 23rd day of August, 2012.

s/Sarah Parker
Sarah Parker, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 23rd day of August, 2012.

s/Jackson, J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING NON-COMPLIANCE WITH MEMBERSHIP OBLIGATIONS

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on April 26, 2012.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning non-compliance with membership obligations, as particularly set forth in 27 N.C.A.C. 1D, Section .0900 and Section .1500, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1D, Section .0900, Procedures for Administrative Committee

27 N.C.A.C. 1D, Section .1500, Rules Governing the Administration of the Continuing Legal Education Program

.0903 Suspension for Failure to Fulfill Obligations of Membership

(a) Procedure for Enforcement of Obligations of Membership

....

(b) Notice

Whenever it appears that a member has failed to comply, in a timely fashion, with an obligation of membership in the State Bar as established by the administrative rules of the State Bar or by statute, the secretary shall prepare a written notice directing the member to show cause, in writing, within 30 days of the date of service of the notice why he or she should not be suspended from the practice of law.

(c) Service of the Notice

The notice shall be served on the member by mailing a copy thereof by registered or certified mail or designated delivery service (such as Federal Express or UPS), return receipt requested, to the last known address of the member ~~according to~~ contained in the records of the North Carolina State Bar or such later address as may be known to the person ~~effecting the~~ attempting service. ~~Notice~~ Service of the notice may also be accomplished by (i) personal service by a State Bar investigator or by any ~~other~~ person authorized by Rule 4 of the North Carolina Rules of Civil Procedure to serve process, or (ii) email

sent to the email address of the member contained in the records of the North Carolina State Bar if the member sends an email from that same email address to the State Bar acknowledging such service.

(d) Entry of Order of Suspension upon Failure to Respond to Notice to Show Cause.

Whenever a member fails to ~~respond~~ show cause in writing within 30 days of the service of the notice to show cause upon the member, and it appears that the member has failed to comply with an obligation of membership in the State Bar as established by the administrative rules of the State Bar or by statute, the council may enter an order suspending the member from the practice of law. The order shall be effective 30 days after proof of service on the member. The order shall be served on the member by mailing a copy thereof by registered or certified mail or designated delivery service, return receipt requested, to the last-known address of the member ~~according to~~ contained in the records of the North Carolina State Bar or such later address as may be known to the person ~~effecting the~~ attempting service. ~~Notice~~ Service of the order may also be accomplished by (i) personal service by a State Bar investigator or by any ~~other~~ person authorized by Rule 4 of the North Carolina Rules of Civil Procedure to serve process, or (ii) email sent to the email address of the member contained in the records of the North Carolina State Bar if the member sends an email from that same email address to the State Bar acknowledging such service. A member who cannot, with due diligence, be served by registered or certified mail, designated delivery service, personal service, or email shall be deemed served by the mailing of a copy of the order to the member's last known address contained in the records of the North Carolina State Bar.

....

.1523 Noncompliance

(a) Failure to Comply with Rules May Result in Suspension

....

(b) Notice of Failure to Comply

The board shall notify a member who appears to have failed to meet the requirements of these rules that the member will be suspended from the practice of law in this state, unless the member shows good cause in writing why the suspension should not be made or the mem-

ber shows in writing that he or she has complied with the requirements within the 30-day period after service of the notice. Notice shall be served on the member by mailing a copy thereof by registered or certified mail or designated delivery service (such as Federal Express or UPS), return receipt requested, to the last-known address of the member according to the records of the North Carolina State Bar or such later address as may be known to the person ~~effecting the~~ attempting service. ~~Notice~~ Service of the notice may also be ~~served~~ accomplished by (i) personal service by a State Bar investigator or by any ~~other~~ person authorized by Rule 4 of the North Carolina Rules of Civil Procedure to serve process, or (ii) email sent to the email address of the member contained in the records of the North Carolina State Bar if the member sends an email from that same email address to the State Bar acknowledging such service.

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on April 26, 2012.

Given over my hand and the Seal of the North Carolina State Bar, this the 16th day of August, 2012.

s/L. Thomas Lunsford, II
L. Thomas Lunsford, II, Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 23rd day of August, 2012.

s/Sarah Parker
Sarah Parker, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the Advance Sheets as

provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 23rd day of August, 2012.

s/Jackson, J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING THE LAWYER ASSISTANCE PROGRAM

The following amendments to the Rules and Regulation and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on October 26, 2012.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning the Lawyer Assistance Program, as particularly set forth in 27 N.C.A.C. 1D, Section .0600, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1D, Section .0600, Rules Governing the Lawyer Assistance Program

.0617 Consensual ~~Suspension~~ Inactive Status

Notwithstanding the provisions of Rule .0616 of this subchapter, the court may enter an order ~~suspending a lawyer's license~~ transferring the lawyer to inactive status if the lawyer consents ~~to such suspension~~. The order may contain such other terms and provisions as the parties agree to and which are necessary for the protection of the public. A lawyer transferred to inactive status pursuant to this rule may not petition for reinstatement pursuant to Rule .0902 of this subchapter. The lawyer may apply to the court at any time for an order reinstating the lawyer to active status.

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on October 26, 2012.

Given over my hand and the Seal of the North Carolina State Bar, this the 4th day of February, 2013.

s/L. Thomas Lunsford, II
L. Thomas Lunsford II, Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 7th day of March, 2013.

s/Sarah Parker
Sarah Parker, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 8th day of March, 2013.

s/Beasley, J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING CONTINUING PARALEGAL EDUCATION

The following amendment to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar was duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on October 26, 2012.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning continuing paralegal education, as particularly set forth in 27 N.C.A.C. 1G, Section .0200, be amended as follows (additions are underlined, deletions are interlined):

27 NCAC 1G, Section .0200, Rules Governing Continuing Paralegal Education

.0202 Accreditation Standards

The Board of Paralegal Certification shall approve continuing education activities in compliance with the following standards and provisions.

(a) ….

(i) A certified paralegal may receive credit for completion of a course offered by an ABA accredited law school with respect to which academic credit may be earned. No more than 6 CPE hours in any year may be earned by attending such courses. Credit shall be awarded as follows: 3.5 hours of CPE credit for every quarter hour of credit assigned to the course by the educational institution, or 5.0 hours of CPE credit for every semester hour of credit assigned to the course by the educational institution.

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendment to the Rules and Regulations of the North Carolina State Bar was duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on October 26, 2012.

Given over my hand and the Seal of the North Carolina State Bar, this the 31st day of January, 2013.

s/L. Thomas Lunsford, II
L. Thomas Lunsford II, Secretary

After examining the foregoing amendment to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same is not inconsistent with Article 4, Chapter 84, of the General Statutes.

This the 7th day of March, 2013.

s/Sarah Parker
Sarah Parker, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendment to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that it be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 8th day of March, 2013.

s/Beasley, J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA BOARD OF LAW EXAMINERS

The following amendments to the Rules and Regulations of the North Carolina Board of Law Examiners were duly adopted by the North Carolina Board of Law Examiners on June 9, 2011, and approved by the Council of the North Carolina State Bar at its quarterly meeting on July 15, 2011.

BE IT RESOLVED by the North Carolina Board of Law Examiners that the Rules and Regulations of the North Carolina Board of Law Examiners, particularly Rule .1203 of the Rules Governing Admission to the Practice of Law in the State of North Carolina, be amended as follows (additions are underlined, deletions are interlined):

.1203 Conduct of Hearings

(1) All hearings shall be heard by the Board except that the Chairman may designate two or more members or Emeritus Members as that term is defined in the Policy of the North Carolina State Bar Council creating Emeritus Members to serve as a Panel to conduct ~~these~~ the hearings.

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina Board of Law Examiners were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on July 15, 2011.

Given over my hand and the Seal of the North Carolina State Bar, this the 27th day of July, 2011.

L. Thomas Lunsford, II
L. Thomas Lunsford, II, Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina Board of Law Examiners as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 25th day of August, 2011.

Sarah Parker
Sarah Parker, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina Board of Law Examiners be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 25th day of August, 2011.

Jackson, J.
For the Court

AMENDMENTS TO THE RULES FOR COURT-ORDERED ARBITRATION

Adopted August 28, 1986. Effective January 1, 1987, with amendments received effective through January 1, 2005, Renumbered, reorganized and amended by order of the Supreme Court adopted on October 6, 2011 and effective January 1, 2012.

Rule 1. Definitions.

(a) *"Court"* as used in these rules means:

(1) The chief district court judge or the delegate of such judge; or

(2) Any assigned judge exercising the court's jurisdiction and authority in an action.

(b) *"Living Human Being"* for purposes of these Rules is defined as a natural person, not to include any legally created person(s), as identified in N.C.G.S. §12-3(6).

Administrative History: Authority—Order of the North Carolina Supreme Court, August 28, 1986, pilot rules adopted; pilot rule amended effective March 4, 1987; permanent rule adopted, by order of the North Carolina Supreme Court, September 14, 1989; Arb. Rule 1(a), formerly Arb. Rule 8(f), amended March 8, 1990, and amended December 19, 2002 and renumbered as Arb. Rule 1(a), effective _____, 2011; New Arb. Rule 1(b) adopted _____, 2011, effective immediately as to all cases filed on or after _____, 2012.

Rule 2. Actions Subject To Arbitration.

(a) *By Order of the Court.*

(1) All civil actions filed in the district court division are subject to court-ordered arbitration under these rules in accordance with the authority set forth in N.C.G.S. §7A-37.1(c), except actions:

(i) Which are assigned to a magistrate, provided that appeals from judgments of magistrates are subject to

court-ordered arbitration under these rules except appeals from summary ejectment actions and actions in which the sole claim is an action on an account;

(ii) In which class certification is sought;

(iii) In which a request has been made for a preliminary injunction or a temporary restraining order including claims filed under N.C.G.S. Chapter 50C;

(iv) Involving family law matters including claims filed under N.C.G.S. chapters 50, 50A, 50B, 51, 52, 52B and 52C;

(v) Involving title to real estate;

(vi) Which are special proceedings; or

(vii) In which the sole claim is an action on an account.

(2) *Requests for jury trial.* Cases otherwise eligible for arbitration shall be arbitrated regardless of whether a party made a request for a jury trial.

(3) *Identification of Actions for Arbitration.* The clerk shall identify actions eligible for arbitration upon the filing of the complaint or docketing of an appeal from a magistrate's judgment, in accordance with Arb. Rule 2(a)(1) and notify the court that the case has been identified for arbitration.

(4) *Notice to Parties.* The court shall serve notice upon the parties or their counsel as soon as practicable after the filing of the last required responsive pleading or the expiration of time for the last required responsive pleading or the docketing of an appeal from a magistrate's judgment.

(5) *Arbitration by Agreement.* The parties in any other civil action pending in the district court division may, upon joint written motion, request to submit the action to arbitration under these rules. The court may approve the motion if it finds that arbitration under these rules is appropriate. The consent of the parties shall not be presumed, but shall be stated by the parties expressly in writing.

(b) *Exemption and Withdrawal From Arbitration.* The court may exempt or withdraw any action from arbitration on its own motion, or on the motion of a party, made not less than 10 days before the arbitration hearing and a showing that:

(1) the action is excepted from arbitration under Arb. Rule 2(a)(1) or

(2) there is a compelling reason to do so.

Administrative History: Authority—Order of the North Carolina Supreme Court, August 28, 1986, pilot rules adopted; pilot rule amended effective March 4, 1987; permanent rule adopted, by order of the North Carolina Supreme Court, September 14, 1989; Arb. Rule 2(a)(1)and Arb. Rule 2(a)(2), formerly Arb. Rule 1(a) were amended March 8, 1990 and December 19, 2002 and renumbered _____, 2011; (d) was amended March 8, 1990 and December 19, 2002; Arb. Rule 2(a)(3), formerly Arb. Rule 8(a), was amended March 8, 1990 and December 19, 2002, and renumbered as Arb. Rule 2(a)(3), _____, 2011.

COMMENT

The purpose of these rules is to create an efficient, economical alternative to traditional litigation for prompt resolution of disputes in district court. The rules provide for court-ordered arbitration of district court actions because district court actions are typically suitable for consideration in the manner provided in these rules.

An arbitrator may award damages in any amount which a party is entitled to recover. These rules do not affect the jurisdiction or functions of the magistrates where they have been assigned such jurisdiction.

In a case involving multiple defendants when there is an appeal from a magistrate's judgment, and one or more defendants have been dismissed, an appeal by a remaining defendant does not operate to rejoin the dismissed defendant(s) in the action absent properly filed pleadings in accordance with N.C.R.Civ.P. 13.

"Family law matters" in Arb.Rule 2(a)(1)(iv) includes all family law cases such as divorce, guardianship, adoptions, juvenile matters, child support, custody, and visitation. "Summary ejectments", referred to in Arb.Rule 2(a)(1)(i) and "special proceedings", referred to in Arb.Rule 2(a)(1)(vi), are actions so designated by the North Carolina General Statutes.

Arb. Rule 2(a)(3) contemplates that the clerk or designee shall determine whether an action is eligible for arbitration after reviewing the pleadings. The rule further contemplates that the clerk or designee will look beyond the cover sheet and filing codes to make this determination. The purpose of these rules is to be inclusive of the cases eligible for arbitration.

"An action on an account" as referenced and excluded in Arb. Rule 2(a)(1)(i) and 2(a)(1)(vii) includes all cases involving an

account wherein the account holder is authorized to complete multiple transactions. These actions should only include accounts in which the account holder has the ability to make more than one purchase during different periods. This exemption should not include cases wherein there was one transaction, even if multiple payments are included in the agreement. The accrual of interest does not constitute multiple transactions. Action on an account, as excluded by Arb. Rule 2(a)(1)(i) and Arb. Rule 2(a)(1)(vii), does not include the exclusion of monies owed claims. Cases in which attorneys' fees are requested are not "actions in which the sole claim is an action on an account" and are therefore not excluded under Arb. Rule 2(a)(1)(vii).

No case should be excluded from the mandatory arbitration process pursuant to Arb.Rule 2(a)(1)(vii) for the action on account exception unless the original petition is accompanied by a verified itemized statement which evidences multiple transactions. All other cases shall be treated as a claim for monies owed and should be arbitrated. The court or their designee shall review any petition alleging it is an action on an account and verify that the verified itemized statement is attached. If there is no such attachment, the matter shall be deemed a petition for monies owed and the matter shall be noticed for arbitration. N.C.G.S. §8-45.

Rule 3. Eligibility of Arbitrators.

(a) *Qualification Requirements for Arbitrators*. The chief district court judge shall receive and approve applications for persons to be appointed as arbitrators. Arbitrators so approved shall serve at the pleasure of the appointing court. A person seeking to be added to the list of eligible arbitrators shall:

(1) Be a member in good standing of the North Carolina State Bar;

(2) Have been licensed to practice law for five years;

(3) Shall have been admitted in North Carolina for at least the last two years of the five-year period. Admission outside North Carolina may be considered for the balance of the five-year period, so long as the arbitrator was admitted as a duly licensed member of the bar of a state(s) or a territory(ies) of the United States or the District of Columbia;

(4) Shall complete the arbitrator training course prescribed by the Administrative Office of the Courts or their training designee;

(5) Shall observe at least one arbitration conducted by an arbitrator already on the list of approved arbitrators as provided for herein; and

(6) Have a valid email address.

(b) *Application Process*. The person seeking eligibility as an arbitrator shall submit:

(1) a completed application on an approved form provided by the Administrative Office of the Courts; and

(2) documented proof of the qualifications as set forth in Arb. Rule 3(a) shall be attached to the application form and submitted to the chief district court judge or designee in each judicial district in which the applicant intends to serve as an arbitrator.

(c) *Oath of Office*. Arbitrators shall take an oath or affirmation similar to that prescribed in N.C.G.S. §11-11, on a form promulgated by the Administrative Office of the Courts, before conducting any hearings. Said oath shall be administered by the chief district court judge or designee. A copy of the oath shall be filed by the applicant with the clerk in each county in which they serve.

(d) *Arbitrator Ethics; Disqualification*. Arbitrators shall comply with the Canons of Ethics for Arbitrators promulgated by the Supreme Court of North Carolina. Arbitrators shall be disqualified and must recuse themselves in accordance with the Canons.

(e) *Conflict*. An arbitrator shall be prohibited from participating, serving or being involved in any capacity, in any case wherein they previously served as an arbitrator. An arbitrator shall also be prohibited from participating in other cases, in any capacity, wherein the parties and/or issues arise from a case over which the arbitrator presided.

(f) *Complaints*. All complaints against an arbitrator shall be filed with the chief district court judge or designee for the county in which the arbitration giving rise to the complaint was conducted using a form promulgated by the Administrative Office of the Courts.

Administrative History: Authority—Order of the North Carolina Supreme Court, August 28, 1986; New Arb. Rule 3 adopted _____, 2011 (a) is former Arb. Rule 2(b) and was adopted September 14, 1989, amended March 8, 1990, amended August 1, 1995, amended December 19, 2005 and amended and renumbered _____, 2011. (c) is former Arb. Rule 2(d) and was adopted September 14, 1989 and was amended and renumbered _____, 2011; (d) is former Arb. Rule 2(e)

and was adopted September 14, 1989, amended December 19, 2002 and renumbered _____, 2011.

Rule 4. Assignment of Arbitrator.

(a) *Appointment.* The court shall appoint an arbitrator in the following manner:

(1) The court shall rotate through the list for their district, set forth in subsection Arb. Rule 3(a), of available qualified arbitrators and appoint the next eligible arbitrator from the list and notify the parties of the arbitrator selected.

(2) Appointments shall be made without regard to race, gender, religious affiliation or political affiliation. The chief district court judge shall retain the discretion to depart in a specific case from a strict rotation when, in the judge's discretion, there is good cause shown.

(b) *Fees and Expenses.* Arbitrators shall be paid the maximum allowable fee as set forth in N.C.G.S. §7A-37.1(c1) after an award is filed with the court. The arbitrator shall make application with the court on the proper NCAOC form within thirty (30) days of the filing of the award. An arbitrator may be paid a reasonable fee not exceeding the maximum allowable fee for work on a case not resulting in a hearing upon the arbitrator's written application to and approval by the chief district court judge. This fee shall be shared by the parties as set forth by these rules.

(c) *Replacement of Arbitrator.* Any party may move the chief district court judge of the district where the action is pending for an order removing the arbitrator from that case so long as the motion is file more than 7 days before the scheduled arbitration hearing. For good cause, such an order shall be entered. If an arbitrator is removed, recused, unable or unwilling to serve, a replacement shall be appointed by the court from the list of arbitrators in accordance with Arb. Rule 4(a).

Administrative History Pilot Rule Adopted: August 28, 1986; Pilot Rule Amended: March 4, 1987; Permanent Rule Adopted: September 14, 1989; (a) was amended March 8, 1990, December 19, 2002 and _____, 2011; former (b) was amended on March 8, 1990, August 1, 1995, December 19, 2002 and was renumbered and reorganized as Arb. Rule 3(a), _____, 2011; former (c) was amended March 8, 1991, December 19, 2002, January 1, 2005 and amended and renumbered as Arb. Rule 4(d), _____, 2011; former (d) was renumbered as Arb. Rule 3(c), _____, 2011; former (e) was adopted September 14, 1989, amended December 19, 2002 and amended and renumbered as Arb,.

Rule 3(d), _____, 2011; former (f) was adopted September 14, 2989, amended December 19, 2002 and amended and renumbered as Arb. Rule 4(d), _____, 2011.

COMMENT

The court shall regularly use all arbitrators on the court's list as established in Arb. Rule 4(a). In counties or districts where arbitrators are assigned for multiple cases in a day, the court shall rotate through the list and appoint the next available arbitrator on the list for each day, rather than appointing a different arbitrator for each case. Under Arb. Rule 4(a)(2), consideration should be given to distance of travel and availability of arbitrators.

In accordance with Arb. Rule 4(b), filing of the award is the final act at which payment should be requested, closing the matter for the arbitrator. The arbitrator should make the award when the hearing is concluded. Hearings must be brief and expedited so that an arbitrator can hear at least three per day. See Arb.Rule 6(q).

Payments authorized by Arb. Rule 4(b) are made subject to court approval to ensure conservation and judicial monitoring of the use of funds available for the program. Arbitrators shall not be paid a fee for continued hearings.

An agreement by all parties to remove an arbitrator may constitute good cause under Arb Rule 4(c).

Rule 5. Fees And Costs.

(a) *Arbitration Costs*. The arbitrator may include, in an award, court costs accruing through the arbitration proceedings in favor of the prevailing party. Costs may not include the arbitrator fee or any portion of said fee, which shall be equally divided between the parties in accordance with these rules.

(b) *Arbitrator Fee*. The arbitrator's fee shall be equally divided among all parties to that action pursuant to Arb. Rule 5(c). No party shall be required to be responsible for any more than their pro rata share of the arbitrator's fee.

(c) *Payment of Arbitrator's Fee.*

(1) *By Non Indigent Parties*. Each party not found by the clerk to be indigent shall pay, into the clerk of court, an equal share of the arbitrator fee prior to the arbitration hearing. Failure to pay the fee shall not be a ground for continuance of the arbitration. The clerk, to whom the fee is paid, shall document each party that pays or is found to be indigent in

the file on the proper form promulgated by the Administrative Office of the Court. This form shall be placed in the file.

(2) *By Indigent or Partially Indigent Parties.*

(i) *Partially Indigent Persons.* If, in the opinion of the clerk or court, an indigent person is financially able to pay a portion, but not all, of their pro rata share of the arbitrator's fee, the court shall require the partially indigent person to pay such portion prior to the arbitration. Failure to pay the fee shall not be a ground for continuance of the arbitration. The clerk, to whom the fee is paid, shall document each party that pays the proper amount or is found to be indigent in the file on the proper form promulgated by the Administrative Office of the Courts. This form shall be placed in the file. The clerk shall apply the criteria enumerated in N.C.G.S. §1-110(a).

(ii) *Fully Indigent Persons.* Upon a finding that the party is indigent, that party shall not be required to pay their portion of the arbitration fee prior to the arbitration.

(3) *Liens.* In all cases, wherein any portion of a party's pro rata share of the arbitrator's fee is not paid in full, the court shall direct that a judgment be entered in the office of the clerk of superior court for the unpaid portion of that party's pro rata share of the arbitrator's fee, which shall constitute a lien as prescribed by the general law of the State applicable to judgments. Any reimbursement to the State as provided in this rule or any funds collected by reason of such judgment shall be deposited in the State treasury and credited against the judgment. A district court judge shall direct entry of judgment for actions or proceedings filed in district court or for those matters appealed from a magistrate's award.

(4) *Judgment for Fee.* The order or judgment shall become effective and the judgment shall be docketed and indexed pursuant to N.C.G.S. § 1-233 et seq., in the amount of the partially indigent or indigent party's share of the arbitrator's fee. Each judgment docketed against a person shall include the social security number, if any, of the judgment debtor.

Administrative History Pilot Rules: Adopted: August 28, 1996; Pilot Rules Amended March 4, 1987; (a) is former Arb. Rule 7(a) and was adopted September 14, 1989, was amended and renumbered _____, 2011; (b) and (c) were adopted _____, 2011; (d) is former Arb. Rule 7(b) and was adopted September 14, 1989, amended December 19, 2002 and renumbered _____, 2011.

COMMENT

When determining each party's equal share of the fee in accordance with Arb. Rule 5(b), take the total arbitrator fee and divide it by the total number of parties in the action. If one party has been granted relief to sue as an indigent, include that party in the number by which the fee is divided to calculate other parties' equal share. Multiple plaintiffs and defendants shall be counted individually and not as one party. These fees are non-refundable.

For purposes of Arb Rule 5, a person shall apply for indigency before the clerk if requesting indigent status as it relates to the arbitration fee by completing and submitting AOC–G-106 or similar form if this form is modified and/or replaced by the Administrative Office of the Courts.

For purposes of Arb. Rule 5, if a party that is not a living human being, as defined by Arb. Rule 1, is listed as a party and a living human being, who is an owner, share holder or has any other ownership interest in that non-human being party is also listed as a party, then each shall be counted as an individual party.

Rule 6. Arbitration Hearings.

(a) *Hearing Scheduled by the Court.* Arbitration hearings shall be scheduled by the court and held in a courtroom, if available, or in any other public room suitable for conducting judicial proceedings and shall be open to the public.

(1) *Scheduling.* The court shall schedule hearings with notice to the parties to begin within 60 days after:

(i) the docketing of an appeal from a magistrate's judgment,

(ii) the filing of the last responsive pleading, or

(iii) the expiration of the time allowed for the filing of such pleading.

(b*) Date of Hearing Advanced by Agreement.* A hearing may be held earlier than the date set by the court, by agreement of the parties with court approval.

(c) *Hearings Rescheduled; Continuance; Cancellation.* A hearing may be scheduled, rescheduled, or continued to a date after the time allowed by this rule only by the court before whom the case is pending, and may be upon a written motion filed at least 24 hours prior to the scheduled arbitration hearing, and a showing of a strong

and compelling reason to do so. In the event a consent judgment or dismissal is not filed with the clerk and notice provided to the court more than 24 hours prior to the scheduled arbitration hearing, all parties shall be liable for the arbitrator fee in accordance with Arb. Rule 5. Any settlement reached prior to the scheduled arbitration hearing must be reported by the parties to the court official administering the arbitration. The parties must file dismissals or consent judgments prior to the scheduled hearing to close the case without a hearing. If the dismissals or consent judgments are not filed before the scheduled hearing, the parties should appear at the hearing to have their agreement entered as the award of the arbitrator.

(d) *Prehearing Exchange of Information*. At least 10 days before the date set for the hearing, the parties shall exchange:

(1) Lists of witnesses they expect to testify;

(2) Copies of documents or exhibits they expect to offer in evidence; and

(3) A brief statement of the issues and their contentions.

Parties may agree in writing to rely on stipulations and/or statements, sworn or unsworn, rather than a formal presentation of witnesses and documents, for all or part of the hearing. Failure to comply with Arb. Rule 6(n) may be cause for sanctions under Arb. Rule 6(o). Each party shall bring to the hearing and provide to the arbitrator a copy of these materials. These materials shall not be filed with the court or included in the case file.

(e) *Exchanged Documents Considered Authenticated*. Any document exchanged may be received in the hearing as evidence without further authentication; however, the party against whom it is offered may subpoena and examine as an adverse witness anyone who is the author, custodian, or a witness through whom the document might otherwise have been introduced. Documents not so exchanged may not be received if to do so would, in the arbitrator's opinion, constitute unfair, prejudicial surprise.

(f) *Copies of Exhibits Admissible*. Copies of exchanged documents or exhibits are admissible in arbitration hearings.

(g) *Witnesses*. Witnesses may be compelled to testify under oath or affirmation and produce evidence by the same authority and to the same extent as if the hearing were a trial. The arbitrator is empowered and authorized to administer oaths and affirmations in arbitration hearings.

(h) *Subpoenas*. N.C.R.Civ.P. 45 shall apply to subpoenas for attendance of witnesses and production of documentary evidence at an arbitration hearing under these rules.

(i) *Authority of Arbitrator to Govern Hearings*. Arbitrators shall have the authority of a trial judge to govern the conduct of hearings, except the arbitrator may not issue contempt orders, issue sanctions or dismiss the action. The arbitrator shall refer all contempt matters and dispositive matters to the court.

(j) *Law of Evidence Used as Guide*. The law of evidence does not apply, except as to privilege, in an arbitration hearing but shall be considered as a guide toward full and fair development of the facts. The arbitrator shall consider all evidence presented and give it the weight and effect the arbitrator determines appropriate.

(k) *No Ex Parte Communications With Arbitrator*. No ex parte communications between parties or their counsel and arbitrators are permitted.

(l) *Failure to Appear; Defaults; Rehearing*. If a party who has been notified of the date, time and place of the hearing fails to appear, or fails to appear with counsel for cases in which counsel is mandated by law, without good cause therefor, the hearing shall proceed and an award may be made by the arbitrator against the absent party upon the evidence offered by the parties present, but not by default or dismissal for failure to appear. If a party is in default for any other reason but no judgment has been entered upon the default pursuant to N.C.R.Civ.P. 55(b) before the hearing, the arbitrator may hear evidence and may issue an award against the party in default. The court may order a rehearing of any case in which an award was made against a party who failed to obtain a continuance of a hearing and failed to appear for reasons beyond the party's control. Such motion for rehearing shall be filed with the court within the time allowed for demanding trial de novo stated in Arb. Rule 9(a).

(m) *No Record of Hearing Made*. No official transcript of an arbitration hearing shall be made. The arbitrator may permit any party to record the arbitration hearing in any manner that does not interfere with the proceeding.

(n) *Parties Must Be Present at Hearings; Representation*. All parties shall be present at hearings in person or through counsel. Parties may appear pro se as permitted by law.

(o) *Sanctions*. Any party failing to attend an arbitration proceeding in person or through counsel shall be subject to those sanctions available to the court in N.C.R.Civ.P. 11, 37(b)(2)(A)- 37(b)(2)(D) and

N.C.G.S. § 6-21.5 on the motion of a party, report of the arbitrator, or by the court on its own motion.

(p) *Proceedings in Forma Pauperis*. The right to proceed in forma pauperis is not affected by these rules.

(q) *Limits of Hearings*. Arbitration hearings shall be limited to one hour unless the arbitrator determines at the hearing that more time is necessary to ensure fairness and justice to the parties.

(1) A written application for a substantial enlargement of time for a hearing must be filed with the court and the arbitrator if the arbitrator has been assigned, and must be served on opposing parties at the earliest practicable time, and no later than the date for prehearing exchange of information under Arb. Rule 6(d). The court will rule on these applications after consulting the arbitrator if an arbitrator has been assigned.

(2) An arbitrator is not required to receive repetitive or cumulative evidence.

(r) *Hearing Concluded*. The arbitrator shall declare the hearing concluded when all the evidence is in and any arguments the arbitrator permits have been completed. In exceptional cases, the arbitrator has discretion to receive post-hearing briefs, but not evidence, if submitted within three days after the hearing has been concluded.

(s) *Motions*. Designation of an action for arbitration does not affect a party's right to file any motion with the court.

(1) The court, in its discretion, may consider and determine any motion at any time. It may defer consideration of issues raised by motion to the arbitrator for determination in the award. Parties shall state their contentions regarding pending motions referred to the arbitrator in the exchange of information required by Arb. Rule 6(d).

(2) Pendency of a motion shall not be cause for delaying an arbitration hearing unless the court so orders.

(t) *Binding Hearing*. All parties to an action may agree that any award by the arbitrator be binding. Such agreement shall be in writing on a form promulgated by the Administrative Office of the Courts and shall be executed by all parties. The consent shall be filed with the clerk's office in the county in which the action is pending. Parties consenting to a binding hearing may not request a trial de novo after the arbitration award is issued. Once all parties agree to binding arbi-

tration, no party may dismiss an appeal from a magistrate's award or dismiss the action in full except by consent. The clerk or court shall enter judgment on the award at the time the award is filed if the action has not been dismissed by consent.

Administrative History Pilot Rule Adopted August 28, 1986. Pilot Rule Amended March 4, 1987. Permanent Rule Adopted September 14, 1989. This is former Arb. Rule 3 renumbered _____, 2011. (b), (j), (o), and (q) were amended March 8, 1990; (a), (b), (g), (j), (l), (n), (o), (p) and (q) were amended December 19, 2002; (r) was adopted _____, 2011and applies to all cases filed on or after _____, 2011.

COMMENT

The 60 days in Arb. Rule 6(a)(1) will allow for discovery, trial preparation, pretrial motions, disposition and calendaring. A motion to continue a hearing will be heard by a judge mindful of this goal. Continuances may be granted when a party or counsel is entitled to such under law, e.g. N.C.R.Civ.P. 40(b); rule of court, e.g. N.C.Prac.R. 3; or customary practice.

Under Arb. Rule 6(c), both parties are responsible for notifying the court personnel responsible for scheduling arbitration hearings that a consent judgment or dismissal has been filed. The notice required under Arb. Rule 6(c) should be filed with the court personnel responsible for scheduling the arbitration hearings. Failure to do so will result in assessment of the arbitrator fee. The "court official administering the arbitration" is the arbitration coordinator, judicial assistant or other staff member managing the arbitration program, as may vary from county to county.

Arb. Rule 6(d)(3) contemplates that the arbitrator shall return all evidence submitted when the hearing is concluded and the award has been made. Original documents and exhibits should not be marked in any way to identify them with the arbitration to avoid possible prejudice in any future trial.

For purposes of Arb. Rule 6(g), the arbitrator shall have such authority to administer oaths if such authorization is consistent with the laws of North Carolina.

As articulated in Arb Rule 6(i), the arbitrator is to rule upon the evidence presented at the hearing, or lack thereof. Thus an arbitrator may enter a $0 award or an award for the defendant if the evidence presented at the hearing does not support an award for the plaintiff.

Arb. Rule 6(n) requires that all parties be present in person or through counsel. The presence of the parties or their counsel is necessary for presentation of the case to the arbitrator. Rule 6(n) does

not require that a party or any representative of a party have authority to make binding decisions on the party's behalf in the matters in controversy, beyond those reasonably necessary to present evidence, make arguments and adequately represent the party during the arbitration. Specifically, a representative is not required to have the authority to make binding settlement decisions.

Arb. Rule 6(n) sets forth that parties may appear pro se, as permitted by law. In accordance with applicable state law, only parties that are natural persons may appear pro se at arbitrations. Any business, corporation, limited liability corporation, unincorporated association or other professional parties, including but not limited to, businesses considered to be a separate legal entity shall be represented by counsel in accordance with the North Carolina General Statutes. See Case Notes Below.

The rules do not establish a separate standard for pro se representation in court-ordered arbitrations. Instead, pro se representation in court-ordered arbitrations is governed by applicable principles of North Carolina law in that area. See Arb. Rule 6(n). Conformance of practice in court-ordered arbitrations with the applicable law is ensured by providing that pro se representation be "as permitted by law."

The purpose of Arb. Rule 6(q) is to ensure that hearings are limited and expedited. Failure to limit and expedite the hearings defeats the purpose of these rules. In this connection, note the option in Arb. Rule 6(d) for use of prehearing stipulations and/or sworn or unsworn statements to meet time limits.

Under Arb. Rule 6(r), the declaration that the hearing is concluded by the arbitrator formally marks the end of the hearing. Note Arb. Rule 7(a), which requires the arbitrator to file the award within three days after the hearing is concluded or post-hearing briefs are received. The usual practice should be a statement of the award at the close of the hearing, without submission of briefs. In the unusual case where an arbitrator is willing to receive post-hearing briefs, the arbitrator should specify the points to be addressed promptly and succinctly. Time limits in these rules are governed by N.C.R. Civ. P. 6 and N.C.G.S. §§103-4, 103-5.

Under Arb. Rule 6(s)(1), the court will rule on prehearing motions which dispose of all or part of the case on the pleadings, or which relate to procedural management of the case.

No party shall be deemed to have consented to binding arbitration unless it is documented on the proper form, which is executed after the filing date of the action. No executed contract, lien, lease or

other legal document, other than the proper form designating the arbitration as binding, shall be used to make an arbitration binding upon either party.

Case Notes—For note discussing representation of parties who are not living human beings, see Lexis-Nexis v Travishan Corp., 155 N.C. App. 205, 573 S.E.2d 547 (2002).

Rule 7. The Award.

(a) *Filing the Award.* The award shall be in writing, signed by the arbitrator and filed with the clerk within three days after the hearing is concluded or the receipt of post-hearing briefs, whichever is later. The arbitrator shall file a complete award indicating any award, the rate of any applicable interest and any accrued interest.

(b) *Findings; Conclusions; Opinions.* No findings of fact and conclusions of law or opinions supporting an award are required.

(c) *Scope of Award.* The award must resolve all issues raised by the pleadings, may be in any amount supported by the evidence, shall include interest as provided by law, and may include attorney's fees as allowed by law.

(d) *Copies of Award to Parties.* The arbitrator shall deliver a copy of the award to all of the parties or their counsel at the conclusion of the hearing or the clerk shall serve, in accordance with the N.C.R.Civ.P. 5, the award within three (3) days after filing. A record shall be made by the arbitrator or the court of the date and manner of service.

Administrative History Pilot Rules Adopted August 28, 1986; Pilot Rules Amended: March 4, 1987; Permanent Rule Adopted September 14, 1989; This is former Arb. Rule 4, renumbered _____, 2011. (a), (c) and (d) were adopted _____, 2011; (a) and (d) were amended _____, 2011.

COMMENT

Ordinarily, the arbitrator should issue the award at the conclusion of the hearing. See Arb. Rule 7(a). If the arbitrator wants post-hearing briefs, the arbitrator must receive them within three days, consider them, and file the award within three days thereafter. See Arb. Rule 6(r) and its Comment. If the arbitrator deems it appropriate, the arbitrator may explain orally the basis of the award.

If an award is incomplete or unclear, the clerk should request clarification from the arbitrator and the arbitrator should amend the award to make the award, including any interest, evident. In the event

this occurs after the award was announced to the parties, the court should serve the amended order on all parties in accordance with Arb. Rule 7(d). The service of an amended order shall cause the period for demanding a trial de novo to restart in accordance with Arb. Rule 8.

Rule 8. The Court's Judgment.

(a) *Termination of Action Before Judgment.* Dismissals or a consent judgment may be filed at any time before entry of judgment on an award.

(b) *Judgment Entered on Award.* If the case is not terminated by dismissal or consent judgment and no party files a demand for trial de novo within 30 days after the award is served, the clerk or the court shall enter judgment on the award, which shall have the same effect as a consent judgment in the action. A copy of the judgment shall be served on all parties or their counsel by mail in accordance with N.C.R.Civ.P. 5(b).

(c) *Judgment upon dismissal or withdrawal of a demand for trial de novo.* If the case is noticed for trial de novo and all parties consent to withdraw the demand for the trial de novo in accordance with Rule 9(a)(3), the clerk or court shall immediately enter judgment on the award. A copy of the judgment shall be served on all parties or their counsel by the clerk in accordance with N.C.R.Civ.P. 5. A certificate of service shall be executed by the clerk and shall be filed.

Administrative History Pilot Rule Adopted August 28, 1986. Pilot Rule Amended March 4, 1987. Permanent Rule Adopted September 14, 1989. This is former Arb. Rule 6, renumbered _____, 2011. (a) was amended December 19, 2002; (b) was amended March 8, 1990 and December 19, 2002; (c) was adopted _____, 2011 and applies to all cases filed on or after _____, 2011.

COMMENT

No appeal lies from an arbitration award to the appellate courts of this State. The remedy available to a party aggrieved by the award is to demand a trial de novo in the district court. In the absence of such a demand within the 30 day period set forth in Arb. Rule 8(b), the clerk or the court will enter judgment on the award.

Rule 9. Trial De Novo.

(a) *Trial De Novo as of Right.*

(1) Any party not in default for a reason subjecting that party to judgment by default who is dissatisfied with an arbitrator's

award may have a trial de novo as of right upon filing a written demand for trial de novo with the court, and service of the demand on all parties, on form promulgated by the Administrative Office of the Courts within 30 days after the arbitrator's award has been served on all parties, or within 10 days after an adverse determination of an Arb. Rule 6(l) motion to rehear. Demand for jury trial pursuant to N.C.R.Civ.P. 38(b) does not preserve the right to a trial de novo. A demand by any party for a trial de novo in accordance with this section is sufficient to preserve the right of all other parties to a trial de novo. Any trial de novo pursuant to this section shall include all claims in the action. No rulings by the arbitrator shall be binding on the court at a trial de novo.

(2) Upon the demand of a trial de novo by any party pursuant to these Rules, that demand shall be deemed to have preserved the rights of all parties and all issues in the case for trial de novo. No party shall lose a right to a trial de novo of any eligible issue as a result of the failure of the party initially demanding the trial de novo to proceed for any reason. In the event the party initiating the trial de novo fails to proceed for any reason, any other party may request that the trial de novo be calendared for all issues.

(3) The court shall, upon any party demanding a trial de novo of any issue, calendar all parties and issues before the court for a de novo trial. All issues and parties shall remain as pending matters and shall be calendared by the court in a timely manner for the trial de novo hearing unless and until such time as all parties agree to dismiss the demand for a trial de novo. Any such agreement shall be recorded on a form promulgated by the Administrative Office of the Courts, executed by all parties and filed with the clerk in the county in which the action is pending prior to the trial de novo.

(b) *Trial De Novo Fee.*

(1) The first party filing a demand for trial de novo in cases wherein the initiating party has not properly moved the court for indigent relief and relief from payment of the trial de novo fee, in accordance with Arb. Rule 9(b)(2)(ii), shall pay a filing fee at the time the written demand for trial de novo is filed with the clerk, equivalent to the arbitrator's compensation, as set forth in Arb. Rule 4(b), which shall be held by the clerk until the case is terminated. The fee shall be returned to the

demanding party only upon written order of the trial judge finding that the position of the demanding party has been improved over the arbitrator's award. Otherwise, the filing fee shall be deposited into the Judicial Department's General Fund at the expiration of thirty days from the final judgment from a court of competent jurisdiction or the expiration of the time for filing any available appeals, whichever is later. No party may make application for the return of this fee after the expiration of thirty days from the final judgment.

(2) If a party properly moves the court by proper motion which includes that party's social security number for indigent status and requests relief from the payment of the trial de novo fee prior to the trial de novo hearing, that party shall not be required to pay the trial de novo fee at the time of demanding the trial de novo. Said motion shall be heard subsequent to the completion of the trial de novo. In a ruling upon such motions, the judge shall apply the criteria enumerated in N.C.G.S. §1-110(a), but shall take into consideration the outcome of the trial de novo and the previous arbitration and whether a judgment was rendered in the indigent's favor. A judge may find that the party was indigent at the time of arbitration, but not indigent at the time of the trial de novo and make a ruling on the fees due accordingly. The court shall enter an order granting, in part or in full, or denying the party's request and:

(i) If the party is denied indigent relief, that party shall pay the trial de novo fee within ten (10) days of a final judgment from a court of competent jurisdiction or the expiration of time for all available appeals, whichever is later. In the event the party fails to pay the trial de novo fee as directed by the court, the clerk shall follow the procedure set forth in this rule for entry of judgment in the amount of the trial de novo fee as if the person had been found indigent.

(ii) If the party is granted indigent relief for any portion of the trial de novo fee, the court shall direct that a judgment be entered in the clerk's office in the county in which the action is pending for the unpaid portion of that party's pro rata share of the trial de novo fee, which shall constitute a lien as prescribed by the general law of the State applicable to judgments. The order or judgment shall become effective and the judgment shall be docketed and indexed pursuant to N.C. Gen. Stat. §1-233 et

seq., in the amount of the partially indigent or indigent party's share of the trial de novo fee. Each judgment docketed against a person shall include the social security number, if any, of the judgment debtor.

(c) *No Reference to Arbitration in Presence of Jury.* A trial de novo shall be conducted as if there had been no arbitration proceeding. No reference may be made to prior arbitration proceedings in the presence of a jury without consent of all parties to the arbitration and the court's approval.

(d) *No Evidence of Arbitration Admissible.* No evidence that there have been arbitration proceedings or of statements made and conduct occurring in arbitration proceedings may be admitted in a trial de novo, or in any subsequent proceeding involving any of the issues in or parties to the arbitration, without the consent of all parties to the arbitration and the court's approval.

(e) *Arbitrator Not to Be Called as Witness.* An arbitrator may not be deposed or called as a witness to testify concerning anything said or done in an arbitration proceeding in a trial de novo or any subsequent civil or administrative proceeding involving any of the issues in or parties to the arbitration. The arbitrator's notes are privileged and not subject to discovery.

(f) *Judicial Immunity.* The arbitrator shall have judicial immunity to the same extent as a trial judge with respect to the arbitrator's actions in the arbitration proceeding.

(g) *Exclusion of Issues.* All parties to an action may consent to limit the issues to be considered by the court in a trial de novo. Any such consent shall be in writing and executed by all parties or their respective counsel, filed with the clerk and submitted to the court at the trial de novo. The consent document shall set forth the issues upon which agreement has been reached and all issues remaining for consideration by the court.

Administrative History Pilot Rule Adopted August 28, 1986; Pilot Rule Amended March 4, 1987; Permanent Rule Adopted September 14, 1989; This is former Arb. Rule 5 and was renumbered _____, 2011; (a)(1) was formerly Arb. Rule 5(a), was amended March 8, 1990, December 19, 2002 and was amended and renumbered _____, 2011; Arb. Rule (a)(2) and Arb. Rule(a)(3) were adopted _____, 2011 and apply to all cases filed on or after _____, 2011; (b)(1)was amended March 8, 1990, December 19, 2002 and was amended and renumbered _____, 2011; Arb. Rule (b)(2) was adopted _____, 2011 and applies to all cases filed on or after _____, 2011; (e) and (f) were amended March 8, 1990; (c)(d) were amended December

19, 2002; (g) was adopted _____, 2011 and applies to all cases filed on or after _____, 2011.

COMMENT

Arb. Rule 9(a)(2) and 9(a)(3) clarify that each party is not required to notice their respective issues for a trial de novo. Once a trial de novo has been demanded, it shall be heard unless all parties consent otherwise in writing.

Under Arb. Rule 9(b)(1), if a party prevails but does not improve their position at the trial novo hearing, that party shall not be eligible for reimbursement of the trial de novo filing fee.

Arb. Rule 9(c) does not preclude cross-examination of a witness in a later proceeding concerning prior inconsistent statements during arbitration proceedings, if done in such a manner as not to violate the intent of Arb. Rules 9(c) and 9(d).

In a case involving multiple defendants and where one or more defendants have been dismissed, a demand for trial de novo by a remaining defendant does not operate to rejoin the dismissed defendant in the action absent properly filed pleadings in accordance with N.C.R.Civ.P. 13.

In the event a party has previously requested a trial by jury, the trial de novo shall be a jury trial. See also the Comment to Arb. Rule 8 regarding demand for trial de novo.

Final judgment of a court of competent jurisdiction as referenced in Arb. Rule 9(b)(1) shall mean the final judgment once all parties have availed themselves of all possible appellate processes and no avenues of appeal remain, either because the appeal has been heard and judgment has been rendered, the court has declined to consider the appeal or the time for properly filing all appeals has expired.

For purposes of Arb. Rule 9(b)(2), a person shall apply for indigency relief before the district court judge by completing and submitting AOC–G-106 or similar form if this form is modified and/or replaced by the Administrative Office of the Courts.

For purposes of Arb. Rule 9, if a party that is not a living human being, as defined by Arb. Rule 1, is listed as a party and a living human being, who is an owner, share holder or has any other ownership interest in that non-human being party is also listed as a party, then each shall be counted as an individual party.

Rule 10. Administration.

(a) *Forms*. Forms for use in these arbitration proceedings must be approved by the Administrative Office of the Courts.

(b) *Delegation of Nonjudicial Functions*. To conserve judicial resources and facilitate the effectiveness of these rules, the court may delegate nonjudicial, administrative duties and functions to supporting court personnel and authorize them to require compliance with these rules.

(c) *Local Rules*. The chief district court judge may publish local rules, not inconsistent with the Rules and N.C.G.S. 7A-37.1, implementing arbitration.

Administrative History: Authority—Order of the North Carolina Supreme Court, August 28, 1986, pilot rule adopted; pilot rule amended effective March 4, 1987; permanent rule adopted, by order of the North Carolina Supreme Court, September 14, 1989; Arb. Rule 8(a), renumbered as Arb. Rule 2(3), effective _____, 2011, was amended March 8, 1990 and December 19, 2002; Arb. Rule 8(b), renumbered as Arb. Rule 8(b)(1) and former Arb. Rule 8(b)(2), effective _____, 2011, was amended March 8, 1990 and December 19, 2002; Arb. Rule (d) was amended March 8, 1990 and (f), renumbered as Arb. Rule 1(b), effective _____, 2011, was amended March 8, 1990 and December 19, 2002; Amended December 19, 2002—(c) and (e); Effective _____, 2011, former (a), (b), (c) were renumbered, reorganized and amended; Effective _____, 2011, Arb. Rule 10(d) was reorganized as Arb. Rule 10(a) and Arb. Rule 10(e) was reorganized as Arb. Rule 10(b).

Rule 11. Application Of Rules.

These Rules shall apply to cases filed on or after the effective date of these rules and to pending cases submitted by agreement of the parties under Arb. Rule 2(b) or referred to arbitration by order of the court in those districts designated for court-ordered arbitration in accordance with N.C.G.S. §7A-37.1.

Administrative History: Authority—Order of the North Carolina Supreme Court, August 28, 1986, pilot rules adopted; pilot rule amended effective March 4, 1987; permanent rule adopted, by order of the North Carolina Supreme Court, September 14, 1989; Amended March 8, 1990; Amended December 19, 2002; Amended _____, 2011, effective immediately to all cases filed on or before _____, 2011.

COMMENT

A common set of rules has been adopted. These rules may be amended only by the Supreme Court of North Carolina. The enabling legislation, N.C.G.S. §7A-37.1, vests rule-making authority in the Supreme Court, and this includes amendments.

Editor's note.—As to the applicability of the Rules for Court-Ordered Arbitration, see the order of the Supreme Court preceding these rules.

In the Supreme Court of North Carolina
Order Adopting Amendments to the Rules for Court-Ordered Arbitration in North Carolina

WHEREAS, section 7A-37.1 of the North Carolina General Statutes authorizes the use of court-ordered, non-binding arbitration in our courts as an alternative procedure to traditional civil litigation, and

WHEREAS, N.C.G.S. section 7A-38.1(b) enables this Court to implement section 7A-38.1 by adopting rules and amendments to rules concerning said court-ordered arbitrations,

NOW, THEREFORE, pursuant to N.C.G.S. section 7A-38.1(c), the Rules for Court-Ordered Arbitration in North Carolina are hereby amended to read as in the following pages. These amended Rules shall be effective on the 1st day of January, 2012.

Adopted by the Court in conference the 6th day of October, 2011. The Appellate Division Reporter shall promulgate by publication as soon as practicable the portions of the Rules for Court-Ordered Arbitration in North Carolina amended through this action in the advance sheets of the Supreme Court and the Court of Appeals.

s/Timmons-Goodson
For the Court

AMENDMENTS TO THE RULES IMPLEMENTING MEDIATION IN MATTERS BEFORE THE CLERK OF SUPERIOR COURT

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RULE 1. INITIATING MEDIATION IN MATTERS BEFORE THE CLERK

A. PURPOSE OF MANDATORY MEDIATION. These Rules are promulgated pursuant to N.C.G.S. § 7A-38.3B to implement mediation in certain cases within the clerk's jurisdiction. The procedures set out here are designed to focus the parties' attention on settlement and resolution rather than on preparation for contested hearings and to provide a structured opportunity for settlement negotiations to take place. Nothing herein is intended to limit or prevent the parties from engaging in other settlement efforts voluntarily either prior to or after the filing of a matter with the clerk.

B. DUTY OF COUNSEL TO CONSULT WITH CLIENTS AND OPPOSING COUNSEL CONCERNING SETTLEMENT PROCEDURES. In furtherance of this purpose, counsel, upon being retained to represent a party to a matter before the clerk, shall discuss the means available to the parties through mediation and other settlement procedures to resolve their disputes without resort to a contested hearing. Counsel shall also discuss with each other what settlement procedure and which neutral third party would best suit their clients and the matter in controversy.

C. INITIATING THE MEDIATION BY ORDER OF THE CLERK.

(1) Order by The Clerk of Superior Court. The clerk of superior court of any county may, by written order, require all persons and entities identified in Rule 4 to attend a mediation in any matter in which the clerk has original or exclusive jurisdiction, except those matters under N.C.G.S. Chapters 45 and 48 and those matters in which the jurisdiction of the clerk is ancillary.

(2) Content of Order. The order shall be on a North Carolina Administrative Office of the Courts (NCAOC) form and shall:

(a) require that a mediation be held in the case;

(b) establish deadlines for the selection of a mediator and completion of the mediation;

(c) state the names of the persons and entities who shall attend the mediation;

(d) state clearly that the persons ordered to attend have the right to select their own mediator as provided by Rule 2;

(~~3~~e) state the rate of compensation of the court appointed mediator in the event that those persons do not exercise their right to select a mediator pursuant to Rule 2; and

(f) state that those persons shall be required to pay the mediator's fee in shares determined by the clerk.

(3) Motion for Court Ordered Mediation. In matters not ordered to mediation, any party, interested persons or fiduciary may file a written motion with the clerk requesting that mediation be ordered. Such motion shall state the reasons why the order should be allowed and shall be served in ac-cordance with Rule 5 of the North Carolina Rules of Civil Procedure (N.C.R.Civ.P.) on non-moving parties, interested persons and fiduciaries designated by the clerk or identified by the petitioner in the pleadings. Objections to the motion may be filed in writing within five days after the date of the service of the motion. Thereafter, the clerk shall rule upon the motion without a hearing and notify the parties or their attorneys of the ruling.

(4) Informational Brochure. The clerk shall serve a brochure prepared by the Dispute Resolution Commission (Commission) explaining the mediation process and the operations of the Commission along with the order required by Rule 1.C.(1) and 1.C.(3).

(5) Motion to Dispense With Mediation. A named party, interested person or fiduciary may move the clerk of superior court to dispense with a mediation ordered by the clerk. Such motion shall state the reasons the relief is sought and shall be served on all persons ordered to attend and the mediator. For good cause shown, the clerk may grant the motion.

(6) Dismissal of Petition For the Adjudication of Incompetence. The petitioner shall not voluntarily dismiss a petition for adjudication of incompetence after mediation is ordered.

RULE 2. DESIGNATION OF MEDIATOR

A. DESIGNATION OF CERTIFIED MEDIATOR BY AGREEMENT OF PARTIES. The parties may designate a mediator certified by the Commission by agreement within a period of time as set out in the clerk's order. However, the parties may only designate mediators certified for estate and guardianship matters pursuant to these Rules for estate or guardianship matters.

The petitioner shall file with the clerk a Designation of Mediator within the period set out in the clerk's order; however, any party may file the designation. The party filing the designation shall serve a copy on all parties and the mediator designated to conduct the mediation. Such designation shall state the name, address and telephone number of the mediator designated; state the rate of compensation of the mediator; state that the mediator and persons ordered to attend have agreed upon the designation and rate of compensation; and state under what rules the mediator is certified. The notice shall be on a NCAOC form.

B. APPOINTMENT OF MEDIATOR BY THE CLERK. In the event a Designation of Mediator is not filed with the clerk within the time for filing stated in the clerk's order, the clerk shall appoint a mediator certified by the Commission. The clerk shall appoint only those mediators certified pursuant to these Rules for estate and guardianship matters to those matters. The clerk may appoint any certified mediator who has

expressed a desire to be appointed to mediate all other matters within the jurisdiction of the clerk.

Except for good cause, mediators shall be appointed by the clerk by rotation from a list of those certified mediators who wish to be appointed for matters within the clerk's jurisdiction, without regard to occupation, race, gender, religion, national origin, disability or whether they are an attorney.

C. MEDIATOR INFORMATION DIRECTORY. The Commission shall maintain for the consideration of the clerks of superior court and those designating mediators for matters within the clerk's jurisdiction, a directory of certified mediators who request appointments in those matters and a directory of those mediators who are certified pursuant to these Rules. Said directory shall be maintained on the Commission's website at www.ncdrc.org.

D. DISQUALIFICATION OF MEDIATOR. Any person ordered to attend a mediation pursuant to these Rules may move the clerk of superior court of the county in which the matter is pending for an order disqualifying the mediator. For good cause, such order shall be entered. If the mediator is disqualified, a replacement mediator shall be designated or appointed pursuant to Rule 2. Nothing in this provision shall preclude mediators from disqualifying themselves.

RULE 3. THE MEDIATION

A. WHERE MEDIATION IS TO BE HELD. The mediation may be held in any location to which all the persons ordered to attend and the mediator agree. In the absence of such an agreement, the mediation shall be held in the courthouse or other public or community building in the county where the matter is pending. The mediator shall be responsible for reserving a place and making arrangements for the mediation and for giving timely notice of the time and location of the mediation to all persons ordered to attend.

B. WHEN MEDIATION IS TO BE HELD. The clerk's order issued pursuant to Rule 1.C.(3) shall state a deadline for completion of the mediation. The mediator shall set a date and time for the mediation pursuant to Rule 6.B.(5) and shall conduct the mediation before that date unless the date is extended by the clerk.

C. ~~REQUEST TO EXTEND DEADLINE FOR COMPLETION~~ EXTENDING DEADLINE FOR COMPLETION. The clerk

may extend the deadline for completion of the mediation upon the clerk's own motion, upon stipulation of the parties or upon suggestion of the mediator. ~~The mediator or any person ordered to attend the mediation may request the Clerk of Superior Court to extend the deadline for completion of the mediation. Such request shall state the reasons the extension is sought and shall be delivered to all persons ordered to attend and the mediator. The Clerk may grant the request without hearing by setting a new deadline for the completion of the mediation, which date may be set at any time prior to the hearing. Notice of the Clerk's decision shall be delivered to all persons ordered to attend and the mediator by the person who sought the extension and shall be filed with the Court.~~

D. RECESSES. The mediator may recess the mediation at any time and may set times for reconvening which are prior to the deadline for completion. If the time for reconvening is set before the mediation is recessed, no further notification is required for persons present at the mediation.

E. THE MEDIATION IS NOT TO DELAY OTHER PROCEEDINGS. The mediation shall not be cause for the delay of other proceedings in the matter, including the completion of discovery, the filing or hearing of motions or the hearing of the matter, except by order of the clerk of superior court.

RULE 4. DUTIES OF PARTIES, ATTORNEYS AND OTHER PARTICIPANTS IN MEDIATIONS

A. ATTENDANCE.

(1) Persons ordered by the clerk to attend a mediation conducted pursuant to these Rules shall physically attend until an agreement is reduced to writing and signed as provided in Rule 4.B or an impasse has been declared. Any such person may have the attendance requirement excused or modified, including the allowance of that person's participation by telephone or teleconference:

(a) By agreement of all persons ordered to attend and the mediator; or

(b) By order of the clerk of superior court, upon motion of a person ordered to attend and notice of the motion to all other persons ordered to attend and the mediator.

(2) Any person ordered to attend a mediation conducted pursuant to these Rules that is not a natural person or a governmental entity shall be represented at the mediation by an officer, employee or agent who is not such person's outside counsel and who has been authorized to decide on behalf of such party whether and on what terms to settle the matter.

(3) Any person ordered to attend a mediation conducted pursuant to these Rules that is a governmental entity shall be represented at the mediation by an employee or agent who is not such entity's outside counsel and who has authority to decide on behalf of such entity whether and on what terms to settle the matter; provided, however, if under law proposed settlement terms can be approved only by a governing board, the employee or agent shall have authority to negotiate on behalf of the governing board.

(4) An attorney ordered to attend a mediation pursuant to these Rules has satisfied the attendance requirement when at least one counsel of record for any person ordered to attend has attended the mediation.

(5) Other persons may participate in the mediation at the discretion of the mediator.

(6) Persons ordered to attend shall promptly notify the mediator after selection or appointment of any significant problems they may have with dates for mediation sessions before the completion deadline and shall keep the mediator informed as to such problems as may arise before an anticipated session is scheduled by the mediator.

B. FINALIZING AGREEMENT.

(1) If an agreement is reached at the mediation, in matters that, as a matter of law, may be resolved by the parties by agreement, the parties to the agreement shall reduce its terms to writing and sign it along with their counsel. The parties shall designate a person who will file a consent judgment or one or more voluntary dismissals with the clerk and that person shall sign the mediator's report. If agreement is reached in such matters prior to the mediation or during a recess, the parties shall inform the mediator and the clerk that the matter has been settled and, within 10 calendar days of the agreement being reached, file a consent judgment or voluntary dismissal(s).

(2) In all other matters, including guardianship and estate matters, if an agreement is reached upon some or all of the

issues at mediation, the persons ordered to attend shall reduce its terms to writing and sign it along with their counsel, if any. Such agreements are not binding upon the clerk but they may be offered into evidence at the hearing of the matter and may be considered by the clerk for a just and fair resolution of the matter. Evidence of statements made and conduct occurring in a mediation where an agreement is reached is admissible pursuant to N.C.G.S. § 7A-38.3B(g)(3).

All written agreements reached in such matters shall include the following language in a prominent place in the document:

"This agreement is not binding on the clerk but will be presented to the clerk as an aid to reaching a just resolution of the matter."

C. PAYMENT OF MEDIATOR'S FEE. The persons ordered to attend the mediation shall pay the mediator's fee as provided by Rule 7.

D. NO RECORDING. There shall be no stenographic, audio or video recording of the mediation process by any participant. This prohibition precludes recording either surreptitiously or with the agreement of the parties.

RULE 5. SANCTIONS FOR FAILURE TO ATTEND MEDIATION OR PAY MEDIATOR'S FEE

Any person ordered to attend a mediation pursuant to these Rules who fails without good cause to attend or to pay a portion of the mediator's fee in compliance with N.C.G.S. § 7A-38.3B and the Rules promulgated by the Supreme Court of North Carolina (Supreme Court) to implement that section, shall be subject to contempt powers of the clerk and the clerk may impose monetary sanctions. Such monetary sanctions may include, but are not limited to, the payment of fines, attorney fees, mediator fees, expenses and loss of earnings incurred by persons attending the mediation.

A person seeking sanctions against another person shall do so in a written motion stating the grounds for the motion and the relief sought. Said motion shall be served upon all persons ordered to attend. The clerk may initiate sanction proceedings upon his/her own motion by the entry of a show cause order. If the clerk imposes sanctions, the clerk shall do so, after notice and a hearing, in a written order making findings of fact and conclusions of law. An order imposing sanctions is reviewable by the superior court in accordance with N.C.G.S. § 1-301.2 and N.C.G.S. § 1-301.3, as applicable, and thereafter by the appellate courts in accordance with N.C.G.S. § 7A-38.1(g).

RULE 6. AUTHORITY AND DUTIES OF MEDIATORS

A. AUTHORITY OF MEDIATOR.

(1) Control of the Mediation. The mediator shall at all times be in control of the mediation and the procedures to be followed. However, the mediator's conduct shall be governed by Standards of Professional Conduct for Mediators (Standards) promulgated by the Supreme Court which shall contain a provision prohibiting mediators from prolonging a conference unduly.

(2) Private Consultation. The mediator may communicate privately with an participant or counsel prior to, during and after the mediation. The fact that private communications have occurred with a participant before the conference shall be disclosed to all other participants at the beginning of the mediation.

B. DUTIES OF MEDIATOR.

(1) The mediator shall define and describe the following at the beginning of the mediation:

(a) The process of mediation;

(b) The costs of the mediation and the circumstances in which participants will not be taxed with the costs of mediation;

(c) That the mediation is not a trial, the mediator is not a judge, and the parties retain their right to a hearing if they do not reach settlement;

(d) The circumstances under which the mediator may meet and communicate privately with any of the parties or with any other person;

(e) Whether and under what conditions communications with the mediator will be held in confidence during the conference;

(f) The inadmissibility of conduct and statements as provided by N.C.G.S. § 7A-38.3B;

(g) The duties and responsibilities of the mediator and the participants; and

(h) That any agreement reached will be reached by mutual consent and reported to the clerk as provided by rule.

(2) Disclosure. The mediator has a duty to be impartial and to advise all participants of any circumstances bearing on possible bias, prejudice or partiality.

(3) Declaring Impasse. It is the duty of the mediator to determine in a timely manner that an impasse exists and that the mediation should end. To that end, the mediator shall inquire of and consider the desires of the parties to cease or continue the mediation.

(4) Reporting Results of Mediation.

(a) The mediator shall report to the court on a NCAOC form within five days of completion of the mediation whether or not the mediation resulted in a settlement or impasse. If settlement occurred prior to or during a recess of a mediation, the mediator shall file the report of settlement within five days of learning of the settlement and, in addition to the other information required, report who informed the mediator of the settlement.

(b) The mediator's report shall identify those persons attending the mediation, the time spent in and fees charged for mediation, and the names and contact information for those persons designated by the parties to file such consent judgment or dismissal(s) with the clerk as required by Rule 4.B. Mediators shall provide statistical data for evaluation of the mediation program as required from time to time by the Commission or the NCAOC. Mediators shall not be required to send agreements reached in mediation to the clerk, except in estate and guardianship matters and other matters which may be resolved only by order of the clerk.

(c) Mediators who fail to report as required pursuant to this Rule shall be subject to the contempt power of the court and sanctions.

(5) Scheduling and Holding the Mediation. It is the duty of the mediator to schedule the mediation and conduct it prior to the mediation completion deadline set out in the clerk's order. The mediator shall make an effort to schedule the mediation at a time that is convenient with all participants. In the absence of agreement, the mediator shall select a date and time for the mediation. Deadlines for completion of the mediation shall be strictly ob-

served by the mediator unless said time limit is changed by a written order of the clerk of superior court.

~~**(6) Distribution of mediator evaluation form.** At the mediation, the mediator shall distribute a mediator evaluation form approved by the Dispute Resolution Commission. The mediator shall distribute one copy per person with additional copies distributed upon request. The evaluation is intended for purposes of self improvement and the mediator shall review returned evaluation forms.~~

RULE 7. COMPENSATION OF THE MEDIATOR

A. BY AGREEMENT. When the mediator is stipulated by the parties, compensation shall be as agreed upon between the parties and the mediator.

B. BY ORDER OF THE CLERK. When the mediator is appointed by the clerk, the parties shall compensate the mediator for mediation services at the rate of $150 per hour. The parties shall also pay to the mediator a one-time, per case administrative fee of $150 that is due upon appointment.

C. PAYMENT OF COMPENSATION. In matters within the clerk's jurisdiction that, as a matter of law, may be resolved by the parties by agreement the mediator's fee shall be paid in equal shares by the parties unless otherwise agreed to by the parties. Payment shall be due upon completion of the mediation.

In all other matters before the clerk, including guardianship and estate matters, the mediator's fee shall be paid in shares as determined by the clerk. A share of a mediator's fee may only be assessed against the estate of a decedent, a trust or a guardianship or against a fiduciary or interested person upon the entry of a written order making specific written findings of fact justifying the taxing of costs.

D. CHANGE OF APPOINTED MEDIATOR. Parties who fail to select a certified mediator within the time set out in the clerk's order and then desire a substitution after the clerk has appointed a certified mediator, shall obtain the approval of the clerk for the substitution. The clerk may approve the substitution only upon proof of payment to the clerk's original appointee the $150 one time, per case administrative fee, any other amount due and owing for mediation services pursuant to Rule 7.B and any postponement fee due and owing pur-

suant to Rule 7.F, unless the clerk determines that payment of the fees would be unnecessary or inequitable.

E. INDIGENT CASES. No person ordered to attend a mediation found to be indigent by the clerk for the purposes of these Rules shall be required to pay a share of the mediator's fee. Any person ordered by the clerk of superior court to attend may move the clerk for a finding of indigence and to be relieved of that person's obligation to pay a share of the mediator's fee. The motion shall be heard subsequent to the completion of the mediation or if the parties do not settle their matter, subsequent to its conclusion. In ruling upon such motions, the clerk shall apply the criteria enumerated in N.C.G.S. § 1-110(a), but shall take into consideration the outcome of the matter and whether a decision was rendered in the movant's favor. The clerk shall enter an order granting or denying the person's request. Any mediator conducting a mediation pursuant to these Rules shall waive the payment of fees from persons found by the court to be indigent.

F. POSTPONEMENTS.

(1) As used herein, the term "postponement" shall mean reschedule or not proceed with mediation once the mediator has scheduled a date for a session of the mediation. After mediation has been scheduled for a specific date, a person ordered to attend may not unilaterally postpone the mediation.

(2) A mediation session may be postponed by the mediator for good cause beyond the control of the movant only after notice by the movant to all persons of the reasons for the postponement and a finding of good cause by the mediator. A postponement fee shall not be charged in such circumstance.

(3) Without a finding of good cause, a mediator may also postpone a scheduled mediation session with the consent of all parties. A fee of $150 shall be paid to the mediator if the postponement is allowed or if the request is within two business days of the scheduled date the fee shall be $300. The person responsible for it shall pay the postponement fee. If it is not possible to determine who is responsible, the clerk shall assess responsibility. Postponement fees are in addition to the one time, per case administrative fee provided for in Rule 7.B. A mediator shall not charge a postponement fee when the mediator is responsible for the postponement.

(4) If all persons ordered to attend select the mediator and they contract with the mediator as to compensation, the parties and the mediator may specify in their contract alternatives to the postponement fees otherwise required herein.

G. SANCTIONS FOR FAILURE TO PAY MEDIATOR'S FEE. Willful failure of a party to make timely payment of that party's share of the mediator's fee (whether the one time, per case, administrative fee, the hourly fee for mediation services or any postponement fee) or willful failure of a party contending indigent status to promptly move the clerk of superior court for a finding of indigency, shall constitute contempt of court and may result, following notice and a hearing, in the imposition of any and all lawful sanctions by the superior court pursuant to N.C.G.S. § 5A.

RULE 8. MEDIATOR CERTIFICATION AND DECERTIFICATION

The Commission may receive and approve applications for certification of persons to be appointed as clerk of court mediators.

A. For appointment by the clerk as mediator in all cases within the clerk's jurisdiction except guardianship and estate matters, a person shall be certified by the Commission for either the superior or district court mediation programs;

B. For appointment by the clerk as mediator in guardianship and estate matters within the clerk's jurisdiction, a person shall be certified as a mediator by the Commission for either the superior or district court programs and complete a course, at least 10 hours in length, approved by the Commission pursuant to Rule 9 concerning estate and guardianship matters within the clerk's jurisdiction;

C. Submit proof of qualifications set out in this section on a form provided by the Commission;

D. Pay all administrative fees established by the NCAOC upon the recommendation of the Commission; and

E. Agree to accept, as payment in full of a party's share of the mediator's fee, the fee ordered by the clerk pursuant to Rule 7.

Certification may be revoked or not renewed at any time it is shown to the satisfaction of the Commission that a mediator no longer meets the above qualifications or has not faithfully observed these Rules or those of any county in which he or she

has served as a mediator or the Standards. Any person who is or has been disqualified by a professional licensing authority of any state for misconduct shall be ineligible to be certified under this Rule.

RULE 9. CERTIFICATION OF MEDIATION TRAINING PROGRAMS

A. Certified training programs for mediators seeking certification pursuant to these Rules for estate and guardianship matters within the jurisdiction of the clerk of superior court shall consist of a minimum of 10 hours instruction. The curriculum of such programs shall include:

(1) Factors distinguishing estate and guardianship mediation from other types of mediations;

(2) The aging process and societal attitudes toward the elderly, mentally ill and disabled;

(3) Ensuring full participation of respondents and identifying interested persons and nonparty participants;

(4) Medical concerns of the elderly, mentally ill and disabled;

(5) Financial and accounting concerns in the administration of estates and of the elderly, mentally ill and disabled;

(6) Family dynamics relative to the elderly, mentally ill and disabled and to the families of deceased persons;

(7) Assessing physical and mental capacity;

(8) Availability of community resources for the elderly, mentally ill and disabled;

(9) Principles of guardianship law and procedure;

(10) Principles of estate law and procedure;

(11) Statute, rules and forms applicable to mediation conducted under these Rules; and

(12) Ethical and conduct issues in mediations conducted under these Rules.

The Commission may adopt Guidelines for trainers amplifying the above topics and set out minimum time frames and materials that trainers shall allocate to each topic. Any such Guidelines shall be available at the Commission's office and posted on its website.

B. A training program must be certified by the Commission before attendance at such program may be used for compliance with Rule 8.B. Certification need not be given in advance of attendance. Training programs attended prior to the promulgation of these Rules or attended in other states may be approved by the Commission if they are in substantial compliance with the standards set forth in this Rule.

C. To complete certification, a training program shall pay all administrative fees established by the NCAOC in consultation with the Commission.

RULE 10. PROCEDURAL DETAILS

The clerk of superior court shall make all those orders just and necessary to safeguard the interests of all persons and may supplement all necessary procedural details not inconsistent with these Rules.

RULE 11. DEFINITIONS

A. The term, clerk of superior court, as used throughout these Rules, shall refer both to said clerk or assistant clerk.

B. The phrase, NCAOC forms, shall refer to forms prepared by, printed and distributed by the NCAOC to implement these Rules or forms approved by local rule which contain at least the same information as those prepared by the NCAOC. Proposals for the creation or modification of such forms may be initiated by the Commission.

RULE 12. TIME LIMITS

Any time limit provided for by these Rules may be waived or extended for good cause shown. Service of papers and computation of time shall be governed by the N.C.R.Civ.P.

In the Supreme Court of North Carolina Order Adopting Amendments to the Rules Implementing Mediation in Matters Before the Clerk of Superior Court

WHEREAS, section 7A-38.3B of the North Carolina General Statutes codifies a statewide system of mediations to facilitate the resolution of matters pending before Clerks of Superior Court, and

WHEREAS, N.C.G.S. § 7A-38.3B(b) enables this Court to implement section 7A-38.3B by adopting rules and amendments to rules concerning said mediation.

NOW, THEREFORE, pursuant to N.C.G.S. § 7A-38.3B(b), the Rules Implementing Mediation In Matters Before The Clerk of Superior Court are hereby amended to read as in the following pages. These amended Rules shall be effective on the 1st day of January, 2012.

Adopted by the Court in conference the 6th day of October, 2011. The Appellate Division Reporter shall promulgate by publication as soon as practicable the portions of the Rules Implementing Mediation In Matters Before The Clerk Of Superior Court amended through this action in the advance sheets of the Supreme Court and the Court of Appeals.

s/Timmons-Goodson, J.
For the Court

AMENDMENTS TO THE RULES IMPLEMENTING MEDIATION IN MATTERS PENDING IN DISTRICT CRIMINAL COURT

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RULE 1. INITIATING VOLUNTARY MEDIATION IN DISTRICT CRIMINAL COURT

A. PURPOSE OF MEDIATION. Pursuant to N.C.G.S. § 7A-38.3D, these Rules are promulgated to implement programs for voluntary mediation of certain cases within the jurisdiction of the district criminal courts. These procedures are intended to assist private parties, with the help of a neutral mediator, in discussing and resolving their disputes and in conserving judicial resources. The chief district court judge, the district attorney and the community mediation center shall determine whether to establish a program in a district court judicial district. Because participation in this program and in the mediation process is voluntary, no defendant, complaining witness or any other person who declines to participate in mediation or whose case cannot be settled in mediation, shall face any adverse consequences as a result of his/her failure to participate or reach an agreement and the case shall simply be returned to court. Consistent with N.C.G.S. § 7A-38.3D(j) a party's participation or failure to participate in mediation is to be held confidential and not revealed to the court or the district attorney.

B. DEFINITIONS.

(1) Court. The term "court" as used throughout these rules, shall refer both to a criminal district court judge or his/her designee, including a district attorney or designee or personnel affiliated with a community mediation center.

(2) Mediation Process. The term "mediation process" as used throughout these rules, shall encompass intake, screening and mediation through impasse or until the case is dismissed.

(3) District Attorney. The term "district attorney" as used throughout these rules, shall refer to the district attorney, assistant district attorneys and any staff or designee of the district attorney.

C. INITIATING THE MEDIATION.

(1) Suggestion by the Court. In districts that establish a program, the court may encourage private parties to attend mediation in certain cases or categories of cases. In determining whether to encourage mediation in a case or category of cases, the judge or designee may consider among other factors:

(a) whether the parties are willing to participate;

(b) whether continuing prosecution is in the best interest of the parties or of any non-parties impacted by the dispute;

(c) whether the private parties involved in the dispute have an expectation of a continuing relationship and there are issues underlying their dispute that have not been addressed and which may create later conflict or require court involvement;

(d) whether cross-warrants have been filed in the case; and

(e) whether the case might otherwise be subject to voluntary dismissal.

(2) Multiple Charges. Multiple charges pending in the same court against a single defendant or pending against multiple defendants and involving the same complainant or complainants may be consolidated for purposes of holding a single mediation in the matter. Charges pending in multiple courts may be consolidated for purposes of mediation with the consent of those courts.

(3) Timing of Suggestion. The court shall encourage parties to attend and participate in mediation as soon as practicable. Since there is no possibility of incarceration resulting from any agreement reached in mediation, the

judge is not required to provide a court-appointed attorney to a defendant prior to his/her mediation.

(4) Notice to Parties. The court shall provide to parties who have agreed to attend mediation notice of the following, either orally or in writing, on a North Carolina Administrative Office of the Courts (NCAOC) approved form: (1) the deadline for completion of the mediation process, (2) the name of the mediator who will mediate the dispute or the name of the community mediation center who will provide the mediator and (3) that the defendant may be required to pay the dismissal fee set forth in Rule 5.B.(2). In lieu of providing this information orally or in writing, the court may refer the complaining witness and defendant to a community mediation center whose staff shall advise the parties of the above information.

(5) Motion for Mediation. Any complainant or defendant may file an oral or written request with the court to have a mediation conducted in his or her dispute and the court shall determine whether the dispute is appropriate for referral. If in writing, the motion may be on a NCAOC form.

(6) Screening. A mediator as defined by Rule 7 below or a community mediation center to which the parties are referred for mediation shall advise the court, if it is determined upon screening of the case or parties, that the matter is not appropriate for mediation.

RULE 2. PROGRAM ADMINISTRATION

Pursuant to N.C.G.S. § 7A-38.3D(c), a community mediation center may assist a judicial district in administering and operating its mediation program for district court criminal matters. The court may delegate to a center responsibility for the scheduling of cases and the center may provide volunteer and/or staff mediators to conduct the mediations. The center shall also maintain files in such mediations; record caseload statistics and other information as required by the court, the Dispute Resolution Commission (Commission) or the (NCAOC), including tracking the number of cases referred to mediation and the outcome of those mediations; and, in accordance with N.C.G.S. § 7A-38.7 and N.C.G.S. § 7A-38.3D(m), oversee the dismissal process for cases resolved in mediation.

RULE 3. APPOINTMENT OF MEDIATOR

A. AUTHORITY TO APPOINT. When the parties have agreed to attend mediation, the court shall appoint a community mediation center mediator by name or shall designate a center to appoint a mediator to conduct the mediation. The mediator appointed shall be qualified pursuant to Rule 8 of these rules.

B. DISQUALIFICATION OF MEDIATOR. For good cause shown, a complainant or defendant may move the court to disqualify the mediator appointed to conduct their mediation. If the mediator is disqualified, the court or designee shall appoint a new one to conduct the mediation. Nothing in this provision shall preclude a mediator from disqualifying him or herself.

RULE 4. THE MEDIATION

A. SCHEDULING MEDIATION. The mediator appointed to conduct the mediation or the community mediation center to which the matter has been referred by the court for appointment of a mediator, shall be responsible for any scheduling that must be done prior to the mediation, any reporting required by these rules or local rules and the maintenance of any files pertaining to the mediation.

B. WHERE MEDIATION IS TO BE HELD. Mediation shall be held in the courthouse or if suitable space is available, in the offices of a community mediation center or at any other place as agreed upon between the mediator and parties.

C. ~~REQUEST TO EXTEND DEADLINE FOR COMPLETION OF MEDATION~~ EXTENDING DEADLINE FOR COMPLETION. The court may extend the deadline for completion of the mediation process upon it's own motion or upon suggestion of community mediation center staff. ~~A mediator or Community Mediation Center staff may for good cause, request that the court extend the deadline for completion of the mediation process set pursuant to Rule 1.C.(4) above.~~

D. RECESSES. The mediator may recess the mediation at any time and may set times for reconvening. If the time for reconvening is set before the mediation is recessed, no further notification is required for persons present at the mediation. In recessing a matter, the mediator shall take into account whether the parties wish to continue mediating and whether they are making progress toward resolving their dispute.

E. **NO RECORDING.** There shall be no stenographic, audio or video recording of the mediation process by any participant. This prohibition precludes recording either surreptitiously or with the agreement of the parties.

RULE 5. DUTIES OF THE PARTIES

A. ATTENDANCE.

(1) Complainant(s) and defendant(s) who agree to attend mediation will physically attend the proceeding until an agreement is reached or the mediator has declared an impasse.

(2) The following may attend and participate in mediation:

(a) Parents or guardians of a minor party. Parent(s) or guardian(s) of a minor complainant or defendant who have been encouraged by the court to attend. However, a court shall encourage attendance by a parent or guardian only in consultation with the mediator and a mediator may later excuse the participation of a parent or guardian if the mediator determines his/her presence is not helpful to the process.

(b) Attorneys. Attorneys representing parties may physically attend and participate in mediation. Alternatively, lawyers may participate indirectly by advising clients before, during and after mediation sessions, including monitoring compliance with any agreements reached.

(c) Others. In the mediator's discretion, others whose presence and participation is deemed helpful to resolving the dispute or to addressing any issues underlying it, may be permitted to attend and participate unless and until the mediator determines their presence is no longer helpful. Mediators may exclude anyone wishing to attend and participate, but whose presence and participation the mediator deems would likely be disruptive or counterproductive.

(3) **Exceptions to Physical Attendance.** A party or other person may be excused from physically attending the mediation and allowed to participate by telephone or through any attorney:

(a) by agreement of the complainant(s) and defendant(s) and the mediator, or

(b) by order of the court.

(4) Scheduling. The complainant(s) and defendant(s) and any parent, guardian or attorney who will be attending the mediation will:

(a) Make a good faith effort to cooperate with the mediator or community mediation center to schedule the mediation at time that is convenient for all participants;

(b) Promptly notify the mediator or community mediation center to which the case has been referred of any significant scheduling concerns which may impact that person's ability to be present for mediation; and

(c) Notify the mediator or the center about any other concerns that may impact a party or person's ability to attend and participate meaningfully, *e.g.*, the need for wheelchair access or for a deaf or foreign language interpreter.

B. FINALIZING AGREEMENT.

(1) Written Agreement. If an agreement is reached at the mediation, the complainant and defendant are to insure that the terms are reduced to writing and signed. Agreements that are not reduced to writing and signed will not be deemed enforceable. If no agreement is reached in mediation, an impasse will be declared and the matter will be referred back to the court or its designee.

(2) Dismissal Fee. To be dismissed by the district attorney, the defendant, unless the parties agree to some other apportionment, shall pay a dismissal fee as set by N.C.G.S. § 7A-38.7 and N.C.G.S. § 7A-38.3D(m) to the clerk of superior court in the county where the case was filed and supply proof of payment to the community mediation center administering the program for the judicial district. Payment is to be made in accordance with the terms of the parties' agreement. The center shall, thereafter, provide the district attorney with a dismissal form, which may be an approved NCAOC form. In his or her discretion, a judge or his/her designee may waive

the dismissal fee pursuant to N.C.G.S. § 7A-38.3D(m) when the defendant is indigent, unemployed, a full-time college or high school student, is a recipient of public assistance or for any other appropriate reason. The mediator shall advise the parties where and how to pay the fee.

RULE 6. AUTHORITY AND DUTIES OF THE MEDIATOR

A. AUTHORITY OF THE MEDIATOR.

(1) Control of Mediation. The mediator shall at all times be in control of the mediation process and the procedures to be followed.

(2) Private Consultation. The mediator may communicate privately with any participant or counsel prior to and during the mediation. The fact that previous communications have occurred with a participant shall be disclosed to all other participants at the beginning of the mediation.

(3) Inclusion and Exclusion of Participants at Mediation. In the mediator's discretion, he or she may encourage or allow persons other than the parties or their attorneys, to attend and participate in mediation, provided that the mediator has determined the presence of such persons to be helpful to resolving the dispute or to addressing issues underlying it. Mediators may also exclude persons other that the parties and their attorneys whose presence the mediator deems would likely be or which has, in fact, been counter-productive.

(4) Scheduling the Mediation. The mediator or community mediation center staff involved in scheduling shall make a good faith effort to schedule the mediation at a time that is convenient for the parties and any parent(s), guardian(s) or attorney(s) who will be attending. In the absence of agreement, the mediator or community mediation center staff shall select the date for the mediation and notify those who will be participating. Parties are to cooperate with the mediator in scheduling the mediation, including providing the information required by Rule 5.A.(4).

B. DUTIES OF THE MEDIATOR.

(1) The mediator shall define and describe the following at the beginning of the mediation:

(a) The process of mediation;

(b) That the mediation is not a trial and the mediator is not a judge, attorney or therapist;

(c) That the mediator is present only to assist the parties in eaching their own agreement;

(d) The circumstances under which the mediator may meet and communicate privately with any of the parties or with any other person;

(e) Whether and under what conditions communications with the mediator will be held in confidence during the mediation;

(f) The inadmissibility of conduct and statements as provided in N.C.G.S. § 7A-38.3D(i);

(g) The duties and responsibilities of the mediator and the participants;

(h) That any agreement reached will be by mutual consent;

(i) That if the parties are unable to agree and the mediator declares an impasse, that the parties and the case will return to court; and

(j) That if an agreement is reached in mediation and the parties agree to request a dismissal of the charges pending in the case, the defendant, unless the parties agree to some other apportionment, shall pay a dismissal fee in accordance with N.C.G.S. § 7A-38.7 and N.C.G.S. § 7A-38.3D(m), unless a judge in his or her discretion has waived the fee for good cause. Payment of the dismissal fee shall be made to the clerk of superior court in the county where the case was filed and the community mediation center must provide the district attorney with a dismissal form and proof that the defendant has paid the dispute resolution fee before the charges can be dismissed.

(2) Disclosure. Consistent with the Standards of Professional Conduct for Mediators (Standards), the mediator has a duty to be impartial and to advise all participants of any circumstances bearing on possible bias, prejudice or partiality.

(3) Declaring Impasse. Consistent with the Standards, it is the duty of the mediator to determine in a timely manner

that an impasse exists and that the mediation should conclude. To that end, the mediator shall inquire of and consider the desires of the parties to cease or continue the mediation.

~~**(4) Distributing Informational Brochure.** The mediator shall distribute to the parties a copy of an informational brochure explaining the mediation process and advising them where they may file a complaint if they are unhappy with their mediator's conduct. The Dispute Resolution Commission shall develop, print, and distribute the informational brochure to participating community mediation centers and each center may add an insert to the brochure which more fully explains the operations of that center's program.~~

~~(5)~~ **(4) Reporting Results of Mediation.** The mediator or community mediation center shall report the outcome of mediation to the court or its designee in writing on a NCAOC approved form by the date the case is next calendared. If the criminal court charges are on the court docket the same day as the mediation, the mediator shall inform the attending district attorney of the outcome of the mediation before close of court on that date unless alternative arrangements are approved by the district attorney.

(5) Scheduling and Holding the Mediation. It is the duty of the mediator and community mediation center staff to schedule the mediation and conduct it prior to any deadline set by the court or its designee. Deadlines shall be strictly observed by the mediator and center staff unless the deadline is extended orally or in writing by a judge or his/her designee.

~~**(6) Distribution of mediator evaluation form.** At the mediation, the mediator shall distribute a mediator evaluation form provided by the Dispute Resolution Commission to the parties, one copy per party with additional copies available on request. The mediator shall deliver any completed evaluation forms to the Community Mediation Center with which he or she is affiliated~~.

RULE 7. MEDIATOR CERTIFICATION AND DECERTIFICATION

The Commission may receive and approve applications for certification of persons to be appointed as district criminal court mediators. For certification, an applicant shall:

A. At the time of application, be affiliated with a community mediation center established pursuant to N.C.G.S. § 7A-38.5 as either a volunteer or staff mediator and have received the center's endorsement that he or she possesses the training, experience and skills necessary to conduct district court criminal mediations.

B. Have the following training and experience:

(1) Have both:

(a) Attended at least 24 hours of training in a district criminal court mediation training program certified by the Commission, and

(b) Have a four-year degree from an accredited college or university or have four years of post high school education through an accredited college, university or junior college or four years of full-time work experience, or any combination thereof; or have two years experience as a staff or volunteer mediator at a community mediation center, or

(2) Be a mediated settlement conference or family financial settlement mediator certified by the Commission or be an Advanced Practitioner Member of the Association for Conflict Resolution.

C. Observations and Mediation Experience:

(1) Observe at least two court-referred criminal district court mediations conducted by a mediator certified pursuant to these rules or for a one-year period following the initial adoption of these rules, observe any mediator who is affiliated with a community mediation center established pursuant to N.C.G.S. § 7A-38.5 and who has mediated at least 10 criminal district court cases.

(2) Co-mediate or mediate at least three court-referred district criminal court mediations under the observation of staff affiliated with a community mediation center whose criminal district court mediation training program has been certified by the Commission pursuant to Rule 9 of these Rules.

D. Demonstrate familiarity with the statutes, rules and practice governing district criminal court mediations in North Carolina.

E. Be of good moral character, submit to a criminal background check within one year prior to applying for certification under these Rules and adhere to any standards of practice for mediators acting pursuant to these Rules adopted by the Supreme Court of North Carolina (Supreme Court). Applicants for certification and recertification and all certified district criminal court mediators shall report to the Commission any pending criminal matters or any criminal convictions, disbarments or other disciplinary complaints and actions or any judicial sanctions as soon as the applicant or mediator has notice of them.

F. Commit to serving the district court as a mediator under the direct supervision of a community mediation center authorized under N.C.G.S. § 7A-38.5 for a period of at least two years.

G. Comply with the requirements of the Commission for continuing mediator education or training.

H. Submit proof of qualifications set out in this Section on a form provided by the Commission.

Community mediation centers participating in the program shall assist the Commission in implementing the certification process established by this Rule by:

(1) Documenting Sections A-F for the mediator and Commission;

(2) Reviewing its documentation with the mediator in a face-to-face meeting scheduled no less than 30 days from the mediator's request to apply for certification;

(3) Making a written recommendation on the applicant's certification to the Commission; and

(4) Forwarding the documentation for Sections A-F and its recommendation to the Commission along with the mediator's completed certification application form.

~~Through December 31, 2008, an applicant may be certified pursuant to these rules without compliance with Rules 7 B,C,D,E,F,G or H above provided that he or she is certified by and affiliated with a Community Mediation Center established pursuant to G.A. 7A 38.5 at the time of his/her application and is endorsed by the Center as possessing the training, experience and skills necessary to conduct district criminal~~

~~court mediations. However, such certification shall be for the period of one year only and it is expected that during the course of that year that the mediator will work toward complying with all the requirements established by Rule 7.~~

Certification may be revoked or not renewed at any time it is shown to the satisfaction of the Commission that a mediator no longer meets the above qualifications or has not faithfully observed these Rules or those of any district in which he or she has served as a mediator. Any person who is or has been disqualified by a professional licensing authority of any state for misconduct shall be ineligible to be certified under this Rule. Certification renewal shall be required every two years.

A community mediation center may withdraw it's affiliation with a mediator certified pursuant to these Rules. Such disaffiliation does not revoke said mediator's certification. A mediator's certification is portable and a mediator may agree to be affiliated with a different center. However to mediate under this program in the district criminal court, a mediator must be affiliated with the community mediation center providing services in that court. A mediator may be affiliated with more than one center and provide services in the county served by those centers.

RULE 8. CERTIFICATION OF MEDIATION TRAINING PROGRAMS

A. Certified training programs for mediators seeking certification as district criminal court mediators shall consist of a minimum of 24 hours instruction. The curriculum of such programs shall include:

(1) Conflict resolution and mediation theory;

(2) Mediation process and techniques, including the process and techniques of district court criminal mediation;

(3) Agreement writing;

(4) Communication and information gathering;

(5) Standards of conduct for mediators including, but not limited to the Standards adopted by the Supreme Court;

(6) Statutes, rules, forms and practice governing mediations in North Carolina's district criminal courts;

(7) Demonstrations of district criminal court mediations;

(8) Simulations of district criminal court mediations, involving student participation as mediator, victim, offender and attorneys which shall be supervised, observed and evaluated by program faculty;

(9) Courtroom protocol;

(10) Domestic violence awareness; and

(11) Satisfactory completion of an exam by all students testing their familiarity with the statutes, rules and practice governing district court mediations in North Carolina.

B. A training program must be certified by the Commission before attendance at such program may be deemed as satisfying Rule 8. Training programs attended prior to the promulgation of these rules or attended in other states may be approved by the Commission if they are in substantial compliance with the standards set forth in this Rule.

C. Renewal of certification shall be required every two years.

RULE 9. LOCAL RULE MAKING

The chief district court judge of any district conducting mediations under these Rules is authorized to publish local rules, not inconsistent with these Rules and N.C.G.S. § 7A-38.3D, implementing mediation in that district.

In the Supreme Court of North Carolina
Order Adopting Amendments To The Rules Implementing Mediation In Matters Pending In District Criminal Court

WHEREAS, section 7A-38.3D of the North Carolina General Statutes codifies a statewide system of court-ordered mediations to be implemented in participating district court judicial districts in order to facilitate the resolution of criminal matter within the jurisdiction of those districts, and

WHEREAS, N.C.G.S. § 7A-38.3D(d) enables this Court to implement section 7A-38.1 by adopting rules and amendments to rules concerning said mediations,

NOW, THEREFORE, pursuant to N.C.G.S. § 7A-38.3D(d), the Rules Implementing Mediations In Matters Pending In District Criminal Court are hereby amended to read as in the following pages. These amended Rules shall be effective on the 1st day of January, 2012.

Adopted by the Court in conference the 6th day of October, 2011. The Appellate Division Reporter shall promulgate by publication as soon as practicable the portions of the Rules of the North Carolina Supreme Court Implementing Mediations In Matters Pending In District Criminal Court amended through this action in the advance sheets of the Supreme Court and the Court of Appeals.

s/Timmons-Goodson, J.
For the Court

AMENDMENTS TO THE RULES IMPLEMENTING PRELITIGATION FARM NUISANCE MEDIATION PROGRAM

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RULE 1. SUBMISSION OF DISPUTE TO PRELITIGATION FARM NUISANCE MEDIATION

A. Mediation shall be initiated by the filing of a Request for Prelitigation Mediation of Farm Nuisance Dispute (Request) (Form AOC-CV-820) with the clerk of superior court in a county in which the action may be brought. The Request shall be on a form prescribed by the North Carolina Administrative Office of the Courts (NCAOC) ~~and be available through the clerk of superior court~~ and posted on the NCAOC's website at www.nccourts.org. The party filing the Request shall mail a copy of the Request by certified U.S. mail, return receipt requested, to each party to the dispute.

B. The clerk of superior court shall accept the Request and shall file it in a miscellaneous file under the name of the requesting party.

RULE 2. EXEMPTION FROM N.C.G.S. § 7A-38.1

A dispute mediated pursuant to N.C.G.S. § 7A-38.3, shall be exempt from an order referring the dispute to a mediated settlement conference entered pursuant to N.C.G.S. § 7A-38.1.

RULE 3. SELECTION OF MEDIATOR

A. PERIOD FOR SELECTION. The parties to the dispute shall have 21 days from the date of the filing of the Request to select a mediator to conduct their mediation and to file Notice of Selection of Certified Mediator by Agreement.

B. SELECTION OF CERTIFIED MEDIATOR BY AGREEMENT. The clerk shall provide each party to the dispute with a list of certified superior court mediators ~~who have expressed a willingness to mediate farm nuisance disputes~~ serving ~~in~~ the judicial district encompassing the county in which the Request was filed. If the parties are able to agree on a mediator from that list to conduct their mediation, the party who filed the Request shall notify the clerk by filing with the clerk a Notice of Selection of Certified Mediator by Agreement (Notice) (Form AOC-CV-821). Such Notice shall state the name, address and telephone number of the certified mediator selected; state the rate of compensation to be paid the mediator; and state that the mediator and the parties to the dispute have agreed on the selection and the rate of compensation. The Notice shall be on a form prepared and distributed by the NCAOC and available ~~through the clerk in the county in which the Request was filed~~ on the court's website.

~~**C.** Nomination of Non-Certified Mediator by Agreement. The parties may by agreement select a mediator who is not certified and whose name does not appear on the list of certified mediators available through the clerk but who, in the opinion of the parties, is otherwise qualified by training or experience to mediate the dispute. If the parties agree on a non-certified mediator, the party who filed the Request shall file with the clerk a Nomination of Non-Certified Mediator. Such Nomination shall state the name, address, and telephone number of the non-certified mediator selected; state the training, experience or other qualifications of the mediator; state the rate of compensation of the mediator; and state that the mediator and the parties to the dispute have agreed upon the selection and rate of compensation.~~

~~The senior resident superior court judge shall rule on the said nomination without a hearing, shall approve or disapprove the parties' nomination and shall notify the parties of his or her decision. The nomination and the court's approval or disapproval shall be on a form prepared and distributed by the Administrative Office of the Courts and available through the clerk of superior court in the county where the Request was filed.~~

~~**D**~~ C. **COURT APPOINTMENT OF MEDIATOR.** If the parties to the dispute cannot agree on selection of a certified superior court mediator, the party who filed the Request shall file with the clerk a Motion for Court Appointment of Mediator

(Motion) and the senior resident superior court judge shall appoint ~~the~~ a certified superior court mediator. The Motion shall be filed with the clerk within 21 days of the date of the filing of the Request. The Motion shall be on a form prepared and distributed by the NCAOC (Form AOC-CV-821). The Motion shall state whether any party prefers a certified attorney mediator, and if so, the senior resident superior court judge shall appoint a certified attorney mediator. The Motion may state that all parties prefer a certified non-attorney mediator, and if so, the senior resident judge shall appoint a certified non-attorney mediator ~~if one is on the list~~. If no preference is expressed, the senior resident superior court judge may appoint any certified superior court ~~attorney~~ mediator ~~or a certified non-attorney mediator~~.

~~E~~ D. **MEDIATOR INFORMATION DIRECTORY.** To assist parties in learning more about the qualifications and experience of certified mediators, the Dispute Resolution Commission (Commission) shall post a list of certified superior court mediators on its website at www.ncdrc.org accompanied by contact, availability and biographical information, including information identifying mediators who wish to mediate farm nuisance matters. ~~the clerk of superior court in the county in which the Request was filed shall make available to the disputing parties a central directory of information on all certified mediators who wish to mediate cases in that county, including those who wish to mediate prelitigation farm nuisance disputes. The Dispute Resolution Commission shall be responsible for distributing and updating the directory.~~

RULE 4. THE PRELITIGATION FARM MEDIATION

A. **WHEN MEDIATION IS TO BE COMPLETED.** The mediation shall be completed within 60 days of the Notice ~~of Selection of Certified Mediator by Agreement~~ or the date of the order appointing a mediator to conduct the mediation.

B. ~~**EXTENTIONS**~~ **EXTENDING DEADLINE FOR COMPLETION.** The senior resident superior court judge may extend the deadline for completion of the mediation upon the judge's own motion, upon stipulation of the parties or upon suggestion of the mediator. ~~A party may file a motion with the clerk seeking to extend the 60 day period set forth in subpart A above. Such request shall state the reasons the extension is sought and explain why the mediation cannot be completed within 60 days of the mediator's appointment. The senior resident superior court judge may grant the motion by entering a~~

~~written order establishing a new date for completion of the mediation~~.

C. WHERE THE ~~CONFERENCE~~ MEDIATION IS TO BE HELD. Unless all parties and the mediator agree otherwise, the mediation shall be held in the courthouse or other public or community building in the county where the Request was filed. The mediator shall be responsible for reserving a place and making arrangements for the mediation and for giving timely notice of the date, time and location of the mediation to all parties named in the Request or their attorneys.

D. RECESSES. The mediator may recess the mediation at any time and may set a time for reconvening, except that such time shall fall within a 30 day period from the date of the order appointing the mediator. No further notification is required for persons present at the recessed mediation session.

E. DUTIES OF THE PARTIES, ATTORNEYS, AND OTHER PARTICIPANTS. Rule 4 of the Rules Implementing Mediated Settlement Conferences in Superior Court Civil Actions is hereby incorporated by reference.

F. SANCATIONS FOR FAILURE TO ATTEND. Rule 5 of the Rules Implementing Mediated Settlement Conferences in Superior Court Civil Actions is hereby incorporated by reference.

RULE 5. AUTHORITY AND DUTIES OF THE MEDIATOR

A. AUTHORITY OF MEDIATOR.

(1) Control of Mediation. The mediator shall at all times be in control of the mediation and the procedures to be followed.

(2) Private Consultation. The mediator may communicate privately with any participant ~~or counsel~~ prior to and during the mediation. The fact that private communications have occurred with a participant shall be disclosed to all other participants at the beginning of the mediation.

(3) Scheduling the ~~Conference~~ Mediation. The mediator shall make a good faith effort to schedule the ~~conference~~ mediation at a time that is convenient for the participants, attorneys and mediator. In the absence of agreement, the mediator shall select the date for the ~~conference~~ mediation.

B. DUTIES OF MEDIATOR.

(1) The mediator shall define and describe the following at the beginning of the mediation:

(a) The process of mediation;

(b) The differences between mediation and other forms of conflict resolution;

(c) The costs of mediation;

(d) The fact that the mediation is not a trial, the mediator is not a judge and that the parties may pursue their dispute in court if mediation is not successful and they so choose;

(e) The circumstances under which the mediator may meet and communicate privately with any of the parties or with any other person;

(f) Whether and under what conditions communications with the mediator will be held in confidence during the ~~conference~~ mediation;

(g) The inadmissibility of conduct and statements as provided by N.C.G.S. § 7A-38.1(l);

(h) The duties and responsibilities of the mediator and the participants; and

(i) The fact that any agreement reached will be reached by mutual consent.

(2) Disclosure. The mediator has a duty to be impartial and to advise all participants of any circumstance bearing on possible bias, prejudice or partiality.

(3) Declaring Impasse. It is the duty of the mediator to determine timely that an impasse exists and that the mediation should end.

(4) Scheduling and Holding the ~~Conference~~ Mediation. It is the duty of the mediator to schedule the mediation and to conduct it within the time frame established by Rule 4 above. Rule 4 shall be strictly observed by the mediator unless an extension has been granted in writing by the senior resident superior court judge.

(5) No Recording. There shall be no stenographic, audio or video recording of the mediation process by any partici-

pant. This prohibition precludes recording either surreptitiously or with the agreement of the parties.

RULE 6. COMPENSATION OF THE MEDIATOR

A. BY AGREEMENT. When the mediator is stipulated to by the parties, compensation shall be as agreed upon between the parties and the mediator, except that no administrative fees or fees for services shall be assessed any party if all parties waive mediation prior to the occurrence of an initial mediation meeting.

B. BY COURT ORDER. When the mediator is appointed by the court, the parties shall compensate the mediator for mediation services at the rate of ~~$125.00~~ $150 per hour. The parties shall also pay to the mediator a one time, per case administrative fee of ~~$125.00~~ $150, except that no administrative fees or fees for services shall be assessed any party if all parties waive mediation prior to the occurrence of an initial mediation meeting.

C. INDIGENT CASES. No party found to be indigent by the court for the purposes of these Rules shall be required to pay a mediator fee. Any mediator conducting a ~~settlement conference~~ mediation pursuant to these rules shall waive the payment of fees from parties found by the court to be indigent. Any party may move the senior resident superior court judge for a finding of indigency and to be relieved of that party's obligation to pay a share of the mediator's fee.

Said motion shall be heard subsequent to the completion of the ~~conference~~ mediation or, if the parties do not settle their cases, subsequent to the trial of the action. In ruling upon such motions, the judge shall apply the criteria enumerated in N.C.G.S. § 1-110(a), but shall take into consideration the outcome of the action and whether a judgment was rendered in the movant's favor. The court shall enter an order granting or denying the party's request.

D. POSTPONEMENT FEE. As used herein, the term "postponement" shall mean reschedule or not proceed with a ~~settlement conference~~ mediation once a date for the ~~settlement conference~~ mediation has been agreed upon and scheduled by the parties and the mediator. After a ~~settlement conference~~ mediation has been scheduled for a specific date, a party may not unilaterally postpone the ~~conference~~ mediation. A ~~conference~~ mediation may be postponed only after notice to all parties of the reason for the postponement, payment of a post-

ponement fee to the mediator and consent of the mediator and the opposing attorney. If a mediation is postponed within seven business days of the scheduled date, the fee shall be ~~$125~~ $150. If the ~~settlement conference~~ mediation is postponed within three business days of the scheduled date, the fee shall be ~~$250~~ $300. Postponement fees shall be paid by the party requesting the postponement unless otherwise agreed to between the parties. Postponement fees are in addition to the one time, per case administrative fee provided for in Rule 6.B.

E. PAYMENT OF COMPENSATION OF PARTIEIS. Unless otherwise agreed to by the parties or ordered by the court, the mediator's fee shall be paid in equal shares by the parties. For purposes of this rule, multiple parties shall be considered one party when they are represented by the same counsel. Parties obligated to pay a share of the fees shall pay them equally. Payment shall be due upon completion of the mediation.

F. SANCATIONS FOR FAILURE TO PAY MEDIATOR'S FEE. Willful failure of a party to make timely payment of that party's share of the mediator's fee (whether the one time, per case, administrative fee, the hourly fee for mediation services, or any postponement fee) or willful failure of a party contending indigent status to promptly move the senior resident superior court judge for a finding of indigency, shall constitute contempt of court and may result, following notice, in a hearing and the imposition of monetary ~~any and all lawful~~ sanctions by a resident or presiding superior court judge.

COMMENTS TO RULE 6

Comment to Rule 6.B.

Court-appointed mediators may not be compensated for travel time, mileage or any other out-of-pocket expenses ~~associated with a court ordered mediation~~.

Comment to Rule 6.D.

Though Rule 6.D. provides that mediators "shall" assess the postponement fee, it is understood there may be rare situations where the circumstances occasioning a request for a postponement are beyond the control of the parties, for example, an illness, serious accident, unexpected and unavoidable trial conflict. When the party or parties take steps to notify the mediator as soon as possible in such circumstances, the mediator, may, in his or her discretion, waive the postponement fee.

Non-essential requests for postponements work a hardship on parties and mediators and serve only to inject delay into a process and program designed to expedite ~~litigation~~ settlement. As such, it is expected that mediators will assess a postponement fee in all instances where a request does not appear to be absolutely warranted. Moreover, mediators are encouraged not to agree to postponements in instances where, in their judgment, the mediation could be held as scheduled.

Comment to Rule 6.E.

If a party is found by a senior resident superior court judge to have failed to attend a ~~mediated settlement conference~~ mediation without good cause, then the court may require that party to pay the mediator's fee and related expenses.

Comment to Rule 6.F.

If the ~~Mediated Settlement Conference~~ Prelitigation Farm Nuisance Mediation Program is to be successful, it is essential that mediators, both party-selected and court-appointed, be compensated for their services. ~~MSC~~ Rule 6.~~E~~F is intended to give the court express authority to enforce payment of fees owed both court-appointed and party-selected mediators. In instances where the mediator is party-selected, the court may enforce fees which exceed the caps set forth in 6.B (hourly fee and administrative fee) and 6.D postponement/cancellation fee) or which provide for payment of services or expenses not provided for in Rule 6 but agreed to among the parties, for example, payment for travel time or mileage.

RULE 7. WAIVER OF MEDIATION

All parties to a farm nuisance dispute may waive mediation by informing the mediator of their waiver in writing. The Waiver of Prelitigation Mediation in Farm Nuisance Dispute (Waiver) shall be on a form prescribed by the ~~Administrative Office of the Courts~~ NCAOC (Form AOC-CV-822). ~~and available through the clerk~~. The party who requested mediation shall file the ~~w~~Waiver with the clerk and mail a copy to the mediator and all parties named in the Request.

RULE 8. MEDIATOR'S CERTIFICATION THAT MEDIATION CONCLUDED

A. CONTENTS OF CERTIFICATION. Following the conclusion of mediation or the receipt of a Waiver ~~of mediation~~ signed by all parties to the farm nuisance dispute, the media-

tor shall prepare a Mediator's Certification in Prelitigation Farm Nuisance Dispute (Certification) on a form prescribed by the NCAOC (Form AOC-CV-823). If a mediation was held, the Certification shall state the date on which the mediation was concluded and report the general results. If a mediation was not held, the Certification shall state why the mediation was not held and identify any parties named in the Request who failed, without good cause, to attend or participate in mediation or shall state that all parties waived mediation in writing pursuant to Rule 7 above.

B. DEADLINE FOR FILING MEDIATOR'S CERTIFICATION. The mediator shall file the completed Certification with the clerk within seven days of the completion of the mediation, the failure of the mediation to be held or the receipt of a signed waiver of mediation. The mediator shall serve a copy of the Certification on each of the parties named in the Request.

~~**RULE 9. CERTIFICATION AND DECERTIFICATION OF MEDIATORS OF PRELITIGATION FARM NUISANCE DISPUTES.**~~

~~Mediators certified to conduct prelitigation mediation of farm disputes shall be subject to all rules and regulations regarding certification, conduct, discipline and decertification applicable to mediators serving the Mediated Settlement Conferences Program and any such additional rules and regulations as adopted by the Dispute Resolution Commission and applicable to mediators of farm nuisance disputes~~.

RULE ~~10~~ 9. CERTIFICATION OF MEDIATION TRAINING PROGRAMS

The Commission may specify a curriculum for a farm mediation training program and may set qualifications for trainers.

In the Supreme Court of North Carolina
Order Adopting Amendments to the Rules Implementing Prelitigation Farm Nuisance Mediation Program

WHEREAS, section 7A-38.3 of the North Carolina General Statutes codifies a establishes a statewide program to provide for prelitigation mediation of farm nuisance disputes prior to bringing of civil actions involving such disputes, and

WHEREAS, N.C.G.S. § 7A-38.3(e) enables this Court to implement section 7A-38.3 by adopting rules and amendments to rules concerning said mediated settlement conferences,

NOW, THEREFORE, pursuant to N.C.G.S. § 7A-38.3(e), the Rules Implementing the Prelitigation Farm Nuisance Mediated Program are adopted to read as the following pages. These amended Rules shall be effective on the 1st day of January, 2012.

Adopted by the Court in conference the 6th day of October 2011. The Appellate Division Reporter promulgate by publication as soon as practicable the portions of the the Rules Implementing the Prelitigation Farm Nuisance Program amended through this action in the advance sheets of the Supreme Court and the Court of Appeals.

s/Timmons-Goodson, J.
For the Court

AMENDMENTS TO THE RULES IMPLEMENTING SETTLEMENT PROCEDURES IN EQUITABLE DISTRIBUTION AND OTHER FAMILY FINANCIAL CASES

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RULE 1. INITIATING SETTLEMENT PROCEDURES

A. PURPOSE OF MANDATORY SETTLEMENT PROCEDURES.

Pursuant to N.C.G.S. § 7A-38.4A, these Rules are promulgated to implement a system of settlement events which are designed to focus the parties' attention on settlement rather than on trial preparation and to provide a structured opportunity for settlement negotiations to take place. Nothing herein is intended to limit or prevent the parties from engaging in settlement procedures voluntarily at any time before or after those ordered by the court pursuant to these Rules.

B. DUTY OF COUNSEL TO CONSULT WITH CLIENTS AND OPPOSING COUNSEL CONCERNING SETTLEMENT PROCEDURES.

In furtherance of this purpose, counsel, upon being retained to represent any party to a district court case involving family financial issues, including equitable distribution, child support, alimony, post-separation support action or claims arising out of contracts between the parties under N.C.G.S.

§§ 50-20(d), 52-10, 52-10.1 or 52B shall advise his or her client regarding the settlement procedures approved by these Rules and, at or prior to the scheduling conference mandated by N.C.G.S. § 50-21(d), shall attempt to reach agreement with opposing counsel on the appropriate settlement procedure for the action.

C. ORDERING SETTLEMENT PROCEDURES.

(1) Equitable Distribution Scheduling Conference. At the scheduling conference mandated by N.C.G.S. § 50-21(d) in all equitable distribution actions in all judicial districts, or at such earlier time as specified by local rule, the court shall include in its scheduling order a requirement that the parties and their counsel attend a mediated settlement conference or, if the parties agree, other settlement procedure conducted pursuant to these Rules, unless excused by the court pursuant to Rule 1.C.(6) or by the court or mediator pursuant to Rule 4.A.(2). The court shall dispense with the requirement to attend a mediated settlement conference or other settlement procedure only for good cause shown.

(2) Scope of Settlement Proceedings. All other financial issues existing between the parties when the equitable distribution settlement proceeding is ordered, or at any time thereafter, may be discussed, negotiated or decided at the proceeding. In those districts where a child custody and visitation mediation program has been established pursuant to N.C.G.S. § 7A-494, child custody and visitation issues may be the subject of settlement proceedings ordered pursuant to these Rules only in those cases in which the parties and the mediator have agreed to include them and in which the parties have been exempted from, or have fulfilled the program requirements. In those districts where a child custody and visitation mediation program has not been established pursuant to N.C.G.S. § 7A-494, child custody and visitation issues may be the subject of settlement proceedings ordered pursuant to these Rules with the agreement of all parties and the mediator.

(3) Authorizing Settlement Procedures Other Than Mediated Settlement Conference. The parties and their attorneys are in the best position to know which settlement procedure is appropriate for their case.

Therefore, the court shall order the use of a settlement procedure authorized by Rules 10-12 herein or by local rules of the district court in the county or district where the action is pending if the parties have agreed upon the procedure to be used, the neutral to be employed and the compensation of the neutral. If the parties have not agreed on all three items, then the court shall order the parties and their counsel to attend a mediated settlement conference conducted pursuant to these Rules.

The motion for an order to use a settlement procedure other than a mediated settlement conference shall be submitted a North Carolina Administrative Office of the Courts (NCAOC) form at the scheduling conference and shall state:

(a) the settlement procedure chosen by the parties;

(b) the name, address and telephone number of the neutral selected by the parties;

(c) the rate of compensation of the neutral; and

(d) that all parties consent to the motion.

(4) Content of Order. The court's order shall (1) require the mediated settlement conference or other settlement proceeding be held in the case; (2) establish a deadline for the completion of the conference or proceeding; and (3) state that the parties shall be required to pay the neutral's fee at the conclusion of the settlement conference or proceeding unless otherwise ordered by the court. Where the settlement proceeding ordered is a judicial settlement conference, the parties shall not be required to pay for the neutral.

The order shall be contained in the court's scheduling order, or if no scheduling order is entered, shall be on a NCAOC form. Any scheduling order entered at the completion of a scheduling conference held pursuant to local rule may be signed by the parties or their attorneys in lieu of submitting the forms referred to hereinafter relating to the selection of a mediator.

(5) Court-Ordered Settlement Procedures in Other Family Financial Cases. Any party to an action involving family financial issues not previously ordered to a

mediated settlement conference may move the court to order the parties to participate in a settlement procedure. Such motion shall be made in writing, state the reasons why the order should be allowed and be served on the non-moving party. Any objection to the motion or any request for hearing shall be filed in writing with the court within 10 days after the date of the service of the motion. Thereafter, the judge shall rule upon the motion and notify the parties or their attorneys of the ruling. If the court orders a settlement proceeding, then the proceeding shall be a mediated settlement conference conducted pursuant to these Rules. Other settlement procedures may be ordered if the circumstances outlined in subsection (3) above have been met.

(6) Motion to Dispense With Settlement Procedures. A party may move the court to dispense with the mediated settlement conference or other settlement procedure ordered by the judge. Such motion ~~shall be in writing and~~ shall state the reasons the relief is sought. For good cause shown, the court may grant the motion. Such good cause may include, but not be limited to, the fact that the parties have participated in a settlement procedure such as non-binding arbitration or early neutral evaluation prior to the court's order to participate in a mediated settlement conference or have elected to resolve their case through arbitration under the Family Law Arbitration Act (N.C.G.S. § 50-41 *et seq.*) or that one of the parties has alleged domestic violence. ~~The Court may also dispense with the mediated settlement conference for good cause upon its own motion or by local rule.~~

COMMENT TO RULE 1

Comment to Rule 1.C.(6).

If a party is unable to pay the costs of the conference or lives a great distance from the conference site, the court may want to consider Rules 4 or 7 prior to dispensing with mediation for good cause. Rule 4 provides a way for a party to attend electronically and Rule 7 provides a way for parties to attend and obtain relief from the obligation to pay the mediator's fee.

RULE 2. DESIGNATION OF MEDIATOR

A. DESIGNATION OF CERTIFIED FAMILY FINANCIAL MEDIATOR BY AGREEMENT OF THE PARTIES. The parties may designate a certified family financial mediator

certified pursuant to these Rules by agreement by filing with the court a Designation of Mediator by Agreement at the scheduling conference. Such designation shall: state the name, address and telephone number of the mediator designated; state the rate of compensation of the mediator; state that the mediator and opposing counsel have agreed upon the designation and rate of compensation; and state that the mediator is certified pursuant to these Rules.

In the event the parties wish to designate a mediator who is not certified pursuant to these Rules, the parties may nominate said person by filing a Nomination of Non-Certified Family Financial Mediator with the court at the scheduling conference. Such nomination shall state the name, address and telephone number of the mediator; state the training, experience or other qualifications of the mediator; state the rate of compensation of the mediator; state that the mediator and opposing counsel have agreed upon the nomination and rate of compensation, if any. The court shall approve said nomination if, in the court's opinion, the nominee is qualified to serve as mediator and the parties and the nominee have agreed upon the rate of compensation.

Designations of mediators and nominations of mediators shall be made on a NCAOC form. A copy of each such form submitted to the court and a copy of the court's order requiring a mediated settlement conference shall be delivered to the mediator by the parties.

B. APPOINTMENT OF CERTIFIED FAMILY FINANCIAL MEDIATOR BY THE COURT. If the parties cannot agree upon the designation of a mediator, they shall so notify the court and request that the court appoint a mediator. The motion shall be filed at the scheduling conference and shall state that the attorneys for the parties have had a full and frank discussion concerning the designation of a mediator and have been unable to agree on a mediator. The motion shall be on a form approved by the NCAOC.

Upon receipt of a motion to appoint a mediator, or failure of the parties to file a Designation of Mediator by Agreement with the court, the court shall appoint a family financial mediator, certified pursuant to these Rules, who has expressed a willingness to mediate actions within the court's district.

In making such appointments, the court shall rotate through the list of available certified mediators. Appointments shall be made without regard to race, gender, religious affiliation or whether the mediator is a licensed attorney. ~~Certified mediators who do not reside in the judicial district, or a county contiguous to the judicial district, shall be included in the list of mediators available for appointment only if, on an annual basis, they inform the Judge in writing that they agree to mediate cases to which they are assigned.~~ The district court judges shall retain discretion to depart in a specific case from a strict rotation when, in the judge's discretion, there is good cause to do so.

Certified mediators who do not reside in the judicial district or a county contiguous to the judicial district, shall be included in the list of mediators available for appointment only if, on an annual basis as determined by the Dispute Resolution Commission (Commission), they request the court in each judicial district in which they wish to be appointed, to be put on their appointment list. Said letters shall be addressed to each court, but be mailed to the offices of the Commission. The Commission shall coordinate the compilation and distribution of appointment lists for each judicial district.

The Commission shall furnish to the district court judges of each judicial district a list of those certified family financial mediators requesting appointments in that district. That list shall contain the mediators' names, addresses and telephone numbers and shall be provided ~~both in writing and~~ electronically through the Commission's website at www.ncdrc.org. The Commission shall promptly notify the district court judges of any disciplinary action taken with respect to a mediator on the list of certified mediators for the judicial district.

C. MEDIATOR INFORMATION. To assist the parties in designating a mediator, the Commission shall assemble, maintain and post on its website ~~at www.ncdrc.org~~ a list of certified family financial mediators. The list shall supply contact information for mediators and identify court districts that they are available to serve. Where a mediator has supplied it to the Commission, the list shall also provide biographical information, including information about an individual mediator's education, professional experience and mediation training and experience.

D. DISQUALIFICATION OF MEDIATOR. Any party may move a court of the district where the action is pending for an

order disqualifying the mediator. For good cause, such order shall be entered. If the mediator is disqualified, a replacement mediator shall be selected or appointed pursuant to Rule 2. Nothing in this provision shall preclude mediators from disqualifying themselves.

RULE 3. THE MEDIATED SETTLEMENT CONFERENCE

A. WHERE CONFERENCE IS TO BE HELD. The mediated settlement conference shall be held in any location agreeable to the parties and the mediator. If the parties cannot agree to a location, the mediator shall be responsible for reserving a neutral place and making arrangements for the conference and for giving timely notice of the time and location of the conference to all attorneys and *pro se* parties.

B. WHEN CONFERENCE IS TO BE HELD. As a guiding principle, the conference should be held after the parties have had a reasonable time to conduct discovery but well in advance of the trial date. The mediator is authorized to assist the parties in establishing a discovery schedule and completing discovery.

The court's order issued pursuant to Rule 1.C.(1) shall state a deadline for completion of the conference which shall be not more than 150 days after issuance of the court's order, unless extended by the court. The mediator shall set a date and time for the conference pursuant to Rule 6.B.(5).

C. ~~REQUEST TO EXTEND DEADLINE FOR COMPLETION~~ EXTENDING DEADLINE FOR COMPLETION. The district court judge may extend the deadline for completion of the mediated settlement conference upon the judge's own motion, upon stipulation of the parties or upon suggestion of the mediator. ~~A party, or the mediator, may move the Court to extend the deadline for completion of the conference. Such motion shall state the reasons the extension is sought and shall be served by the moving party upon the other parties and the mediator. If any party does not consent to the motion, said party shall promptly communicate its objection to the Court.~~

~~The Court may grant the request by entering a written order setting a new deadline for completion of the conference, which date may be set at any time prior to trial. Said order shall be delivered to all parties and the mediator by the person who sought the extension.~~

D. RECESSES. The mediator may recess the conference at any time and may set times for reconvening. If the time for reconvening is set during the conference, no further notification is required for persons present at the conference.

E. THE MEDIATED SETTLEMENT CONFERENCE IS NOT TO DELAY OTHER PROCEEDINGS. The mediated settlement conference shall not be cause for the delay of other proceedings in the case, including the completion of discovery, the filing or hearing of motions or the trial of the case, except by order of the court.

RULE 4. DUTIES OF PARTIES, ATTORNEYS AND OTHER PARTICIPANTS IN MEDIATED SETTLEMENT CONFERENCES

A. ATTENDANCE.

(1) The following persons shall attend a mediated settlement conference:

(a) Parties.

(b) Attorneys. At least one counsel of record for each party whose counsel has appeared in the action.

(2) Any person required to attend a mediated settlement conference shall physically attend until such time as an agreement has been reached or the mediator, after conferring with the parties and their counsel, if any, declares an impasse. No mediator shall prolong a conference unduly.

Any such person may have the attendance requirement excused or modified, including allowing a person to participate by phone, by agreement of both parties and the mediator or by order of the court. Ordinarily, attorneys for the parties may be excused from attending only after they have appeared at the first session.

(3) Scheduling. Participants required to attend shall promptly notify the mediator after selection or appointment of any significant problems they may have with dates for conference sessions before the completion deadline, and shall keep the mediator informed as to such problems as may arise before an anticipated conference session is scheduled by the mediator. After a conference session has been scheduled by the mediator, and a scheduling conflict with another court proceeding thereafter arises, participants shall promptly attempt to

resolve it pursuant to Rule 3.1 of the General Rules of Practice for the Superior and District Courts, or, if applicable, the Guidelines for Resolving Scheduling Conflicts adopted by the State-Federal Judicial Council of North Carolina on June 20, 1985.

B. FINALIZING AGREEMENT.

(1) If an agreement is reached at the conference, the parties shall reduce to writing the essential terms of the agreement.

(a) If the parties conclude the conference with a written document containing all the terms of their agreement, signed by all parties and formally acknowledged as required by N.C.G.S. § 50-20(d) for property distribution, the mediator shall report to the court that the matter has been settled and include in the report the name ~~and signature~~ of the person responsible for filing closing documents with the court.

(b) If the parties are able to reach an agreement at the conference, but are unable to have it written or have it signed and acknowledged as required by N.C.G.S. § 50-20(d) for property distribution agreements, then the parties shall summarize their understanding in written form and shall use it as a memorandum and guide to writing such agreements and orders as may be required to give legal effect to its terms. In that event, the mediator shall facilitate the writing of the summary memorandum and shall either:

(i) report to the court that the matter has been settled and include in the report the name ~~and signature~~ of the person responsible for filing closing documents with the court; or, in the mediator's discretion,

(ii) declare a recess of the conference. If a recess is declared, the mediator may schedule another session of the conference if the mediator determines that it would assist the parties in finalizing a settlement.

(2) If the agreement is reached at the conference, ~~the person(s) responsible for filing closing documents with the~~

~~Court shall sign the mediator's report to the Court.~~ ~~T~~the parties shall file their consent judgment or voluntary dismissal with the court within 30 days or before expiration of the mediation deadline, whichever is longer.

(3) If an agreement is reached prior to the conference or finalized while the conference is in recess, the parties shall notify the mediator and file the consent judgment or voluntary dismissal(s) with the court within 30 days or before the expiration of the mediation deadline, whichever is longer. The mediator shall report to the court that the matter has been settled and who reported the settlement.

(4) No settlement agreement resolving issues reached at the proceeding conducted under this section or during its recesses shall be enforceable unless it has been reduced to writing, signed by the parties and acknowledged as required by N.C.G.S. § 50-20(d).

C. OF MEDIATOR'S FEE. The parties shall pay the mediator's fee as provided by Rule 7.

D. NO RECORDING. There shall be no stenographic, audio or video recording of the mediation process by any participant. This prohibition precludes recording either surreptitiously or with the agreement of the parties.

COMMENT TO RULE 4.

Comment to Rule 4.B.

N.C.G.S. § 7A-38.4A(j) provides that no settlement shall be enforceable unless it has been reduced to writing and signed by the parties. When a settlement is reached during a mediated settlement conference, the mediator shall be sure its terms are reduced to writing and signed by the parties and their attorneys before ending the conference.

Cases in which agreement on all issues has been reached should be disposed of as expeditiously as possible. This rule is intended to assure that the mediator and the parties move the case toward disposition while honoring the private nature of the mediation process and the mediator's duty of confidentiality. If the parties wish to keep confidential the terms of their settlement, they may timely file with the court closing documents which do not contain confidential terms, *i.e.*, voluntary dismissal(s) or a consent judgment resolving all claims. Mediators will not be required by local rules to submit agreements to the court.

RULE 5. SANCTIONS FOR FAILURE TO ATTEND MEDIATED SETTLEMENT CONFERENCES OR PAY MEDIATOR'S FEE

Any person required to attend a mediated settlement conference or to pay a portion of the mediator's fee in compliance with N.C.G.S. § 7A-38.4A and the rules promulgated by the Supreme Court of North Carolina (Supreme Court) to implement that section who fails to attend or to pay without good cause, shall be subject to the contempt powers of the court and monetary sanctions imposed by a judge. Such monetary sanctions may include, but are not limited to, the payment of fines, attorney fees, mediator fees, expenses and loss of earnings incurred by persons attending the conference.

A party seeking sanctions against another party or person shall do so in a written motion stating the grounds for the motion and the relief sought. Said motion shall be served upon all parties and on any person against whom sanctions are being sought. The court may initiate sanction proceedings upon its own motion by the entry of a show cause order.

If the court imposes sanctions, it shall do so, after notice and a hearing, in a written order, making findings of fact and conclusions of law. An order imposing sanctions shall be reviewable upon appeal where the entire record as submitted shall be reviewed to determine whether the order is supported by substantial evidence. (~~See also Rule 7.F. and the Comment to Rule 7.F.~~)

RULE 6. AUTHORITY AND DUTIES OF MEDIATORS

A. AUTHORITY OF MEDIATOR.

(1) Control of Conference. The mediator shall at all times be in control of the conference and the procedures to be followed. However, the mediator's conduct shall be governed by Standards of Professional Conduct for Mediators (Standards) promulgated by the Supreme Court which shall contain a provision prohibiting mediators from prolonging a conference unduly.

(2) Private Consultation. The mediator may communicate privately with any participant during the conference. However, there shall be no *ex parte* communication before or outside the conference between the mediator and any counsel or party on any matter touching the proceeding, except with regard to scheduling matters. Nothing in this rule prevents the mediator from engaging in *ex parte* communications, with the consent of the parties, for the purpose of assisting settlement negotiations.

B. DUTIES OF MEDIATOR.

(1) The mediator shall define and describe the following at the beginning of the conference:

(a) The process of mediation;

(b) The differences between mediation and other forms of conflict resolution;

(c) The costs of the mediated settlement conference;

(d) That the mediated settlement conference is not a trial, the mediator is not a judge and the parties retain their right to trial if they do not reach settlement;

(e) The circumstances under which the mediator may meet and communicate privately with any of the parties or with any other person;

(f) Whether and under what conditions communications with the mediator will be held in confidence during the conference;

(g) The inadmissibility of conduct and statements as provided by N.C.G.S. § 7A-38.4A(j);

(h) The duties and responsibilities of the mediator and the participants; and

(i) The fact that any agreement reached will be reached by mutual consent.

(2) Disclosure. The mediator has a duty to be impartial and to advise all participants of any circumstance bearing on possible bias, prejudice or partiality.

(3) Declaring Impasse. It is the duty of the mediator to determine in a timely manner that an impasse exists and that the conference should end. To that end, the mediator shall inquire of and consider the desires of the parties to cease or continue the conference.

(4) Reporting Results of ~~Conference~~ Mediation.

(a) The mediator shall report to the court ~~on an A.O.C. form within 10 days of the conference whether or not an agreement was reached by the parties.~~ the results of the mediated settlement conference and any settlement reached by the parties prior to or

during a recess of the conference. Mediators shall also report the results of mediations held in other district court family financial cases in which a mediated settlement conference was not ordered by the court. ~~The mediator's~~ Said report shall ~~include~~ be filed on a NCAOC form within 10 days of the conclusion of the conference or of being notified of the settlement and shall include the names of those persons attending the mediated settlement conference if a conference was held. If partial agreements are reached at the conference, the report shall state what issues remain for trial. ~~The Dispute Resolution Commission or the Administrative Office of the Courts may require the mediator to provide statistical data for evaluation of the mediated settlement conference program.~~ Local rules shall not require the mediator to send a copy of the parties' agreement to the court.

(b) If an agreement upon all issues was reached, the mediator's report shall state whether the action will be concluded by consent judgment or voluntary dismissal(s)~~, when it shall be filed with the Court,~~ and the name, address and telephone number of the person(s) designated by the parties to file such consent judgment or dismissal(s) with the court as required by Rule 4.B.2. The mediator shall advise the parties that consistent with Rule 4.B.2 above, their consent judgment or voluntary dismissal is to be filed with the court within 30 days or before expiration of the mediation deadline, whichever is longer, and the mediator's report shall indicate that the parties have been so advised. ~~If an agreement upon all issues is reached at the conference, the mediator shall have the person(s) designated sign the mediator's report acknowledging acceptance of the duty to timely file the closing documents with the Court.~~

~~Mediators who fail to report as required pursuant to this rule shall be subject to the contempt power of the Court and sanctions.~~

(c) The Commission or the NCAOC may require the mediator to provide statistical data for evaluation of the mediated settlement conference program.

(d) Mediators who fail to report as required by this rule shall be subject to sanctions by the court. Such

sanctions shall include, but not be limited to, fines or other monetary penalties, decertification as a mediator and any other sanctions available through the power of contempt. The court shall notify the Commission of any action taken against a mediator pursuant to this section.

(5) Scheduling and Holding the Conference. The mediator shall schedule the conference and conduct it prior to the conference completion deadline set out in the court's order. The mediator shall make an effort to schedule the conference at a time that is convenient with all participants. In the absence of agreement, the mediator shall select a date and time for the conference. Deadlines for completion of the conference shall be strictly observed by the mediator unless changed by written order of the court.

A mediator selected by agreement of the parties shall not delay scheduling or holding the conference because one or more of the parties has not paid an advance fee deposit required by that agreement.

~~**(6) Informational Brochure.** Before the conference, the mediator shall distribute to the parties or their attorneys a brochure prepared by the Dispute Resolution Commission explaining the mediated settlement conference process and the operations of the Commission.~~

~~**(7) Evaluation Forms.** At the mediated settlement conference, the mediator shall distribute a mediator evaluation form approved by the Dispute Resolution Commission. The mediator shall distribute one copy per party with additional copies distributed upon request. The evaluation is intended for purpose of self improvement and the mediator shall review returned evaluation forms.~~

RULE 7. COMPENSATION OF THE MEDIATOR AND SANCTIONS

A. BY AGREEMENT. When the mediator is selected by agreement of the parties, compensation shall be as agreed upon between the parties and the mediator. The terms of the parties' agreement with the mediator notwithstanding, Section E below shall apply to issues involving the compensation of the mediator. Sections D and F below shall apply unless the parties' agreement provides otherwise.

B. BY COURT ORDER. When the mediator is appointed by the court, the parties shall compensate the mediator for mediation services at the rate of $150 per hour. The parties shall also pay to the mediator a one time, per case administrative fee of $150, which accrues upon appointment.

C. CHANGE OF APPOINTED MEDIATOR. Pursuant to Rule 2.A, the parties may select a certified mediator or nominate a non-certified mediator to conduct their mediated settlement conference. Parties who fail to select a mediator and then desire a substitution after the court has appointed a mediator, shall obtain court approval for the substitution. The court may approve the substitution only upon proof of payment to the court's original appointee the $150 one time, per case administrative fee and any other amount due and owing for mediation services pursuant to Rule 7.B and any postponement fee due and owing pursuant to Rule 7.F.

D. PAYMENT OF COMPENSATION BY PARTIES. Unless otherwise agreed to by the parties or ordered by the court, the mediator's fees shall be paid in equal shares by the named parties. Payment shall be due and payable upon completion of the conference.

E. INABILITY TO PAY. No party found by the court to be unable to pay a full share of a mediator's fee shall be required to pay a full share. Any party required to pay a share of a mediator fee pursuant to Rules 7.B and C may move the court to pay according to the court's determination of that party's ability to pay.

In ruling on such motions, the judge may consider the income and assets of the movant and the outcome of the action. The court shall enter an order granting or denying the party's motion. In so ordering, the court may require that one or more shares be paid out of the marital estate.

Any mediator conducting a settlement conference pursuant to these rules shall accept as payment in full of a party's share of the mediator's fee that portion paid by or on behalf of the party pursuant to an order of the court issued pursuant to this rule.

F. POSTPONEMENTS AND FEES.

(1) As used herein, the term "postponement" shall mean reschedule or not proceed with a settlement conference once a date for a session of the settlement conference

has been scheduled by the mediator. After a settlement conference has been scheduled for a specific date, a party may not unilaterally postpone the conference.

(2) A conference session may be postponed by the mediator for good cause only after notice by the movant to all parties of the reasons for the postponement and a finding of good cause by the mediator. Good cause shall mean that the reason for the postponement involves a situation over which the party seeking the postponement has no control, including but not limited to, a party or attorney's illness, a death in a party or attorney's family, a sudden and unexpected demand by a judge that a party or attorney for a party appear in court for a purpose not inconsistent with the Guidelines established by Rule 3.1(d) of the General Rules of Practice for the Superior and District Courts or inclement weather such that travel is prohibitive. Where good cause is found, a mediator shall not assess a postponement fee.

(3) The settlement of a case prior to the scheduled date for mediation shall be good cause provided that the mediator was notified of the settlement immediately after it was reached and the mediator received notice of the settlement at least 14 calendar days prior to the date scheduled for mediation.

(4) Without a finding of good cause, a mediator may also postpone a scheduled conference session with the consent of all parties. A fee of $150 shall be paid to the mediator if the postponement is allowed, except that if the request for postponement is made within seven calendar days of the scheduled date for mediation, the fee shall be $300. The postponement fee shall be paid by the party requesting the postponement unless otherwise agreed to between the parties. Postponement fees are in addition to the one time, per case administrative fee provided for in Rule 7.B.

(5) If all parties select the certified mediator and they contract with the mediator as to compensation, the parties and the mediator may specify in their contract alternatives to the postponement fees otherwise required herein.

~~G. SANCTIONS FOR FAILURE TO PAY MEDIATOR'S FEE.~~
~~Willful failure of a party to make timely payment of that~~

~~party's share of the mediator's fee (whether the one time, per case administrative fee, the hourly fee for mediation services, or any postponement fee) or willful failure of a party contending indigent status or the inability to pay his or her full share of the fee to promptly move the Court for a determination of indigency or the inability to pay a full share, shall constitute contempt of Court and may result, following notice, in a hearing and the imposition of any and all lawful sanctions by the Court.~~

COMMENTS TO RULE 7

Comment to Rule 7.B.

Court-appointed mediators may not be compensated for travel time, mileage or any other out-of-pocket expenses associated with a court-ordered mediation.

Comment to Rule 7.D.

If a party is found by the court to have failed to attend a family financial settlement conference without good cause, then the court may require that party to pay the mediator's fee and related expenses.

Comment to Rule 7.F.

Non-essential requests for postponements work a hardship on parties and mediators and serve only to inject delay into a process and program designed to expedite litigation. As such, it is expected that mediators will assess a postponement fee in all instances where a request does not appear to be absolutely warranted. Moreover, mediators are encouraged not to agree to postponements in instances where, in their judgment, the mediation could be held as scheduled.

~~**DRC Comment to Rule 7.G.**~~

~~If the Family Financial Settlement Program is to be successful, it is essential that mediators, both party selected and Court appointed, be compensated for their services. FFS Rule 7.G. is intended to give the Court express authority to enforce payment of fees owned both Court appointed and party selected mediators. In instances where the mediator is party selected, the Court may enforce fees which exceed the caps set forth in 7.B. (hourly fee and administrative fee) and 7.F (postponement/cancellation fee) or which provide for payment of services or expenses not provided for in Rule 7 but agreed to among the parties, for example, payment for travel time or mileage.~~

RULE 8. MEDIATOR CERTIFICATION AND DECERTIFICATION

The Commission may receive and approve applications for certification of persons to be appointed as family financial mediators. For certification, a person must have complied with the requirements in each of the following sections.

A. Training and Experience. ~~Each applicant for certification under this provision shall have completed the North Carolina Bar Association's two-day basic family law CLE course or equivalent course work in North Carolina law relating to separation and divorce, alimony and post separation support, equitable distribution, child custody and support and domestic violence and in addition, shall:~~ Each applicant for certification must demonstrate that she/he has a basic understanding of North Carolina family law. Applicants should be able to demonstrate that they have completed at least 12 hours of education in basic family law (a) by attending workshops and programs on topics such as separation and divorce, alimony and post-separation support, equitable distribution, child custody and support and domestic violence; (b) by engaging in independent study such as viewing or listening to video or audio programs on those family law topics; or (c) by demonstrating equivalent experience, including demonstrating that his or her work experience satisfies one of the categories set forth in the Commission's Policy on Interpreting and Implementing the First Unnumbered Paragraph of FFS Rule 8.A., *e.g.*, that the applicant is an experienced family law judge, board certified family lawyer and, in addition, shall:

(1) Be an Advanced Practitioner member of the Association for Conflict Resolution (ACR) and have earned an undergraduate degree from an accredited four-year college or university, or

(2) Have completed a 40-hour family and divorce mediation training approved by the Commission pursuant to Rule 9, or, if already a certified superior court mediator, have completed the16-hour family mediation supplemental course pursuant to Rule 9, and have additional experience as follows:

(a) as a licensed attorney and/or judge of the General Court of Justice of the State of North Carolina or other state for at least five years; or

(b) as a licensed physician certified in psychiatry pursuant to N.C.G.S. § 90-9 *et seq.*, for at least five years; or

(c) as a person licensed to practice psychology in North Carolina pursuant to N.C.G.S. § 90-270.1 *et seq.*, for at least five years; or

(d) as a licensed marriage and family therapist pursuant to N.C.G.S. § 90-270.45 *et seq.*, for at least five years; or

(e) as a licensed clinical social worker pursuant to N.C.G.S. § 90B-7 *et seq.*, for at least five years; or

(f) as a licensed professional counselor pursuant to N.C.G.S. § 90-329 *et seq.*, for at least five years; or

(g) as a certified public accountant certified in North Carolina for at least five years.

B. If not licensed to practice law in one of the United States, have completed a six-hour training on North Carolina legal terminology, court structure and civil procedure provided by a trainer certified by the Commission. Attorneys licensed to practice law in states other than North Carolina shall complete this requirement through a course of self-study as directed by the Commission's executive secretary.

C. Be a member in good standing of the state bar of one of the United States or have provided to the Commission three letters of reference as to the applicant's good character and experience as required by Rule 8.A.

D. Have observed as a neutral observer with the permission of the parties two mediations involving custody or family financial issues conducted by a mediator who is certified pursuant to these rules, or who is an Advanced Practitioner Member of the ACR or who is a NCAOC mediator, and, if the applicant is not an attorney licensed to practice law in one of the United States, have observed three additional court ordered mediations in cases that are pending in state or federal courts in North Carolina having rules for mandatory mediation similar to these.

E. Demonstrate familiarity with the statutes, rules and standards of practice and conduct governing mediated settlement conferences conducted pursuant to these Rules.

F. Be of good moral character and adhere to any standards of practice for mediators acting pursuant to these Rules adopted by the Supreme Court. An applicant for certification shall disclose on his/her application(s) any of the following: any pending criminal matters or any criminal convictions; any disbarments or other revocations or suspensions of any professional license or certification, including suspension or revocation of any license, certification, registration or qualification to serve as a mediator in another state or country for any reason other than to pay a renewal fee. In addition, an applicant for certification shall disclose on his/her application(s) any of the following which occurred within 10 years of the date the application(s) is filed with the Commission: any pending disciplinary complaint(s) filed with, or any private or public sanction(s) imposed by a professional licensing or regulatory body, including any body regulating mediator conduct; any judicial sanction(s); any civil judgment(s); any tax lien(s); or any bankruptcy filing(s). Once certified, a mediator shall report to the Commission within 30 days of receiving notice any subsequent criminal conviction(s); any disbarment(s) or revocation(s) of a professional license, other disciplinary complaints filed with, or actions taken by, a professional licensing or regulatory body; any judicial sanction(s); any tax lien(s); any civil judgment(s) or any filing(s) for bankruptcy.

G. Submit proof of qualifications set out in this section on a form provided by the Commission.

H. Pay all administrative fees established by the NCAOC upon the recommendation of the Commission.

I. Agree to accept as payment in full of a party's share of the mediator's fee, the fee ~~as~~ ordered by the court pursuant to Rule 7.

J. Comply with the requirements of the Commission for continuing mediator education or training. (These requirements may include advanced divorce mediation training, attendance at conferences or seminars relating to mediation skills or process and consultation with other family and divorce mediators about cases actually mediated. Mediators seeking recertification beyond one year from the date of initial certification may also be required to demonstrate that they have completed eight hours of family law training, including tax issues relevant to divorce and property distribution and eight hours of training in family dynamics, child development and interper-

sonal relations at any time prior to that recertification.) Mediators shall report on a Commission approved form.

Certification may be revoked or not renewed at any time if it is shown to the satisfaction of the Commission that a mediator no longer meets the above qualifications or has not faithfully observed these rules or those of any district in which he or she has served as a mediator. Any person who is or has been disqualified by a professional licensing authority of any state for misconduct shall be ineligible to be certified under this Rule. No application for recertification shall be denied on the grounds that the mediator's training and experience does not meet the training and experience required under Rules which were promulgated after the date of his/her original certification.

K. No mediator who held a professional license and relied upon that license to qualify for certification under subsection 8.A.2 above shall be decertified or denied recertification because that mediator's license lapses, is relinquished or becomes inactive; provided, however, that this subsection shall not apply to any mediator whose professional license is revoked, suspended, lapsed, relinquished or becomes inactive due to disciplinary action or the threat of same, from his/her licensing authority. Any mediator whose professional license is revoked, suspended, lapsed, relinquished or becomes inactive shall report such matter to the Commission.

If a mediator's professional license lapses, is relinquished or becomes inactive, s/he shall be required to complete all otherwise voluntary continuing mediator education requirements as adopted by the Commission as part of its annual certification renewal process and to report completion of those hours to the Commission's office annually.

RULE 9. CERTIFICATION OF MEDIATION TRAINING PROGRAMS

A. Certified training programs for mediators certified pursuant to Rule 8.A.2.(c) shall consist of a minimum of 40 hours of instruction. The curriculum of such programs shall include the subjects in each of the following sections:

(1) Conflict resolution and mediation theory;

(2) Mediation process and techniques, including the process and techniques typical of family and divorce mediation;

(3) Communication and information gathering skills;

(4) Standards of conduct for mediators including, but not limited to the Standards adopted by the Supreme Court;

(5) Statutes, rules and practice governing mediated settlement conferences conducted pursuant to these Rules;

(6) Demonstrations of mediated settlement conferences with and without attorneys involved;

(7) Simulations of mediated settlement conferences, involving student participation as mediator, attorneys and disputants, which simulations shall be supervised, observed and evaluated by program faculty;

(8) An overview of North Carolina law as it applies to custody and visitation of children, equitable distribution, alimony, child support and post separation support;

(9) An overview of family dynamics, the effect of divorce on children and adults~~,~~ and child development;

(10) Protocols for the screening of cases for issues of domestic violence and substance abuse; and

(11) Satisfactory completion of an exam by all students testing their familiarity with the statutes, rules and practice governing family financial settlement procedures in North Carolina.

B. Certified training programs for mediators certified pursuant to Rule 8.A.2.(d) shall consist of a minimum of 16 hours of instruction. The curriculum of such programs shall include the subjects listed in Rule 9.A. There shall be at least two simulations as specified in subsection (7).

C. A training program must be certified by the Commission before attendance at such program may be used for compliance with Rule 8.A. Certification need not be given in advance of attendance.

Training programs attended prior to the promulgation of these Rules or attended in other states or approved by the ACR with requirements equivalent to those in effect for the Academy of Family Mediators immediately prior to its merger with other organizations to become the ACR may be approved by the Commission if they are in substantial compliance with the Standards set forth in this rule. The Commission may require attendees of an ACR approved program to demonstrate com-

pliance with the requirements of Rules 9.A.(5) and 9.A.(8) either in the ACR approved training or in some other acceptable course.

D. To complete certification, a training program shall pay all administrative fees established by the NCAOC in consultation with the Commission.

RULE 10. OTHER SETTLEMENT PROCEDURES

A. ORDER AUTHORIZING OTHER SETTLEMENT PROCEDURES.

A. Upon receipt of a motion by the parties seeking authorization to utilize a settlement procedure in lieu of a mediated settlement conference, the court may order the use of those procedures listed in Rule 10.B unless the court finds: that the parties did not agree upon the procedure to be utilized, the neutral to conduct it or the neutral's compensation; or that the procedure selected is not appropriate for the case or the parties. Judicial settlement conferences may be ordered only if permitted by local rule.

B. OTHER SETTLEMENT PROCEDURES AUTHORIZED BY THESE RULES.

In addition to mediated settlement conferences, the following settlement procedures are authorized by these Rules:

(1) Neutral Evaluation (Rule 11), in which a neutral offers an advisory evaluation of the case following summary presentations by each party.

(2) Judicial Settlement Conference (Rule 12), in which a district court judge assists the parties in reaching their own settlement, if allowed by local rules.

(3) Other Settlement Procedures described and authorized by local rule pursuant to Rule 13.

The parties may agree to use arbitration under the Family Law Arbitration Act (N.C.G.S. § 50-41 *et seq.*) which shall constitute good cause for the court to dispense with settlement procedures authorized by these rules (Rule 1.C.6).

C. GENERAL RULES APPLICABLE TO OTHER SETTLEMENT PROCEDURES.

(1) When Proceeding is Conducted. The neutral shall schedule the conference and conduct it no later than 150 days from the issuance of the court's order or no later

than the deadline for completion set out in the court's order, unless extended by the court. The neutral shall make an effort to schedule the conference at a time that is convenient with all participants. In the absence of agreement, the neutral shall select a date and time for the conference. Deadlines for completion of the conference shall be strictly observed by the neutral unless changed by written order of the court.

(2) Extensions of Time. A party or a neutral may request the court to extend the deadlines for completion of the settlement procedure. A request for an extension shall state the reasons the extension is sought and shall be served by the moving party upon the other parties and the neutral. The court may grant the extension and enter an order setting a new deadline for completion of the settlement procedure. Said order shall be delivered to all parties and the neutral by the person who sought the extension.

(3) Where Procedure is Conducted. Settlement proceedings shall be held in any location agreeable to the parties. If the parties cannot agree to a location, the neutral shall be responsible for reserving a neutral place and making arrangements for the conference and for giving timely notice of the time and location of the conference to all attorneys and *pro se* parties.

(4) No Delay of Other Proceedings. Settlement proceedings shall not be cause for delay of other proceedings in the case, including but not limited to the conduct or completion of discovery, the filing or hearing of motions or the trial of the case, except by order of the court.

(5) Inadmissibility of Settlement Proceedings. Evidence of statements made and conduct occurring in a mediated settlement conference or other settlement proceeding conducted under this section, whether attributable to a party, the mediator, other neutral or a neutral observer present at the settlement proceeding, shall not be subject to discovery and shall be inadmissible in any proceeding in the action or other civil actions on the same claim, except:

(a) In proceedings for sanctions under this section;

(b) In proceedings to enforce or rescind a settlement of the action;

(c) In disciplinary proceedings before the State Bar or any agency established to enforce standards of conduct for mediators or other neutrals; or

(d) In proceedings to enforce laws concerning juvenile or elder abuse.

As used in this subsection, the term "neutral observer" includes persons seeking mediator certification, persons studying dispute resolution processes, and persons acting as interpreters.

No settlement agreement to resolve any or all issues reached at the proceeding conducted under this section or during its recesses shall be enforceable unless it has been reduced to writing and signed by the parties and in all other respects complies with the requirements of Chapter 50 of the North Carolina General Statutes. No evidence otherwise discoverable shall be inadmissible merely because it is presented or discussed in a settlement proceeding.

No mediator, other neutral or neutral observer present at a settlement proceeding under this section, shall be compelled to testify or produce evidence concerning statements made and conduct occurring in anticipation of, during or as a follow-up to a mediated settlement conference or other settlement proceeding pursuant to this section in any civil proceeding for any purpose, including proceedings to enforce or rescind a settlement of the action, except to attest to the signing of any agreements, and except proceedings for sanctions under this section, disciplinary hearings before the State Bar or any agency established to enforce standards of conduct for mediators or other neutrals, and proceedings to enforce laws concerning juvenile or elder abuse.

(6) No Record Made. There shall be no stenographic or other record made of any proceedings under these Rules.

(7) Ex Parte Communication Prohibited. Unless all parties agree otherwise, there shall be no *ex parte* communication prior to the conclusion of the proceeding between the neutral and any counsel or party on any matter related to the proceeding except with regard to administrative matters.

(8) Duties of the Parties.

(a) Attendance. All parties and attorneys shall attend other settlement procedures authorized by Rule 10 and ordered by the court.

(b) Finalizing Agreement.

(i) If agreement is reached on all issues at the neutral evaluation, judicial settlement conference or other settlement procedure, the essential terms of the agreement shall be reduced to writing as a summary memorandum unless the parties have reduced their agreement to writing, signed it and in all other respects have complied with the requirements of Chapter 50 of the North Carolina General Statutes. The parties and their counsel shall use the summary memorandum as a guide to drafting such agreements and orders as may be required to give legal effect to its terms. Within 30 days of the proceeding, all final agreements and other dispositive documents shall be executed by the parties and notarized, and judgments or voluntary dismissals shall be filed with the court by such persons as the parties or the court shall designate.

(ii) If an agreement is reached upon all issues prior to the neutral evaluation, judicial settlement conference or other settlement procedure or finalized while the proceeding is in recess, the parties shall reduce its terms to writing and sign it along with their counsel, shall comply in all respects with the requirements of Chapter 50 of the North Carolina General Statutes and shall file a consent judgment or voluntary dismissals(s) disposing of all issues with the court within 30 days, or before the expiration of the deadline for completion of the proceeding, whichever is longer.

(iii) When a case is settled upon all issues, all attorneys of record must notify the court within four business days of the settlement and advise who will sign the consent judgment or voluntary dismissal(s) *and when.*

(c) Payment of Neutral's Fee. The parties shall pay the neutral's fee as provided by Rule 10.C.(12), except that no payment shall be required or paid for a judicial settlement conference.

(9) Sanctions for Failure to Attend Other Settlement Procedure or Pay Neutral's Fee. Any person required to attend a settlement procedure or pay a neutral's fee in com-

pliance with N.C.G.S. § 7A-38.4A and the rules promulgated by the Supreme Court to implement that section who, fails to attend or to pay the fee without good cause, shall be subject to the contempt powers of the court and monetary sanctions imposed by the court. Such monetary sanctions may include, but are not limited to, the payment of fines, attorney fees, neutral fees, expenses and loss of earnings incurred by persons attending the procedure. A party to the action, or the court on its own motion, seeking sanctions against a party or attorney, shall do so in a written motion stating the grounds for the motion and the relief sought. Said motion shall be served upon all parties and on any person against whom sanctions are being sought. If the court imposes sanctions, it shall do so, after notice and a hearing, in a written order, making findings of fact supported by substantial evidence and conclusions of law.

(10) Selection of Neutrals in Other Settlement Procedures.

Selection By Agreement. The parties may select any person whom they believe can assist them with the settlement of their case to serve as a neutral in any settlement procedure authorized by these rules, except for judicial settlement conferences.

Notice of such selection shall be given to the court and to the neutral through the filing of a motion to authorize the use of other settlement procedures at the scheduling conference or the court appearance when settlement procedures are considered by the court. The notice shall be on a NCAOC form as set out in Rule 2 herein. Such notice shall state the name, address and telephone number of the neutral selected; state the rate of compensation of the neutral; and state that the neutral and opposing counsel have agreed upon the selection and compensation.

If the parties are unable to select a neutral by agreement, then the court shall deny the motion for authorization to use another settlement procedure and the court shall order the parties to attend a mediated settlement conference.

(11) Disqualification of Neutrals. Any party may move a court of the district in which an action is pending for an order disqualifying the neutral; and, for good cause, such order shall be entered. Cause shall exist, but is not limited to circumstances where, the selected neutral has violated any standard of conduct of the State Bar or any standard

of conduct for neutrals that may be adopted by the Supreme Court.

(12) Compensation of Neutrals. A neutral's compensation shall be paid in an amount agreed to among the parties and the neutral. Time spent reviewing materials in preparation for the neutral evaluation, conducting the proceeding and making and reporting the award shall be compensable time. The parties shall not compensate a settlement judge.

(13) Authority and Duties of Neutrals.

(a) Authority of Neutrals.

(i) Control of Proceeding. The neutral shall at all times be in control of the proceeding and the procedures to be followed.

(ii) Scheduling the Proceeding. The neutral shall make a good faith effort to schedule the proceeding at a time that is convenient with the participants, attorneys and neutral. In the absence of agreement, the neutral shall select the date and time for the proceeding. Deadlines for completion of the conference shall be strictly observed by the neutral unless changed by written order of the court.

(b) Duties of Neutrals.

(i) The neutral shall define and describe the following at the beginning of the proceeding:

(a) The process of the proceeding;

(b) The differences between the proceeding and other forms of conflict resolution;

(c) The costs of the proceeding;

(d) The admissibility of conduct and statements as provided by N.C.G.S. § 7A-38.1(1) and Rule 10.C.(6) herein; and

(e) The duties and responsibilities of the neutral and the participants.

(ii) Disclosure. The neutral has a duty to be impartial and to advise all participants of any circumstance bearing on possible bias, prejudice or partiality.

(iii) Reporting Results of the Proceeding. The neutral evaluator, settlement judge or other neutral shall report the result of the proceeding to the court in writing within 10 days in accordance with the provisions of Rules 11 and 12 herein on a NCAOC form. The NCAOC, in consultation with the Commission, may require the neutral to provide statistical data for evaluation of other settlement procedures.

(iv) Scheduling and Holding the Proceeding. It is the duty of the neutral to schedule the proceeding and conduct it prior to the completion deadline set out in the court's order. Deadlines for completion of the proceeding shall be strictly observed by the neutral unless said time limit is changed by a written order of the court.

RULE 11. RULES FOR NEUTRAL EVALUATION

A. NATURE OF NEUTRAL EVALUATION. Neutral evaluation is an informal, abbreviated presentation of facts and issues by the parties to an evaluator at an early stage of the case. The neutral evaluator is responsible for evaluating the strengths and weaknesses of the case, providing a candid assessment of the merits of the case, settlement value and a dollar value or range of potential awards if the case proceeds to trial. The evaluator is also responsible for identifying areas of agreement and disagreement and suggesting necessary and appropriate discovery.

B. WHEN CONFERENCE IS TO BE HELD. As a guiding principle, the neutral evaluation conference should be held at an early stage of the case, after the time for the filing of answers has expired but in advance of the expiration of the discovery period.

C. PRE-CONFERENCE SUBMISSIONS. No later than 20 days prior to the date established for the neutral evaluation conference to begin, each party shall furnish the evaluator with written information about the case, and shall at the same time certify to the evaluator that they served a copy of such summary on all other parties to the case. The information provided to the evaluator and the other parties hereunder shall be a summary of the significant facts and issues in the party's case, and shall have attached to it copies of any documents supporting the parties' summary. Information provided to the

evaluator and to the other parties pursuant to this paragraph shall not be filed with the court.

D. REPLIES TO PRE-CONFERENCE SUBMISSIONS. No later than 10 days prior to the date established for the neutral evaluation conference to begin, any party may, but is not required to, send additional written information to the evaluator responding to the submission of an opposing party. The response furnished to the evaluator shall be served on all other parties and the party sending such response shall certify such service to the evaluator, but such response shall not be filed with the court.

E. CONFERENCE PROCEDURE. Prior to a neutral evaluation conference, the evaluator, if he or she deems it necessary, may request additional written information from any party. At the conference, the evaluator may address questions to the parties and give them an opportunity to complete their summaries with a brief oral statement.

F. MODIFICATION OF PROCEDURE. Subject to approval of the evaluator, the parties may agree to modify the procedures required by these rules for neutral evaluation.

G. EVALUATOR'S DUTIES.

(1) Evaluator's Opening Statement. At the beginning of the conference the evaluator shall define and describe the following points to the parties in addition to those matters set out in Rule 10.C.(2)(b):

(a) The fact that the neutral evaluation conference is not a trial, the evaluator is not a judge, the evaluator's opinions are not binding on any party and the parties retain their right to trial if they do not reach a settlement.

(b) The fact that any settlement reached will be only by mutual consent of the parties.

(2) Oral Report to Parties by Evaluator. In addition to the written report to the court required under these rules, at the conclusion of the neutral evaluation conference, the evaluator shall issue an oral report to the parties advising them of his or her opinions of the case. Such opinion shall include a candid assessment of the merits of the case, estimated settlement value and the strengths and weaknesses of each party's claims if the case proceeds to trial. The oral report shall also contain a suggested settlement or disposition of the case

and the reasons therefore. The evaluator shall not reduce his or her oral report to writing and shall not inform the court thereof.

(3) Report of Evaluator to Court. Within 10 days after the completion of the neutral evaluation conference, the evaluator shall file a written report with the court using a NCAOC form, stating when and where the conference was held, the names of those persons who attended the conference and the names of any party or attorney known to the evaluator to have been absent from the neutral evaluation without permission. The report shall also inform the court whether or not any agreement was reached by the parties. If partial agreement(s) are reached at the evaluation conference, the report shall state what issues remain for trial. In the event of a full or partial agreement, the report shall state the name of the person(s) designated to file the consent judgment or voluntary dismissals with the court. Local rules shall not require the evaluator to send a copy of any agreement reached by the parties to the court.

H. EVALUATOR'S AUTHORITY TO ASSIST NEGOTIATIONS. If all parties at the neutral evaluation conference request and agree, the evaluator may assist the parties in settlement discussions. If the parties do not reach a settlement during such discussions, however, the evaluator shall complete the neutral evaluation conference and make his or her written report to the court as if such settlement discussions had not occurred. If the parties reach agreement at the conference, they shall reduce their agreement to writing as required by Rule 10.C.(8)(b).

RULE 12. JUDICIAL SETTLEMENT CONFERENCE

A. SETTLEMENT JUDGE. A judicial settlement conference shall be conducted by a district court judge who shall be selected by the district court judge. Unless specifically approved by the district court judge, the district court judge who presides over the judicial settlement conference shall not be assigned to try the action if it proceeds to trial.

B. CONDUCTING THE CONFERENCE. The form and manner of conducting the conference shall be in the discretion of the settlement judge. The settlement judge may not impose a settlement on the parties but will assist the parties in reaching a resolution of all claims.

C. CONFIDENTIAL NATURE OF THE CONFERENCE. Judicial settlement conferences shall be conducted in private. No stenographic or other record may be made of the conference. Persons other than the parties and their counsel may attend only with the consent of all parties. The settlement judge will not communicate with anyone the communications made during the conference, except that the judge may report that a settlement was reached and, with the parties' consent, the terms of that settlement.

D. REPORT OF JUDGE. Within 10 days after the completion of the judicial settlement conference, the settlement judge shall file a written report with the court using a NCAOC form, stating when and where the conference was held, the names of those persons who attended the conference and the names of any party or attorney known to the settlement judge to have been absent from the settlement conference without permission. The report shall also inform the court whether or not any agreement was reached by the parties. If partial agreement(s) are reached at the settlement conference, the report shall state what issues remain for trial. In the event of a full or partial agreement, the report shall state the name of the person(s) designated to file the consent judgment or voluntary dismissals with the court. Local rules shall not require the settlement judge to send a copy of any agreement reached by the parties to the court

RULE 13. LOCAL RULE MAKING

The chief district court judge of any district conducting settlement procedures under these Rules is authorized to publish local rules, not inconsistent with these Rules and N.C.G.S. § 7A-38.4, implementing settlement procedures in that district.

RULE 14. DEFINITIONS

A. The word, court, shall mean a judge of the district court in the district in which an action is pending who has administrative responsibility for the action as an assigned or presiding judge, or said judge's designee, such as a clerk, trial court administrator, case management assistant, judicial assistant and trial court coordinator.

B. The phrase, NCAOC forms, shall refer to forms prepared by, printed and distributed by the NCAOC to implement these Rules or forms approved by local rule which contain at least the same information as those prepared by the NCAOC. Proposals for the creation or modification of such forms may be initiated by the Commission.

C. The term, family financial case, shall refer to any civil action in district court in which a claim for equitable distribution, child support, alimony or post separation support is made or in which there are claims arising out of contracts between the parties under N.C.G.S. §§ 50-20(d), 52-10, 52-10.1 or 52B.

RULE 15. TIME LIMITS.

Any time limit provided for by these rules may be waived or extended for good cause shown. Time shall be counted pursuant to the North Carolina Rules of Civil Procedure.

In The Supreme Court of North Carolina
Order Adopting Amendments to the Rules Implementing Settlement Procedures in Equitable Distribution and Other Family Financial Cases

WHEREAS, section 7A-38.4A of the North Carolina General Statutes codifies a statewide system of court-ordered mediated settlement conferences to be implemented in district court judicial districts in order to facilitate the resolution of equitable distribution and other family financial matters within the jurisdiction of those districts, and

WHEREAS, N.C.G.S. § 7A-38.4A(o) provides for this Court to implement section 7A-38.4A by adopting rules and amendments to rules concerning said mediated settlement conferences,

NOW, THEREFORE, pursuant to N.C.G.S. § 7A-38.4A(o), Rules Implementing Settlement Procedures in Equitable Distribution and other Family Financial Cases are hereby amended to read as in the following pages. These amended Rules shall be effective on the 1st day of January, 2012.

Adopted by the Court in conference the 6th day of October, 2011. The Appellate Division Reporter shall promulgate by publication as soon as practicable the portions of the Rules Implementing Settlement Procedures in Equitable Distribution and Other Family Financial Cases amended through this action in the advance sheets of the Supreme Court and the Court of Appeals.

s/Timmons-Goodson, J.
For the Court

AMENDMENTS TO THE RULES IMPLEMENTING STATEWIDE MEDIATED SETTLEMENT CONFERENCES AND OTHER SETTLEMENT PROCEDURES IN SUPERIOR COURT ACTIONS

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RULE 1. INITIATING SETTLEMENT EVENTS

A. PURPOSE OF MANDATORY SETTLEMENT PROCEDURES. Pursuant to N.C.G.S. § 7A-38.1, these Rules are promulgated to implement a system of settlement events which are designed to focus the parties' attention on settlement rather than on trial preparation and to provide a structured opportunity for settlement negotiations to take place. Nothing herein is intended to limit or prevent the parties from engaging in settlement procedures voluntarily at any time before or after those ordered by the court pursuant to these Rules.

B. DUTY OF COUNSEL TO CONSULT WITH CLIENTS AND OPPOSING COUNSEL CONCERNING SETTLEMENT PROCEDURES. In furtherance of this purpose, counsel, upon being retained to represent any party to a superior court case, shall advise his or her client(s) regarding the settlement procedures approved by these Rules and shall attempt to reach agreement with opposing counsel on the appropriate settlement procedure for the action.

C. INITIATING THE MEDIATED SETTLEMENT CONFERENCE IN EACH ACTION BY COURT ORDER.

(1) Order by Senior Resident Superior Court Judge. The senior resident superior court judge of any judicial district shall, by written order, require all persons and entities identified in Rule 4 to attend a pre-trial mediated settlement conference in all civil actions except those actions in which a party is seeking the issuance of an extraordinary writ or is appealing the revocation of a motor vehicle operator's license. The judge may withdraw his/her order upon motion of a party pursuant to Rule 1.C.(6) only for good cause shown.

(2) Motion to Authorize the Use of Other Settlement Procedures. The parties may move the senior resident superior court judge to authorize the use of some other settlement procedure allowed by these rules or by local rule in lieu of a mediated settlement conference, as provided in N.C.G.S. § 7A-38.1(i). Such motion shall be filed within 21 days of the order requiring a mediated settlement conference on a North Carolina Administrative Office of the Courts (NCAOC) form, and shall include:

(a) the type of other settlement procedure requested;

(b) the name, address and telephone number of the neutral selected by the parties;

(c) the rate of compensation of the neutral;

(d) that the neutral and opposing counsel have agreed upon the selection and compensation of the neutral selected; and

(e) that all parties consent to the motion.

If the parties are unable to agree to each of the above, then the senior resident superior court judge shall deny the motion and the parties shall attend the mediated settlement conference as originally ordered by the court. Otherwise, the court may order the use of any agreed upon settlement procedures authorized by Rules 10-12~~2~~3 herein or by local rules of the superior court in the county or district where the action is pending.

(3) Timing of the Order. The senior resident superior court judge shall issue the order requiring a mediated

settlement conference as soon as practicable after the time for the filing of answers has expired. Rules 1.C.(4) and 3.B herein shall govern the content of the order and the date of completion of the conference.

(4) Content of Order. The court's order shall (1) require that a mediated settlement conference be held in the case; (2) establish a deadline for the completion of the conference; (3) state clearly that the parties have the right to select their own mediator as provided by Rule 2; (4) state the rate of compensation of the court appointed mediator in the event that the parties do not exercise their right to select a mediator pursuant to Rule 2; and (5) state that the parties shall be required to pay the mediator's fee at the conclusion of the settlement conference unless otherwise ordered by the court. The order shall be on a NCAOC form.

(5) Motion for Court Ordered Mediated Settlement Conference. In cases not ordered to mediated settlement conference, any party may file a written motion with the senior resident superior court judge requesting that such conference be ordered. Such motion shall state the reasons why the order should be allowed and shall be served on non-moving parties. Objections to the motion may be filed in writing with the senior resident superior court judge within 10 days after the date of the service of the motion. Thereafter, the judge shall rule upon the motion without a hearing and notify the parties or their attorneys of the ruling.

(6) Motion to Dispense with Mediated Settlement Conference. A party may move the senior resident superior court judge to dispense with the mediated settlement conference ordered by the judge. Such motion shall state the reasons the relief is sought. For good cause shown, the senior resident superior court judge may grant the motion.

Such good cause may include, but not be limited to, the fact that the parties have participated in a settlement procedure such as non-binding arbitration or early neutral evaluation prior to the court's order to participate in a mediated settlement conference or have elected to resolve their case through arbitration.

D. INITIATING THE MEDIATED SETTLEMENT CONFERENCE BY LOCAL RULE.

(1) Order by Local Rule. In judicial districts in which a system of scheduling orders or scheduling conferences is utilized to aid in the administration of civil cases, the senior resident superior court judge of said districts shall, by local rule, require all persons and entities identified in Rule 4 to attend a pre-trial mediated settlement conference in all civil actions except those actions in which a party is seeking the issuance of an extraordinary writ or is appealing the revocation of a motor vehicle operator's license. The judge may withdraw his/her order upon motion of a party pursuant to Rule 1.D.(6) only for good cause shown.

(2) Scheduling Orders or Notices. In judicial districts in which scheduling orders or notices are utilized to manage civil cases and for all cases ordered to mediated settlement conference by local rule, said order or notice shall (1) require that a mediated settlement conference be held in the case; (2) establish a deadline for the completion of the conference; (3) state clearly that the parties have the right to ~~select~~ designate their own mediator and the deadline by which that ~~selection~~ designation should be made; (4) state the rate of compensation of the court appointed mediator in the event that the parties do not exercise their right to ~~select~~ designate a mediator; and (5) state that the parties shall be required to pay the mediator's fee at the conclusion of the settlement conference unless otherwise ordered by the court.

(3) Scheduling Conferences. In judicial districts in which scheduling conferences are utilized to manage civil cases and for cases ordered to mediated settlement conferences by local rule, the notice for said scheduling conference shall (1) require that a mediated settlement conference be held in the case; (2) establish a deadline for the completion of the conference; (3) state clearly that the parties have the right to ~~select~~ designate their own mediator and the deadline by which that ~~selection~~ designation should be made; (4) state the rate of compensation of the court appointed mediator in the event that the parties do not exercise their right to ~~select~~ designate a mediator; and (5) state that the parties shall be required

to pay the mediator's fee at the conclusion of the settlement conference unless otherwise ordered by the court.

(4) Application of Rule 1.C. The provisions of Rules 1.C.(2), (5) and (6) shall apply to Rule 1.D except for the time limitations set out therein.

(5) Deadline for Completion. The provisions of Rule 3.B determining the deadline for completion of the mediated settlement conference shall not apply to mediated settlement conferences conducted pursuant to Rule 1.D. The deadline for completion shall be set by the senior resident superior court judge or designee at the scheduling conference or in the scheduling order or notice, whichever is applicable. However, the completion deadline shall be well in advance of the trial date.

(6) Selection of Mediator. The parties may ~~select and nominate~~ designate or the senior resident superior court judge may appoint, mediators pursuant to the provisions of Rule 2, except that the time limits for ~~selection, nomination,~~ designation and appointment shall be set by local rule. All other provisions of Rule 2 shall apply to mediated settlement conferences conducted pursuant to Rule 1.D.

(7) Use of Other Settlement Procedures. The parties may utilize other settlement procedures pursuant to the provisions of Rule 1.C.(2) and Rule 10. However, the time limits and method of moving the court for approval to utilize another settlement procedure set out in those rules shall not apply and shall be governed by local rule.

COMMENT TO RULE 1

Comment to Rule 1.C.(6).

If a party is unable to pay the costs of the conference or lives a great distance from the conference site, the court may want to consider Rules 4 or 7 prior to dispensing with mediation for good cause. Rule 4 provides a way for a party to attend electronically and Rule 7 provides a way for parties to attend and obtain relief from the obligation to pay the mediator's fee.

RULE 2. DESIGNATION OF MEDIATOR

A. DESIGNATION OF CERTIFIED MEDIATOR BY AGREEMENT OF PARTIES. The parties may designate a mediator certified pursuant to these Rules by agreement within 21 days

of the court's order. The plaintiff's attorney shall file with the court a Designation of Mediator by Agreement within 21 days of the court's order, however, any party may file the designation. The party filing the designation shall serve a copy on all parties and the mediator designated to conduct the settlement conference. Such designation shall state the name, address and telephone number of the mediator designated; state the rate of compensation of the mediator; state that the mediator and opposing counsel have agreed upon the designation and rate of compensation; and state that the mediator is certified pursuant to these Rules. The notice shall be on a NCAOC form.

B. APPROVAL OF PARTY NOMINEE ELIMINATED. As of January 1, 2006, the former Rule 2.B rule allowing the approval of a non-certified mediator is rescinded. Beginning on that date, the court shall appoint mediators certified by the Dispute Resolution Commission (Commission), pursuant to Rule 2.C which follows.

C. APPOINTMENT OF MEDIATOR BY THE COURT. If the parties cannot agree upon the designation of a mediator, the plaintiff or plaintiff's attorney shall so notify the court and request, on behalf of the parties, that the senior resident superior court appoint a mediator. The motion must be filed within 21 days after the court's order and shall state that the attorneys for the parties have had a full and frank discussion concerning the designation of a mediator and have been unable to agree. The motion shall be on a form approved by the NCAOC.

Upon receipt of a motion to appoint a mediator, or failure of the parties to file a Designation of Mediator <u>by Agreement</u> with the court within 21 days of the court's order, the senior resident superior court judge shall appoint a mediator, certified pursuant to these Rules, who has expressed a willingness to mediate actions within the judge's district.

In making such appointments, the senior resident superior court judge shall rotate through the list of available certified mediators. Appointments shall be made without regard to race, gender, religious affiliation or whether the mediator is a licensed attorney. ~~Certified mediators who do not reside in the judicial district, or a county contiguous to the judicial district, shall be included in the list of mediators available for appointment only if, on an annual basis, they inform the Judge in writing that they agree to mediate cases to which~~

~~they are assigned~~. The senior resident superior court judge shall retain discretion to depart in a specific case from a strict rotation when, in the judge's discretion, there is good cause to do so.

Certified mediators who do not reside in the judicial district or a county contiguous to the judicial district, shall be included in the list of mediators available for appointment only if, on an annual basis as determined by the Commission, they request each senior resident superior court judge in whose district they wish to be appointed to be put on the appointment list. Said letters shall be addressed to such senior resident superior court judges, but be mailed to the offices of the Commission. The Commission shall coordinate the compilation and distribution of appointment lists for each judicial district.

The Commission shall furnish to the senior resident superior court judge of each judicial district a list of those certified superior court mediators requesting appointments in that district. Said list shall contain the mediators' names, addresses and telephone numbers and shall be provided ~~both in writing and~~ electronically through the Commission's website at www.ncdrc.org. The Commission shall promptly notify the senior resident superior court judge of any disciplinary action taken with respect to a mediator on the list of certified mediators for the judicial district.

D. MEDIATOR INFORMATION DIRECTORY. To assist the parties in designating a mediator, the Commission shall assemble, maintain and post on its website at ~~www.ncdrc.org~~ a list of certified superior court mediators. The list shall supply contact information for mediators and identify court districts that they are available to serve. Where a mediator has supplied it to the Commission, the list shall also provide biographical information including information about an individual mediator's education, professional experience and mediation training and experience.

E. DISQUALIFICATION OF MEDIATOR. Any party may move the senior resident superior court judge of the district where the action is pending for an order disqualifying the mediator. For good cause, such order shall be entered. If the mediator is disqualified, a replacement mediator shall be designated or appointed pursuant to Rule 2. Nothing in this provision shall preclude mediators from disqualifying themselves.

RULE 3. THE MEDIATED SETTLEMENT CONFERENCE

A. WHERE CONFERENCE IS TO BE HELD. Unless all parties and the mediator otherwise agree, the mediated settlement conference shall be held in the courthouse or other public or community building in the county where the case is pending. The mediator shall be responsible for reserving a place and making arrangements for the conference and for giving timely notice of the time and location of the conference to all attorneys, unrepresented parties and other persons and entities required to attend.

B. WHEN CONFERENCE IS TO BE HELD. As a guiding principle, the conference should be held after the parties have had a reasonable time to conduct discovery but well in advance of the trial date.

The court's order issued pursuant to Rule 1.C.(1) shall state a deadline for completion for the conference which shall be not less than 120 days nor more than 180 days after issuance of the court's order. The mediator shall set a date and time for the conference pursuant to Rule 6.B.(5).

C. ~~REQUEST TO EXTEND DEADLINE FOR COMPLETION~~ EXTENDING DEADLINE FOR COMPLETION. The senior resident superior court judge may extend the deadline for completion of the mediated settlement conference upon the judge's own motion, upon stipulation of the parties or upon suggestion of the mediator. ~~A party, or the mediator, may request the Senior Resident Superior Court Judge to extend the deadline for completion of the conference. Such request shall state the reasons the extension is sought and shall be served by the moving party upon the other parties and the mediator. If any party does not consent to the request, said party shall promptly communicate its objection to the office of the Senior Resident Superior Court Judge.~~

~~The Senior Resident Superior Court Judge may grant the request by setting a new deadline for the completion of the conference, which date may be set at any time prior to trial. Notice of the Judge's action shall be served immediately on all parties and the mediator by the person who sought the extension and shall be filed with the Court~~.

D. RECESSES. The mediator may recess the conference at any time and may set times for reconvening. If the time for reconvening is set before the conference is recessed, no further notification is required for persons present at the conference.

E. THE MEDIATED SETTLEMENT CONFERENCE IS NOT TO DELAY OTHER PROCEEDINGS. The mediated settlement conference shall not be cause for the delay of other proceedings in the case, including the completion of discovery, the filing or hearing of motions or the trial of the case, except by order of the senior resident superior court judge.

RULE 4. DUTIES OF PARTIES, ATTORNEYS AND OTHER PARTICIPANTS IN MEDIATED SETTLEMENT CONFERENCES

A. ATTENDANCE.

(1) The following persons shall attend a mediated settlement conference:

(a) Parties.

(i) All individual parties;

(ii) Any party that is not a natural person or a governmental entity shall be represented at the conference by an officer, employee or agent who is not such party's outside counsel and who has been authorized to decide on behalf of such party whether and on what terms to settle the action or who has been authorized to negotiate on behalf of such party and can promptly communicate during the conference with persons who have decision-making authority to settle the action; provided, however, if a specific procedure is required by law (*e.g.*, a statutory pre-audit certificate) or the party's governing documents (*e.g.*, articles of incorporation, bylaws, partnership agreement, articles of organization or operating agreement) to approve the terms of the settlement, then the representative shall have the authority to negotiate and make recommendations to the applicable approval authority in accordance with that procedure;

(iii) Any party that is a governmental entity shall be represented at the conference by an employee or agent who is not such party's outside counsel and who has authority to decide on behalf of such party whether and on what terms to settle the action; provided, if under

law proposed settlement terms can be approved only by a board, the representative shall have authority to negotiate on behalf of the party and to make a recommendation to that board.

(b) Insurance Company Representatives. A representative of each liability insurance carrier, uninsured motorist insurance carrier and underinsured motorist insurance carrier which may be obligated to pay all or part of any claim presented in the action. Each such carrier shall be represented at the conference by an officer, employee or agent, other than the carrier's outside counsel, who has the authority to make a decision on behalf of such carrier or who has been authorized to negotiate on behalf of the carrier and can promptly communicate during the conference with persons who have such decision-making authority.

(c) Attorneys. At least one counsel of record for each party or other participant, whose counsel has appeared in the action.

(2) Any party or person required to attend a mediated settlement conference shall physically attend until an agreement is reduced to writing and signed as provided in Rule 4.C or an impasse has been declared. Any such party or person may have the attendance requirement excused or modified, including the allowance of that party's or person's participation without physical attendance:

(a) By agreement of all parties and persons required to attend and the mediator; or

(b) By order of the senior resident superior court judge, upon motion of a party and notice to all parties and persons required to attend and the mediator.

(3) Scheduling. Participants required to attend shall promptly notify the mediator after ~~selection~~ designation or appointment of any significant problems they may have with dates for conference sessions before the completion deadline, and shall keep the mediator informed as to such problems as may arise before an anticipated conference session is scheduled by the mediator. After a conference session has been scheduled by the mediator,

and a scheduling conflict with another court proceeding thereafter arises, participants shall promptly attempt to resolve it pursuant to Rule 3.1 of the General Rules of Practice for the Superior and District Courts, or, if applicable, the Guidelines for Resolving Scheduling Conflicts adopted by the State-Federal Judicial Council of North Carolina on June 20, 1985.

B. NOTIFYING LIEN HOLDERS. Any party or attorney who has received notice of a lien or other claim upon proceeds recovered in the action shall notify said lien holder or claimant of the date, time and location of the mediated settlement conference and shall request said lien holder or claimant to attend the conference or make a representative available with whom to communicate during the conference.

C. FINALIZING AGREEMENT.

(1) If an agreement is reached at the conference, parties to the agreement shall reduce its terms to writing and sign it along with their counsel. By stipulation of the parties and at their expense, the agreement may be electronically recorded. If an agreement is upon all issues, a consent judgment or one or more voluntary dismissals shall be filed with the court by such persons as the parties shall designate.

(2) If the agreement is upon all issues at the conference, ~~the person(s) responsible for filing closing documents with the Court shall also sign the mediator's report to the Court~~. ~~T~~the parties shall give a copy of their signed agreement, consent judgment or voluntary dismissal(s) to the mediator and all parties at the conference and shall file a consent judgment or voluntary dismissal(s) with the court within 30 days or within 90 days if the state or a political subdivision thereof is a party to the action, or before expiration of the mediation deadline, whichever is longer. In all cases, consent judgments or voluntary dismissals shall be filed prior to the scheduled trial.

(3) If an agreement is reached upon all issues prior to the conference or finalized while the conference is in recess, the parties shall reduce its terms to writing and sign it along with their counsel and shall file a consent judgment or voluntary dismissal(s) disposing of all issues with the court within 30 days or within 90 days if the

state or a political subdivision thereof is a party to the action or before expiration of the mediation deadline, whichever is longer.

(4) When a case is settled upon all issues, all attorneys of record must notify the senior resident judge within four business days of the settlement and advise who will file the consent judgment or voluntary dismissal(s), *and when*.

D. PAYMENT OF MEDIATOR'S FEE. The parties shall pay the mediator's fee as provided by Rule 7.

E. RELATED CASES. Upon application by any party or person, the senior resident superior court judge may order that an attorney of record or a party in a pending superior court case or a representative of an insurance carrier that may be liable for all or any part of a claim pending in superior court shall, upon reasonable notice, attend a mediation conference that may be convened in another pending case, regardless of the forum in which the other case may be pending, provided that all parties in the other pending case consent to the attendance ordered pursuant to this rule. Any such attorney, party or carrier representative that properly attends a mediation conference pursuant to this rule shall not be required to pay any of the mediation fees or costs related to that mediation conference. Any disputed issues concerning an order entered pursuant to this rule shall be determined by the senior resident superior court judge who entered the order.

F. NO RECORDING. There shall be no stenographic, audio or video recording of the mediation process by any participant. This prohibition precludes recording either surreptitiously or with the agreement of the parties.

COMMENTS TO RULE 4

Comment to Rule 4.C.

N.C.G.S. § 7A-38.1(1) provides that no settlement shall be enforceable unless it has been reduced to writing and signed by the parties. When a settlement is reached during a mediated settlement conference, the mediator shall be sure its terms are reduced to writing and signed by the parties and their attorneys before ending the conference.

Cases in which agreement upon all issues has been reached should be disposed of as expeditiously as possible. This rule is intended to assure that the mediator and the parties move the case toward disposition while honoring the private nature of the mediation process

and the mediator's duty of confidentiality. If the parties wish to keep confidential the terms of their settlement, they may timely file with the court closing documents which do not contain confidential terms, *i.e.*, voluntary dismissal(s) or a consent judgment resolving all claims. Mediators will not be required by local rules to submit agreements to the court.

Comment to Rule 4.E.

Rule 4.E was adopted to clarify a senior resident superior court judge's authority in those situations where there may be a case related to a superior court case pending in a different forum. For example, it is common for there to be claims asserted against a third-party tortfeasor in a superior court case at the same time that there are related workers' compensation claims being asserted in an Industrial Commission case. Because of the related nature of such claims, the parties in the Industrial Commission case may need an attorney of record, party or insurance carrier representative in the superior court case to attend the Industrial Commission mediation conference in order to resolve the pending claims in that case. Rule 4.E specifically authorizes a senior resident superior court judge to order such attendance provided that all parties in the related Industrial Commission case consent and the persons ordered to attend receive reasonable notice. The Industrial Commission's Rules for Mediated Settlement and Neutral Evaluation Conferences contain a similar provision that provides that persons involved in an Industrial Commission case may be ordered to attend a mediation conference in a related superior court case.

RULE 5. SANCTIONS FOR FAILURE TO ATTEND MEDIATED SETTLEMENT CONFERENCE OR PAY MEDIATOR'S FEE

Any person required to attend a mediated settlement conference or to pay a portion of the mediator's fee in compliance with N.C.G.S. § 7A-38.1 and the rules promulgated by the Supreme Court of North Carolina (Supreme Court) to implement that section who fails to attend or to pay without good cause, shall be subject to the contempt powers of the court and monetary sanctions imposed by a resident or presiding superior court judge. Such monetary sanctions may include, but are not limited to, the payment of fines, attorney fees, mediator fees, expenses and loss of earnings incurred by persons attending the conference.

A party seeking sanctions against another party or person shall do so in a written motion stating the grounds for the motion and the relief sought. Said motion shall be served upon all parties and on any person against whom sanctions are being sought. The court may initiate

sanction proceedings upon its own motion by the entry of a show cause order.

If the court imposes sanctions, it shall do so, after notice and a hearing, in a written order, making findings of fact and conclusions of law. An order imposing sanctions shall be reviewable upon appeal where the entire record as submitted shall be reviewed to determine whether the order is supported by substantial evidence. (~~See also Rule 7.G. and the Comment to Rule 7.G.~~)

RULE 6. AUTHORITY AND DUTIES OF MEDIATORS

A. AUTHORITY OF MEDIATOR.

(1) Control of Conference. The mediator shall at all times be in control of the conference and the procedures to be followed. However, the mediator's conduct shall be governed by Standards of Professional Conduct for Mediators (Standards) promulgated by the Supreme Court which shall contain a provision prohibiting mediators from prolonging a conference unduly.

(2) Private Consultation. The mediator may communicate privately with any participant ~~or counsel~~ prior to and during the conference. The fact that private communications have occurred with a participant shall be disclosed to all other participants at the beginning of the conference.

~~**(3) Scheduling the conference.** The mediator shall make a good faith effort to schedule the conference at a time that is convenient with the participants, attorneys and mediator. In the absence of agreement, the mediator shall select the date for the conference.~~

B. DUTIES OF MEDIATOR.

(1) The mediator shall define and describe the following at the beginning of the conference:

(a) The process of mediation;

(b) The differences between mediation and other forms of conflict resolution;

(c) The costs of the mediated settlement conference;

(d) That the mediated settlement conference is not a trial, the mediator is not a judge and the parties retain their right to trial if they do not reach settlement;

(e) The circumstances under which the mediator may meet and communicate privately with any of the parties or with any other person;

(f) Whether and under what conditions communications with the mediator will be held in confidence during the conference;

(g) The inadmissibility of conduct and statements as provided by N.C.G.S. § 7A-38.1;

(h) The duties and responsibilities of the mediator and the participants; and

(i) That any agreement reached will be reached by mutual consent.

(2) Disclosure. The mediator has a duty to be impartial and to advise all participants of any circumstances bearing on possible bias, prejudice or partiality.

(3) Declaring impasse. It is the duty of the mediator to determine in a timely manner that an impasse exists and that the conference should end. To that end, the mediator shall inquire of and consider the desires of the parties to cease or continue the conference.

(4) Reporting Results of ~~conference~~ Mediation.

(a) The mediator shall report to the court the results of the mediated settlement conference and any settlement reached by the parties prior to or during a recess of the conference. Mediators shall also report the results of mediations held in other superior court civil cases in which a mediated settlement conference was not ordered by the court. Said report shall be filed on a NCAOC form within 10 days of the conclusion of the conference or of being notified of the settlement and shall include the names of those persons attending the mediated settlement conference if a conference was held. ~~whether or not an agreement was reached by the parties. The mediator's report shall include the names of those persons attending the mediated settlement conference. The Dispute Resolution Commission or the Administrative Office of the Courts may require the mediator to provide statistical data for evaluation of the mediated settlement~~

~~conference program~~. Local rules shall not require the mediator to send a copy of the parties' agreement to the court.

(b) If an agreement upon all issues is reached at, prior to or during a recess of the conference, the mediator's report shall state whether the action will be concluded by consent judgment or voluntary dismissal(s)~~, when it shall be filed with the Court,~~ and the name, address and telephone number of the person(s) designated by the parties to file such consent judgment or dismissal(s) with the court. ~~as required by Rule 4.C.(1).~~ The mediator shall advise the parties that Rule 4.C requires them to file their consent judgment or voluntary dismissal with the court within 30 days or within 90 days if the state or a political subdivision thereof is a party to the action, or before expiration of the mediation deadline, whichever is longer. The mediator shall indicate on the report that the parties have been so advised. ~~If an agreement upon all issues is reached at the conference, the mediator shall have the person(s) designated sign the mediator's report acknowledging acceptance of the duty to timely file the closing documents with the court.~~

~~Mediators who fail to report as required pursuant to this rule shall be subject to the contempt power of the court and sanctions.~~

(c) The Commission or the NCAOC may require the mediator to provide statistical data for evaluation of the mediated settlement conference program.

(d) Mediators who fail to report as required by this rule shall be subject to sanctions by the senior resident superior courtjudge. Such sanctions shall include, but not be limited to, fines or other monetary penalties, decertification as a mediator and any other sanction available through the power of contempt. The senior resident superior court judge shall notify the Commission of any action taken against a mediator pursuant to this section.

(5) Scheduling and Holding the Conference. It is the duty of the mediator to schedule the conference and conduct it prior to the conference completion deadline set out in the court's order. The mediator shall make an

effort to schedule the conference at a time that is convenient with all participants. In the absence of agreement, the mediator shall select a date and time for the conference. Deadlines for completion of the conference shall be strictly observed by the mediator unless said time limit is changed by a written order of the senior resident superior court judge.

A mediator selected by agreement of the parties shall not delay scheduling or holding a conference because one of more of the parties has not paid an advance fee deposit required by that agreement.

~~**(6) Distribution of mediator evaluation form.** At the mediated settlement conference, the mediator shall distribute a mediator evaluation form approved by the Dispute Resolution Commission. The mediator shall distribute one copy per party with additional copies distributed upon request. The evaluation is intended for purposes of self improvement and the mediator shall review returned evaluation forms.~~

RULE 7. COMPENSATION OF THE MEDIATOR AND SANCTIONS

A. BY AGREEMENT. When the mediator is stipulated by the parties, compensation shall be as agreed upon between the parties and the mediator. The terms of the parties' agreement with the mediator notwithstanding, Section D below shall apply to issues involving the compensation of the mediator. Sections E and F below shall apply unless the parties' agreement provides otherwise.

B. BY COURT ORDER. When the mediator is appointed by the court, the parties shall compensate the mediator for mediation services at the rate of $150 per hour. The parties shall also pay to the mediator a one time, per case administrative fee of $150 that is due upon appointment.

C. CHANGE OF APPOINTED MEDIATOR. Pursuant to Rule 2.A, the parties may select a certified mediator to conduct their mediated settlement conference. Parties who fail to select a certified mediator and then desire a substitution after the court has appointed a mediator, shall obtain court approval for the substitution. The court may approve the substitution only upon proof of payment to the court's original appointee the $150 one time, per case administrative fee, any other amount due and owing for mediation services pursuant

to Rule 7.B and any postponement fee due and owing pursuant to Rule 7.E.

D. INDIGENT CASES. No party found to be indigent by the court for the purposes of these rules shall be required to pay a mediator fee. Any mediator conducting a settlement conference pursuant to these rules shall waive the payment of fees from parties found by the court to be indigent. Any party may move the senior resident superior court judge for a finding of indigence and to be relieved of that party's obligation to pay a share of the mediator's fee.

Said motion shall be heard subsequent to the completion of the conference or, if the parties do not settle their case, subsequent to the trial of the action. In ruling upon such motions, the judge shall apply the criteria enumerated in N.C.G.S. § 1-110(a), but shall take into consideration the outcome of the action and whether a judgment was rendered in the movant's favor. The court shall enter an order granting or denying the party's request.

E. POSTPONEMENTS AND FEES.

(1) As used herein, the term "postponement" shall mean reschedule or not proceed with a settlement conference once a date for a session of the settlement conference has been scheduled by the mediator. After a settlement conference has been scheduled for a specific date, a party may not unilaterally postpone the conference.

(2) A conference session may be postponed by the mediator for good cause only after notice by the movant to all parties of the reasons for the postponement and a finding of good cause by the mediator. Good cause shall mean that the reason for the postponement involves a situation over which the party seeking the postponement has no control, including but not limited to, a party or attorney's illness, a death in a party or attorney's family, a sudden and unexpected demand by a judge that a party or attorney for a party appear in court for a purpose not inconsistent with the Guidelines established by Rule 3.1(d) of the General Rules of Practice for the Superior and District Courts or inclement weather such that travel is prohibitive. Where good cause is found, a mediator shall not assess a postponement fee.

(3) The settlement of a case prior to the scheduled date for mediation shall be good cause provided that the media-

tor was notified of the settlement immediately after it was reached and the mediator received notice of the settlement at least 14 calendar days prior to the date scheduled for mediation.

(4) Without a finding of good cause, a mediator may also postpone a scheduled conference session with the consent of all parties. A fee of $150 shall be paid to the mediator if the postponement is allowed, except that if the request for postponement is made within seven calendar days of the scheduled date for mediation, the fee shall be $300. The postponement fee shall be paid by the party requesting the postponement unless otherwise agreed to between the parties. Postponement fees are in addition to the one time, per case administrative fee provided for in Rule 7.B.

(5) If all parties select the certified mediator and they contract with the mediator as to compensation, the parties and the mediator may specify in their contract alternatives to the postponement fees otherwise required herein.

F. PAYMENT OF COMPENSATION BY PARTIES. Unless otherwise agreed to by the named parties or ordered by the court, the mediator's fee shall be paid in equal shares by the parties. For purposes of this rule, multiple parties shall be considered one party when they are represented by the same counsel. Parties obligated to pay a share of the fees shall pay them equally. Payment shall be due upon completion of the conference.

~~**G. SANCTIONS FOR FAILURE TO PAY MEDIATOR'S FEE.** Willful failure of a party to make timely payment of that party's share of the mediator's fee (whether the one time, per case, administrative fee, the hourly fee for mediation services, or any postponement fee) or willful failure of a party contending indigent status to promptly move the Senior Resident Superior Court Judge for a finding of indigency, shall constitute contempt of Court and may result, following notice, in a hearing and the imposition of any and all lawful sanctions by a Resident or Presiding Superior Court Judge.~~

COMMENTS TO RULE 7

Comment to Rule 7.B.

Court-appointed mediators may not be compensated for travel time, mileage or any other out-of-pocket expenses associated with a court-ordered mediation.

It is not unusual for two or more related cases to be mediated collectively. A mediator shall use his or her business judgment in assessing the one time, per case administrative fee when two or more cases are mediated together and set his/her fee according to the amount of time s/he spent in an effort to schedule the matter for mediation. The mediator may charge a flat fee of $150 if scheduling was relatively easy or multiples of that amount if more effort was required.

Comment to Rule 7.E.

Non-essential requests for postponements work a hardship on parties and mediators and serve only to inject delay into a process and program designed to expedite litigation. As such, it is expected that mediators will assess a postponement fee in all instances where a request does not appear to be absolutely warranted. Moreover, mediators are encouraged not to agree to postponements in instances where, in their judgment, the mediation could be held as scheduled.

Comment to Rule 7.F.

If a party is found by a senior resident superior court judge to have failed to attend a mediated settlement conference without good cause, then the court may require that party to pay the mediator's fee and related expenses.

~~**DRC Comment to Rule 7.G.**~~

~~If the Mediated Settlement Conference Program is to be successful, it is essential that mediators, both party-selected and Court-appointed, be compensated for their services. MSC Rule 7.G. is intended to give the Court express authority to enforce payment of fees owed both Court-appointed and party-selected mediators. In instances where the mediator is party selected, the Court may enforce fees which exceed the caps set forth in 7.B. (hourly fee and administrative fee) and 7.E. (postponement/cancellation fee) or which provide for payment of services or expenses not provided for in Rule 7 but agreed to among the parties, for example, payment for travel time or mileage.~~

RULE 8. MEDIATOR CERTIFICATION AND DECERTIFICATION

The Commission may receive and approve applications for certification of persons to be appointed as superior court mediators. For certification, a person shall:

A. Have completed a minimum of 40 hours in a trial court mediation training program certified by the Commission, or have completed a 16-hour supplemental trial court mediation training certified by the Commission after having been certified by the Commission as a family financial mediator;

B. Have the following training, experience and qualifications:

(1) An attorney may be certified if he or she:

(a) is either:

(i) a member in good standing of the North Carolina State Bar (State Bar), pursuant to Title 27, N.C. Administrative Code, The N.C. State Bar, Chapter 1, Subchapter A, Section .0201(b) or Section .0201(c)(1), as those rules existed January 1, 2000, or

(ii) a member similarly in good standing of the bar of another state and a graduate of a law school recognized as accredited by the North Carolina Board of Law Examiners; demonstrates familiarity with North Carolina court structure, legal terminology and civil procedure; and provides to the Commission three letters of reference as to the applicant's good character, including at least one letter from a person with knowledge of the applicant's practice as an attorney; and

(b) has at least five years of experience after date of licensure as a judge, practicing attorney, law professor and/or mediator or equivalent experience.

Any current or former attorney who is disqualified by the attorney licensing authority of any state shall be ineligible to be certified under this Rule 8.B.(1) or Rule 8.B.(2).

(2) A non-attorney may be certified if he or she has completed the following:

(a) a six-hour training on North Carolina court organization, legal terminology, civil court procedure, the attorney-client privilege, the unauthorized practice of law and common legal issues arising in superior court cases, provided by a trainer certified by the Commission;

(b) provide to the Commission three letters of reference as to the applicant's good character, including at least one letter from a person with knowledge of the applicant's experience claimed in Rule 8.B.(2)(c);

(c) one of the following; (i) a minimum of 20 hours of basic mediation training provided by a trainer acceptable to the Commission; and after completing the 20-hour training, mediating at least 30 disputes, over the course of at least three years, or equivalent experience, and possess a four-year college degree from an accredited institution, except that the four-year degree requirement shall not be applicable to mediators certified prior to January 1, 2005, and have four years of professional, management or administrative experience in a professional, business or governmental entity; or (ii) 10 years of professional, management or administrative experience in a professional, business or governmental entity and possess a four-year college degree from an accredited institution, except that the four-year degree requirement shall not be applicable to mediators certified prior to January 1, 2005.

(d) Observe three mediated settlement conferences meeting the requirements of Rule 8.C conducted by at least two different certified mediators, in addition to those required by Rule 8.C.

C. Observe two mediated settlement conferences conducted by a certified superior court mediator;

(1) at least one of which must be court ordered by a superior court, and

(2) the other may be a mediated settlement conference conducted under rules and procedures substantially similar to those set out herein in cases pending in the North Carolina Court of Appeals, North Carolina Industrial Commission, the North Carolina Office of Administrative Hearings, the North Carolina Superior Court or the United States District Courts for North Carolina.

D. Demonstrate familiarity with the statute, rules and practice governing mediated settlement conferences in North Carolina;

E. Be of good moral character and adhere to any standards of practice for mediators acting pursuant to these Rules adopted by the Supreme Court. An applicant for certification shall disclose on his/her application(s) any of the following: any pending criminal matters or any criminal convictions; any disbarments or other revocations or suspensions of any professional license or certification, including suspension or revocation of any license, certification, registration or qualification to serve as a mediator in another state or country for any reason other than to pay a renewal fee. In addition, an applicant for certification shall disclose on his/her application(s) any of the following which occurred within ten years of the date the application(s) is filed with the Commission: any pending disciplinary complaint(s) filed with, or any private or public sanctions(s) imposed by, a professional licensing or regulatory body, including any body regulating mediator conduct; any judicial sanction(s); any civil judgment(s); any tax lien(s); or any bankruptcy filing(s). Once certified, a mediator shall report to the Commission within 30 days of receiving notice any subsequent criminal conviction(s); any disbarment(s) or revocation(s) of a professional license(s), other disciplinary complaint(s) filed with or actions taken by, a professional licensing or regulatory body; any judicial sanction(s); any tax lien(s); any civil judgment(s) or any filing(s) for bankruptcy.

F. Submit proof of qualifications set out in this section on a form provided by the Commission;

G. Pay all administrative fees established by the NCAOC upon the recommendation of the Commission;

H. Agree to accept as payment in full of a party's share of the mediator's fee, the fee ordered by the court pursuant to Rule 7; ~~and~~,

(I) Comply with the requirements of the Commission for continuing mediator education or training. (These requirements may include completion of training or self-study designed to improve a mediator's communication, negotiation, facilitation or mediation skills; completion of observations; service as a mentor to a less experienced mediator; being mentored by a more experienced mediator; or serving as a trainer. Mediators shall report on a Commission approved form.); and

J. No mediator who held a professional license and relied upon that license to quality for certification under subsections B.(1) or B.(2) above shall be decertified or denied recertification because that mediator's license lapses, is relinquished or becomes inactive; provided, however, that this subsection shall not apply to any mediator whose professional license is revoked, suspended, lapsed, relinquished or becomes inactive due to disciplinary action or the threat of same, from his/her licensing authority. Any mediator whose professional license is revoked, sus pended, lapsed or relinquished or becomes inactive shall report such matter to the Commission.

If a mediator's professional license lapses, is relinquished or becomes inactive, s/he shall be required to complete all otherwise voluntary continuing mediator education requirements adopted by the Commission as part of its annual certification renewal process and to report completion of those hours to the Commission's office annually.

Certification may be revoked or not renewed at any time it is shown to the satisfaction of the Commission that a mediator no longer meets the above qualifications or has not faithfully observed these rules or those of any district in which he or she has served as a mediator. Any person who is or has been disqualified by a professional licensing authority of any state for misconduct shall be ineligible to be certified under this Rule.

RULE 9. CERTIFICATION OF MEDIATION TRAINING PROGRAMS

A. Certified training programs for mediators seeking only certification as superior court mediators shall consist of a minimum of 40 hours instruction. The curriculum of such programs shall include:

(1) Conflict resolution and mediation theory;

(2) Mediation process and techniques, including the process and techniques of trial court mediation;

(3) Communication and information gathering skills;

(4) Standards of conduct for mediators including, but not limited to the Standards adopted by the Supreme Court;

(5) Statutes, rules and practice governing mediated settlement conferences in North Carolina;

(6) Demonstrations of mediated settlement conferences;

(7) Simulations of mediated settlement conferences, involving student participation as mediator, attorneys and disputants, which simulations shall be supervised, observed and evaluated by program faculty; and

(8) Satisfactory completion of an exam by all students testing their familiarity with the statutes, rules and practice governing mediated settlement conferences in North Carolina.

B. Certified training programs for mediators who are already certified as family financial mediators shall consist of a minimum of sixteen hours. The curriculum of such programs shall include the subjects in Rule 9.A and discussion of the mediation and culture of insured claims. There shall be at least two simulations as specified in subsection (7).

C. A training program must be certified by the Commission before attendance at such program may be used for compliance with Rule 8.A. Certification need not be given in advance of attendance.

Training programs attended prior to the promulgation of these Rules or attended in other states may be approved by the Commission if they are in substantial compliance with the standards set forth in this Rule.

D. To complete certification, a training program shall pay all administrative fees established by the NCAOC upon the recommendation of the Commission.

RULE 10. OTHER SETTLEMENT PROCEDURES

A. ORDER AUTHORIZING OTHER SETTLEMENT PROCEDURES. Upon receipt of a motion by the parties seeking authorization to utilize a settlement procedure in lieu of a mediated settlement conference, the senior resident superior court judge may order the use of the procedure requested under these rules or under local rules unless the court finds that the parties did not agree upon all of the relevant details of the procedure, (including items a-e in Rule 1.C.(2)); or that for good cause, the selected procedure is not appropriate for the case or the parties.

B. OTHER SETTLEMENT PROCEDURES AUTHORIZED BY THESE RULES. In addition to mediated settlement conferences, the following settlement procedures are authorized by these Rules:

(1) Neutral Evaluation (Rule 11). Neutral evaluation in which a neutral offers an advisory evaluation of the case following summary presentations by each party;

(2) Arbitration (Rule 12). Non-binding arbitration, in which a neutral renders an advisory decision following summary presentations of the case by the parties and binding arbitration, in which a neutral renders a binding decision following presentations by the parties; and

(3) Summary Trials (Jury or Non-Jury) (Rule 13). Non-binding summary trials, in which a privately procured jury or presiding officer renders an advisory verdict following summary presentations by the parties and, in the case of a summary jury trial, a summary of the law presented by a presiding officer; and binding summary trials, in which a privately procured jury or presiding officer renders a binding verdict following summary presentations by the parties and, in the case of a summary jury trial, a summary of the law presented by a presiding officer.

C. GENERAL RULES APPLICABLE TO OTHER SETTLEMENT PROCEDURES.

(1) When Proceeding is Conducted. Other settlement procedures ordered by the court pursuant to these rules

shall be conducted no later than the date of completion set out in the court's original mediated settlement conference order unless extended by the senior resident superior court judge.

(2) Authority and Duties of Neutrals.

(a) Authority of neutrals.

(i) Control of proceeding. The neutral evaluator, arbitrator or presiding officer shall at all times be in control of the proceeding and the procedures to be followed.

(ii) Scheduling the proceeding. The neutral evaluator, arbitrator or presiding officer shall attempt to schedule the proceeding at a time that is convenient with the participants, attorneys and neutral(s). In the absence of agreement, such neutral shall select the date for the proceeding.

(b) Duties of neutrals.

(i) The neutral evaluator, arbitrator or presiding officer shall define and describe the following at the beginning of the proceeding.

(a) The process of the proceeding;

(b) The differences between the proceeding and other forms of conflict resolution;

(c) The costs of the proceeding;

(d) The inadmissibility of conduct and statements as provided by N.C.G.S. § 7A-38.1(l) and Rule 10.C.(6) herein; and

(e) The duties and responsibilities of the neutral(s) and the participants.

(ii) Disclosure. Each neutral has a duty to be impartial and to advise all participants of any circumstance bearing on possible bias, prejudice or partiality.

(iii) Reporting results of the proceeding. The neutral evaluator, arbitrator or presiding officer shall report the result of the proceeding to

the court on a NCAOC form. The NCAOC may require the neutral to provide statistical data for evaluation of other settlement procedures on forms provided by it.

(iv) Scheduling and holding the proceeding. It is the duty of the neutral evaluator, arbitrator or presiding officer to schedule the proceeding and conduct it prior to the completion deadline set out in the court's order. Deadlines for completion of the proceeding shall be strictly observed by the neutral evaluator, arbitrator or presiding officer unless said time limit is changed by a written order of the senior resident superior court judge.

(3) Extensions of Time. A party or a neutral may request the senior resident superior court judge to extend the deadline for completion of the settlement procedure. A request for an extension shall state the reasons the extension is sought and shall be served by the moving party upon the other parties and the neutral. If the court grants the motion for an extension, this order shall set a new deadline for the completion of the settlement procedure. Said order shall be delivered to all parties and the neutral by the person who sought the extension.

(4) Where Procedure is Conducted. The neutral evaluator, arbitrator or presiding officer shall be responsible for reserving a place agreed to by the parties, setting a time, and making other arrangements for the proceeding and for giving timely notice to all attorneys and unrepresented parties in writing of the time and location of the proceeding.

(5) No Delay of Other Proceedings. Settlement proceedings shall not be cause for delay of other proceedings in the case, including but not limited to the conduct or completion of discovery, the filing or hearing of motions or the trial of the case, except by order of the senior resident superior court judge.

(6) Inadmissibility of Settlement Proceedings. Evidence of statements made and conduct occurring in a mediated settlement conference or other settlement proceeding conducted under this section, whether attributable to a party, the mediator, other neutral or a neutral observer present at the settlement proceeding, shall not be sub-

ject to discovery and shall be inadmissible in any proceeding in the action or other civil actions on the same claim, except:

(a) In proceedings for sanctions under this section;

(b) In proceedings to enforce or rescind a settlement of the action;

(c) In disciplinary proceedings before the State Bar or any agency established to enforce standards of conduct for mediators or other neutrals; or

(d) In proceedings to enforce laws concerning juvenile or elder abuse.

As used in this section, the term "neutral observer" includes persons seeking mediator certification, persons studying dispute resolution processes, and persons acting as interpreters.

No settlement agreement to resolve any or all issues reached at the proceeding conducted under this subsection or during its recesses shall be enforceable unless it has been reduced to writing and signed by the parties. No evidence otherwise discoverable shall be inadmissible merely because it is presented or discussed in a mediated settlement conference or other settlement proceeding. No mediator, other neutral or neutral observer present at a settlement proceeding shall be compelled to testify or produce evidence concerning statements made and conduct occurring in anticipation of, during or as a follow-up to a mediated settlement conference or other settlement proceeding pursuant to this section in any civil proceeding for any purpose, including proceedings to enforce or rescind a settlement of the action, except to attest to the signing of any agreements, and except proceedings for sanctions under this section, disciplinary hearings before the State Bar or any agency established to enforce standards of conduct for mediators or other neutrals and proceedings to enforce laws concerning juvenile or elder abuse.

(7) No Record Made. There shall be no record made of any proceedings under these Rules unless the parties have stipulated to binding arbitration or binding summary trial in which case any party after giving adequate notice to opposing parties may record the proceeding.

(8) Ex Parte Communication Prohibited. Unless all parties agree otherwise, there shall be no *ex parte* communication prior to the conclusion of the proceeding between the neutral and any counsel or party on any matter related to the proceeding except with regard to administrative matters.

(9) Duties of the Parties.

(a) Attendance. All persons required to attend a mediated settlement conference pursuant to Rule 4 shall attend any other settlement procedure which is non-binding in nature, authorized by these rules and ordered by the court except those persons to whom the parties agree and the senior resident superior court judge excuses. Those persons required to attend other settlement procedures which are binding in nature, authorized by these rules and ordered by the court shall be those persons to whom the parties agree.

Notice of such agreement shall be given to the court and to the neutral through the filing of a motion to authorize the use of other settlement procedures within 21 days after entry of the order requiring a mediated settlement conference. The notice shall be on a NCAOC form.

(b) Finalizing agreement.

(i) If an agreement is reached on all issues at the neutral evaluation, arbitration or summary trial, the parties to the agreement shall reduce its terms to writing and sign it along with their counsel. A consent judgment or one or more voluntary dismissals shall be filed with the court by such persons as the parties shall designate within 14 days of the conclusion of the proceeding or before the expiration of the deadline for its completion, whichever is longer. The person(s) responsible for filing closing documents with the court shall also sign the report to the court. The parties shall give a copy of their signed agreement, consent judgment or voluntary dismissal(s) to the neutral evaluator, arbitrator or presiding officer and all parties at the proceeding.

(ii) If an agreement is reached upon all issues prior to the evaluation, arbitration or summary trial or while the proceeding is in recess, the parties shall reduce its terms to writing and sign it along with their counsel and shall file a consent judgment or voluntary dismissal(s) disposing of all issues with the court within 14 days or before the expiration of the deadline for completion of the proceeding whichever is longer.

(iii) When a case is settled upon all issues, all attorneys of record must notify the senior resident judge within four business days of the settlement and advise who will sign the consent judgment or voluntary dismissal(s), *and when*.

(c) Payment of neutral's fee. The parties shall pay the neutral's fee as provided by Rule 10.C.(l2).

(10) Selection of Neutrals in Other Settlement Procedures. The parties may select any individual to serve as a neutral in any settlement procedure authorized by these rules. For arbitration, the parties may select either a single arbitrator or a panel of arbitrators. Notice of such selection shall be given to the court and to the neutral through the filing of a motion to authorize the use of other settlement procedures within 21 days after entry of the order requiring a mediated settlement conference.

The notice shall be on a NCAOC form. Such notice shall state the name, address and telephone number of the neutral selected; state the rate of compensation of the neutral; and state that the neutral and opposing counsel have agreed upon the selection and compensation.

(11) Disqualification. Any party may move a resident or presiding superior court judge of the district in which an action is pending for an order disqualifying the neutral; and for good cause, such order shall be entered. Cause shall exist if the selected neutral has violated any standard of conduct of the State Bar or any standard of conduct for neutrals that may be adopted by the Supreme Court.

(12) Compensation of the Neutral. A neutral's compensation shall be paid in an amount agreed to among the parties and the neutral. Time spent reviewing materials in preparing for the neutral evaluation, conducting the proceeding and making and reporting the award shall be compensable time.

Unless otherwise ordered by the court or agreed to by the parties, the neutral's fees shall be paid in equal shares by the parties. For purposes of this section, multiple parties shall be considered one party when they are represented by the same counsel. The presiding officer and jurors in a summary jury trial are neutrals within the meaning of these Rules and shall be compensated by the parties.

(13) Sanctions for Failure to Attend Other Settlement Procedure or Pay Neutral's Fee. Any person required to attend a settlement procedure or to pay a neutral's fee in compliance with N.C.G.S. § 7A-38.1 and the rules promulgated by the Supreme Court to implement that section, who fails to attend or to pay the fee without good cause, shall be subject to the contempt powers of the court and monetary sanctions imposed by a resident or presiding superior court judge. Such monetary sanctions may include, but are not limited to, the payment of fines, attorney fees, neutral fees, expenses and loss of earnings incurred by persons attending the procedure. A party seeking sanctions against a person or a resident or presiding judge upon his/her own motion, shall do so in a written motion stating the grounds for the motion and the relief sought. Said motion shall be served upon all parties and on any person against whom sanctions are being sought. If the court imposes sanctions, it shall do so, after notice and a hearing, in a written order, making findings of fact supported by substantial evidence and conclusions of law.

RULE 11. RULES FOR NEUTRAL EVALUATION

A. NATURE OF NEUTRAL EVALUATION. Neutral evaluation is an informal, abbreviated presentation of facts and issues by the parties to an evaluator at an early stage of the case. The neutral evaluator is responsible for evaluating the strengths and weaknesses of the case, providing candid assessment of liability, settlement value and a dollar value or range of potential awards if the case proceeds to trial. The evaluator is also

responsible for identifying areas of agreement and disagreement and suggesting necessary and appropriate discovery.

B. WHEN CONFERENCE IS TO BE HELD. As a guiding principle, the neutral evaluation conference should be held at an early stage of the case after the time for the filing of answers has expired but in advance of the expiration of the discovery period.

C. PRE-CONFERENCE SUBMISSIONS. No later than 20 days prior to the date established for the neutral evaluation conference to begin, each party shall furnish the evaluator with written information about the case and shall at the same time certify to the evaluator that they served a copy of such summary on all other parties to the case. The information provided to the evaluator and the other parties hereunder shall be a summary of the significant facts and issues in the party's case, shall not be more than five pages in length and shall have attached to it copies of any documents supporting the parties' summary. Information provided to the evaluator and to the other parties pursuant to this paragraph shall not be filed with the court.

D. REPLIES TO PRE-CONFERENCE SUBMISSIONS. No later than 10 days prior to the date established for the neutral evaluation conference to begin any party may, but is not required to, send additional written information not exceeding three pages in length to the evaluator, responding to the submission of an opposing party. The response shall be served on all other parties and the party sending such response shall certify such service to the evaluator, but such response shall not be filed with the court.

E. CONFERENCE PROCEDURE. Prior to a neutral evaluation conference, the evaluator may request additional written information from any party. At the conference, the evaluator may address questions to the parties and give them an opportunity to complete their summaries with a brief oral statement.

F. MODIFICATION OF PROCEDURE. Subject to approval of the evaluator, the parties may agree to modify the procedures required by these rules for neutral evaluation.

G. EVALUATOR'S DUTIES.

(1) Evaluator's Opening Statement. At the beginning of the conference the evaluator shall define and describe

the following points to the parties in addition to those matters set out in Rule 10.C.(2)(b):

(a) The fact that the neutral evaluation conference is not a trial, the evaluator is not a judge, the evaluator's opinions are not binding on any party and the parties retain their right to trial if they do not reach a settlement.

(b) The fact that any settlement reached will be only by mutual consent of the parties.

(2) Oral Report to Parties by Evaluator. In addition to the written report to the court required under these rules at the conclusion of the neutral evaluation conference, the evaluator shall issue an oral report to the parties advising them of his or her opinions of the case. Such opinion shall include a candid assessment of liability, estimated settlement value and the strengths and weaknesses of each party's claims if the case proceeds to trial. The oral report shall also contain a suggested settlement or disposition of the case and the reasons therefore. The evaluator shall not reduce his or her oral report to writing and shall not inform the court thereof.

(3) Report of Evaluator to Court. Within 10 days after the completion of the neutral evaluation conference, the evaluator shall file a written report with the court using a NCAOC form. The evaluator's report shall inform the court when and where the evaluation was held, the names of those who attended and the names of any party, attorney or insurance company representative known to the evaluator to have been absent from the neutral evaluation without permission. The report shall also inform the court whether or not an agreement upon all issues was reached by the parties and, if so, state the name of the person(s) designated to file the consent judgment or voluntary dismissal(s) with the court. Local rules shall not require the evaluator to send a copy of any agreement reached by the parties to the court.

H. EVALUATOR'S AUTHORITY TO ASSIST NEGOTIATIONS. If all parties to the neutral evaluation conference request and agree, the evaluator may assist the parties in settlement discussions.

RULE 12. RULES FOR ARBITRATION

In this form of settlement procedure the parties select an arbitrator who shall hear the case and enter an advisory decision. The arbitrator's decision is made to facilitate the parties' negotiation of a settlement and is non-binding, unless neither party timely requests a trial *de novo*, in which case the decision is entered by the senior resident superior court judge as a judgment, or the parties agree that the decision shall be binding.

A. ARBITRATORS.

(1) Arbitrator's Canon of Ethics. Arbitrators shall comply with the Canons of Ethics for Arbitrators promulgated by the Supreme Court of North Carolina (Canons). Arbitrators shall be disqualified and must recuse themselves in accordance with the Canons.

B. EXCHANGE OF INFORMATION.

(1) Pre-hearing Exchange of Information. At least 10 days before the date set for the arbitration hearing the parties shall exchange in writing:

(a) Lists of witnesses they expect to testify;

(b) Copies of documents or exhibits they expect to offer into evidence; and

(c) A brief statement of the issues and contentions of the parties.

Parties may agree in writing to rely on stipulations and/or statements, sworn or unsworn, rather than a formal presentation of witnesses and documents, for all or part of the hearing. Each party shall bring to the hearing and provide to the arbitrator a copy of these materials. These materials shall not be filed with the court or included in the case file.

(2) Exchanged Documents Considered Authenticated. Any document exchanged may be received in the hearing as evidence without further authentication; however, the party against whom it is offered may subpoena and examine as an adverse witness anyone who is the author, custodian or a witness through whom the document might otherwise have been introduced. Documents not so exchanged may not be received if to do so would, in the arbitrator's opinion, constitute unfair, prejudicial surprise.

(3) Copies of Exhibits Admissible. Copies of exchanged documents or exhibits are admissible in arbitration hearings, in lieu of the originals.

C. ARBITRATION HEARINGS.

(1) Witnesses. Witnesses may be compelled to testify under oath or affirmation and produce evidence by the same authority and to the same extent as if the hearing were a trial. The arbitrator is empowered and authorized to administer oaths and affirmations in arbitration hearings.

(2) Subpoenas. Rule 45 of the North Carolina Rules of Civil Procedure (N.C.R.Civ.P.) shall apply to subpoenas for attendance of witnesses and production of documentary evidence at an arbitration hearing under these Rules.

(3) Motions. Designation of an action for arbitration does not affect a party's right to file any motion with the court.

(a) The court, in its discretion, may consider and determine any motion at any time. It may defer consideration of issues raised by motion to the arbitrator for determination in the award. Parties shall state their contentions regarding pending motions referred to the arbitrator in the exchange of information required by Rule 12.B.(1).

(b) Pendency of a motion shall not be cause for delaying an arbitration hearing unless the court so orders.

(4) Law of Evidence Used as Guide. The law of evidence does not apply, except as to privilege, in an arbitration hearing but shall be considered as a guide toward full and fair development of the facts. The arbitrator shall consider all evidence presented and give it the weight and effect the arbitrator determines appropriate.

(5) Authority of Arbitrator to Govern Hearings. Arbitrators shall have the authority of a trial judge to govern the conduct of hearings, except for the power to punish for contempt. The arbitrator shall refer all matters involving contempt to the senior resident superior court judge.

(6) Conduct of Hearing. The arbitrator and the parties shall review the list of witnesses, exhibits and written

statements concerning issues previously exchanged by the parties pursuant to Rule 12.B.(1), above. The order of the hearing shall generally follow the order at trial with regard to opening statements and closing arguments of counsel, direct and cross-examination of witnesses and presentation of exhibits. However, in the arbitrator's discretion the order may be varied.

(7) No Record of Hearing Made. No official transcript of an arbitration hearing shall be made. The arbitrator may permit any party to record the arbitration hearing in any manner that does not interfere with the proceeding.

(8) Parties must be Present at Hearings; Representation. Subject to the provisions of Rule 10.C.(9), all parties shall be present at hearings in person or through representatives authorized to make binding decisions on their behalf in all matters in controversy before the arbitrator. All parties may be represented by counsel. Parties may appear *pro se* as permitted by law.

(9) Hearing Concluded. The arbitrator shall declare the hearing concluded when all the evidence is in and any arguments the arbitrator permits have been completed. In exceptional cases, the arbitrator has discretion to receive post-hearing briefs, but not evidence, if submitted within three days after the hearing has been concluded.

D. THE AWARD.

(1) Filing the Award. The arbitrator shall file a written award signed by the arbitrator and filed with the clerk of superior court in the county where the action is pending, with a copy to the senior resident superior court judge within 20 days after the hearing is concluded or the receipt of post-hearing briefs whichever is later. The award shall inform the court of the absence of any party, attorney or insurance company representative known to the arbitrator to have been absent from the arbitration without permission. An award form, which shall be a NCAOC form, shall be used by the arbitrator as the report to the court and may be used to record its award. The report shall also inform the court in the event that an agreement upon all issues was reached by the parties and, if so, state the name of the person(s) designated to file the consent judgment or voluntary dismissal(s) with

the court. Local rules shall not require the arbitrator to send a copy of any agreement reached by the parties to the court.

(2) Findings; Conclusions; Opinions. No findings of fact and conclusions of law or opinions supporting an award are required.

(3) Scope of Award. The award must resolve all issues raised by the pleadings, may be in any amount supported by the evidence, shall include interest as provided by law, and may include attorney's fees as allowed by law.

(4) Costs. The arbitrator may include in an award court costs accruing through the arbitration proceedings in favor of the prevailing party.

(5) Copies of Award to Parties. The arbitrator shall deliver a copy of the award to all of the parties or their counsel at the conclusion of the hearing or the arbitrator shall serve the award after filing. A record shall be made by the arbitrator of the date and manner of service.

E. TRIAL DE NOVO.

(1) Trial *De Novo* as of Right. Any party not in default for a reason subjecting that party to judgment by default who is dissatisfied with an arbitrator's award may have a trial *de novo* as of right upon filing a written demand for trial *de novo* with the court, and service of the demand on all parties, on a NCAOC form within 30 days after the arbitrator's award has been served. Demand for jury trial pursuant to N.C.R.Civ.P. 38(b) does not preserve the right to a trial *de novo*. A demand by any party for a trial *de novo* in accordance with this section is sufficient to preserve the right of all other parties to a trial *de novo*. Any trial *de novo* pursuant to this section shall include all claims in the action.

(2) No Reference to Arbitration in Presence of Jury. A trial *de novo* shall be conducted as if there had been no arbitration proceeding. No reference may be made to prior arbitration proceedings in the presence of a jury without consent of all parties to the arbitration and the court's approval.

F. JUDGMENT ON THE ARBITRATION DECISION.

(1) Termination of Action Before Judgment. Dismissals or a consent judgment may be filed at any time before entry of judgment on an award.

(2) Judgment Entered on Award. If the case is not terminated by dismissal or consent judgment and no party files a demand for trial *de novo* within 30 days after the award is served, the senior resident superior court judge shall enter judgment on the award, which shall have the same effect as a consent judgment in the action. A copy of the judgment shall be served on all parties or their counsel.

G. AGREEMENT FOR BINDING ARBITRATION.

(1) Written Agreement. The arbitrator's decision may be binding upon the parties if all parties agree in writing. Such agreement may be made at any time after the order for arbitration and prior to the filing of the arbitrator's decision. The written agreement shall be executed by the parties and their counsel and shall be filed with the clerk of superior court and the senior resident superior court judge prior to the filing of the arbitrator's decision.

(2) Entry of Judgment on a Binding Decision. The arbitrator shall file the decision with the clerk of superior court and it shall become a judgment in the same manner as set out in N.C.G.S. § 1-567.1 ff.

H. MODIFICATION PROCEDURE.

Subject to approval of the arbitrator, the parties may agree to modify the procedures required by these rules for court ordered arbitration.

MSC RULE 13. RULES FOR SUMMARY TRIALS

In a summary bench trial, evidence is presented in a summary fashion to a presiding officer, who shall render a verdict. In a summary jury trial, evidence is presented in summary fashion to a privately procured jury, which shall render a verdict. The goal of summary trials is to obtain an accurate prediction of the ultimate verdict of a full civil trial as an aid to the parties and their settlement efforts.

Rule 23 of the General Rules of Practice also provide for summary jury trials. While parties may request of the court permission to utilize that process, it may not be substituted in lieu of mediated settlement conferences or other procedures outlined in these rules.

(A) PRE-SUMMARY TRIAL CONFERENCE.

Prior to the summary trial, counsel for the parties shall attend a conference with the presiding officer selected by the parties pursuant to Rule 10.C.(10). That presiding officer shall issue an order which shall:

(1) onfirm the completion of discovery or set a date for the completion;

(2) Order that all statements made by counsel in the summary trial shall be founded on admissible evidence, either documented by deposition or other discovery previously filed and served or by affidavits of the witnesses;

(3) Schedule all outstanding motions for hearing;

(4) Set dates by which the parties exchange:

(a) A list of parties' respective issues and contentions for trial;

(b) A preview of the party's presentation, including notations as to the document (*e.g.* deposition, affidavit, letter, contract) which supports that evidentiary statement;

(c) All documents or other evidence upon which each party will rely in making its presentation; and

(d) All exhibits to be presented at the summary trial.

(5) Set the date by which the parties shall enter a stipulation, subject to the presiding officer's approval, detailing the time allowable for jury selection, opening statements, the presentation of evidence and closing arguments (total time is usually limited to one day);

(6) Establish a procedure by which private, paid jurors will be located and assembled by the parties if a summary jury trial is to be held and set the date by which the parties shall submit agreed upon jury instructions, jury selection questionnaire, and the number of potential jurors to be questioned and seated;

(7) Set a date for the summary jury trial; and

(8) Address such other matters as are necessary to place the matter in a posture for summary trial.

B. PRESIDING OFFICER TO ISSUE ORDER IF PARTIES UNABLE TO AGREE. If the parties are unable to agree upon the dates and procedures set out in Section A of this Rule, the presiding officer shall issue an order which addresses all matters necessary to place the case in a posture for summary trial.

C. STIPULATION TO A BINDING SUMMARY TRIAL. At any time prior to the rendering of the verdict, the parties may stipulate that the summary trial be binding and the verdict become a final judgment. The parties may also make a binding high/low agreement, wherein a verdict below a stipulated floor or above a stipulated ceiling would be rejected in favor of the floor or ceiling.

D. EVIDENTIARY MOTIONS. Counsel shall exchange and file motion *in limine* and other evidentiary matters, which shall be heard prior to the trial. Counsel shall agree prior to the hearing of said motions as to whether the presiding officer's rulings will be binding in all subsequent hearings or non-binding and limited to the summary trial.

E. JURY SELECTION. In the case of a summary jury trial, potential jurors shall be selected in accordance with the procedure set out in the pre-summary trial order. These jurors shall complete a questionnaire previously stipulated to by the parties. Eighteen jurors or such lesser number as the parties agree shall submit to questioning by the presiding officer and each party for such time as is allowed pursuant to the Summary Trial Pre-trial Order. Each party shall then have three peremptory challenges, to be taken alternately, beginning with the plaintiff. Following the exercise of all peremptory challenges, the first 12 seated jurors, or such lesser number as the parties may agree, shall constitute the panel.

After the jury is seated, the presiding officer in his/her discretion, may describe the issues and procedures to be used in presenting the summary jury trial. The jury shall not be informed of the non-binding nature of the proceeding, so as not to diminish the seriousness with which they consider the matter and in the event the parties later stipulate to a binding proceeding.

F. PRESENTATION OF EVIDENCE AND ARGUMENTS OF COUNSEL. Each party may make a brief opening statement, following which each side shall present its case within the time limits set in the Summary Trial Pre-trial Order. Each party may reserve a portion of its time for rebuttal or surrebuttal evidence. Although closing arguments are generally omitted, subject to the presiding officer's discretion and the parties' agreement, each party may be allowed to make closing arguments within the time limits previously established.

Evidence shall be presented in summary fashion by the attorneys for each party without live testimony. Where the credibility of a witness is important, the witness may testify in person or by video deposition. All statements of counsel shall be founded on evidence that would be admissible at trial and documented by prior discovery.

Affidavits offered into evidence shall be served upon opposing parties far enough in advance of the proceeding to allow time for affiants to be deposed. Counsel may read portions of the deposition to the jury. Photographs, exhibits, documentary evidence and accurate summaries of evidence through charts, diagrams, evidence notebooks or other visual means are encouraged, but shall be stipulated by both parties or approved by the presiding officer.

G. JURY CHARGE. In a summary jury trial, following the presentation of evidence by both parties, the presiding officer shall give a brief charge to the jury, relying on predetermined jury instructions and such additional instructions as the presiding officer deems appropriate.

H. DELIBERATION AND VERDICT. In a summary jury trial, the presiding officer shall inform the jurors that they should attempt to return a unanimous verdict. The jury shall be given a verdict form stipulated to by the parties or approved by the presiding officer. The form may include specific interrogatories, a general liability inquiry and/or an inquiry as to damages. If, after diligent efforts and a reasonable time, the jury is unable to reach a unanimous verdict, the presiding officer may recall the jurors and encourage them to reach a verdict quickly and/or inform them that they may return separate verdicts, for which purpose the presiding officer may distribute separate forms.

In a summary bench trial, at the close of the presentation of evidence and arguments of counsel and after allowing time for

settlement discussions and consideration of the evidence by the presiding officer, the presiding officer shall render a decision. Upon a party's request, the presiding officer may allow three business days for the filing of post-hearing briefs. If the presiding officer takes the matter under advisement or allows post-hearing briefs, the decision shall be rendered no later than 10 days after the close of the hearing or filing of briefs whichever is longer.

I. JURY QUESTIONNING. In a summary jury trial the presiding officer may allow a brief conference with the jurors in open court after a verdict has been returned, in order to determine the basis of the jury's verdict. However, if such a conference is used, it should be limited to general impressions. The presiding officer should not allow counsel to ask detailed questions of jurors to prevent altering the summary trial from a settlement technique to a form of pre-trial rehearsal. Jurors shall not be required to submit to counsels' questioning and shall be informed of the option to depart.

J. SETTLEMENT DISCUSSIONS. Upon the retirement of the jury in summary jury trials or the presiding officer in summary bench trials, the parties and/or their counsel shall meet for settlement discussions. Following the verdict or decision, the parties and/or their counsel shall meet to explore further settlement possibilities. The parties may request that the presiding officer remain available to provide such input or guidance as the presiding officer deems appropriate.

K. MODIFICATION OF PROCEDURE. Subject to approval of the presiding officer, the parties may agree to modify the procedures set forth in these Rules for summary trial.

L. REPORT OF PRESIDING OFFICER. The presiding officer shall file a written report no later than 10 days after the verdict. The report shall be signed by the presiding officer and filed with the clerk of the superior court in the county where the action is pending, with a copy to the senior resident court judge. The presiding officer's report shall inform the court of the absence of any party, attorney or insurance company representative known to the presiding officer to have been absent from the summary jury or summary bench trial without permission. The report may be used to record the verdict. The report shall also inform the court in the event that an agreement upon all issues was reached by the parties and, if so, state the name of the person(s) designated to file the consent judgment or voluntary dismissal(s) with the court. Local

rules shall not require the presiding officer to send a copy of any agreement reached by the parties.

RULE 14. LOCAL RULE MAKING

The senior resident superior court judge of any district conducting mediated settlement conferences under these Rules is authorized to publish local rules, not inconsistent with these Rules and N.C.G.S. § 7A-38.1, implementing mediated settlement conferences in that district.

RULE 15. DEFINITIONS

A. The term, senior resident superior court judge, as used throughout these rules, shall refer both to said judge or said judge's designee.

B. The phrase, NCAOC forms, shall refer to forms prepared by, printed and distributed by the NCAOC to implement these Rules or forms approved by local rule which contain at least the same information as those prepared by the NCAOC. Proposals for the creation or modification of such forms may be initiated by the Commission.

RULE 16. TIME LIMITS

Any time limit provided for by these Rules may be waived or extended for good cause shown. Service of papers and computation of time shall be governed by the N.C.R.Civ.P.

In the Supreme Court of North Carolina
Order Adopting Amendments To The Rules Implementing Statewide Mediated Settlement Conferences And Other Settlement Procedures
In Superior Court Civil Actions

WHEREAS, section 7A-38.1 of the North Carolina General Statutes codifies a statewide system of court-ordered mediated settlement conferences to be implemented in superior court judicial districts in order to facilitate the resolution of civil actions within the jurisdiction of those districts, and

WHEREAS, N.C.G.S. § 7A-38.1(c) enables this Court to implement section 7A-38.1 by adopting rules and amendments to rules concerning said mediated settlement conferences.

NOW, THEREFORE, pursuant to N.C.G.S. § 7A-38.1(c), the Rules Implementing Statewide Mediated Settlement Conferences and Other

Settlement Procedures in Superior Court Civil Actions are hereby amended to read as in the following pages. These amended Rules shall be effective on the 1st day of January, 2012.

Adopted by the Court in conference the 6th day of October, 2011. The Appellate Division Reporter shall promulgate by publication as soon as practicable the portions of the Rules of the North Carolina Supreme Court Implementing Statewide Mediated Settlement Conferences and Other Settlement Procedures in Superior Court Civil Actions amended through this action in the advance sheets of the Supreme Court and the Court of Appeals.

s/Timmons-Goodson, J.
For the Court

AMENDMENTS TO THE RULES OF THE NORTH CAROLINA SUPREME COURT FOR THE DISPUTE RESOLUTION COMMISSION

TABLE OF CONTENTS

I. OFFICERS OF THE COMMISSION.

A. Officers. The Dispute Resolution Commission (Commission) shall establish the offices of chair and vice chair.

B. Appointment; Elections.

(1) The chair shall be appointed for a two-year term and shall serve at the pleasure of the Chief Justice of the Supreme Court of North Carolina (Supreme Court).

(2) The vice chair shall be elected by vote of the full Commission for a two-year term and shall serve in the absence of the chair.

C. Committees.

(**1**) The chair may appoint such standing and *ad hoc* committees as are needed and designate Commission members to serve as committee chairs.

(2) The chair may, with approval of the full Commission, appoint ex-officio members to serve on either standing or *ad hoc* committees. Ex-officio members may vote upon issues before committees but not upon issues before the Commission.

II. COMMISSION OFFICE; STAFF.

A. Office. The chair, in consultation with the director of the North Carolina Administrative Office of the Courts (NCAOC), is authorized to establish and maintain an office for the conduct of Commission business.

B. Staff. The chair, in consultation with the director of the NCAOC, is authorized to appoint an executive secretary and to: (1) fix his or her terms of employment, salary, and benefits; (2) determine the scope of his or her authority and duties and (3) delegate to the executive secretary the authority to employ necessary secretarial and staff assistants, with the approval of the director of the NCAOC.

III. COMMISSION MEMBERSHIP.

A. Vacancies. Upon the death, resignation or permanent incapacitation of a member of the Commission, the chair shall notify the appointing authority and request that the vacancy created by the death, resignation or permanent incapacitation be filled. The appointment of a successor shall be for the former member's unexpired term.

B. Disqualifications. If, for any reason, a Commission member becomes disqualified to serve, that member's appointing authority shall be notified and requested to take appropriate action. If a member resigns or is removed, the appointment of a successor shall be for the former member's unexpired term.

C. Conflicts of Interest and Recusals. All members and ex-officio members of the Commission must:

(1) Disclose any present or prior interest or involvement in any matter pending before the Commission or its committees for decision upon which the member or ex-officio member is entitled to vote;

(2) Recuse himself or herself from voting on any such matter if his or her impartiality might reasonably be questioned; and

(3) Continue to inform themselves and to make disclosures of subsequent facts and circumstances requiring recusal.

D. Compensation. Pursuant to N.C.G.S. § 138-5, ex-officio members of the Commission shall receive no compensa-

D. tion for their services but may be reimbursed for their out-of-pocket expenses necessarily incurred on behalf of the Commission and for their mileage, subsistence and other travel expenses at the per diem rate established by statutes and regulations applicable to state boards and commissions.

IV. MEETINGS OF THE COMMISSION.

A. Meeting Schedule. The Commission shall meet at least twice each year pursuant to a schedule set by the Commission and in special sessions at the call of the chair or other officer acting for the chair.

B. Quorum. A majority of Commission members shall constitute a quorum. Decisions shall be made by a majority of the members present and voting except that decisions to dismiss complaints or impose sanctions pursuant to Rule VIII of these Rules or to deny certification or certification renewal or to revoke certification pursuant to Rule IX of these Rules shall require an affirmative vote consistent with those Rules.

C. Public Meetings. All meetings of the Commission for the general conduct of business and minutes of such meetings shall be open and available to the public except that meetings, portions of meetings or hearings conducted pursuant to Rules VIII and IX of these Rules may be closed to the public in accordance with those Rules.

D. Matters Requiring Immediate Action. If, in the opinion of the chair, any matter requires a decision or other action before the next regular meeting of the Commission and does not warrant the call of a special meeting, it may be considered and a vote or other action taken by correspondence, telephone, facsimile~~,~~ or other practicable method; provided, all formal Commission decisions taken are reported to the executive secretary and included in the minutes of Commission proceedings.

V. COMMISSION'S BUDGET.

The Commission, in consultation with the director of the NCAOC, shall prepare an annual budget. The budget and supporting financial information shall be public records.

VI. POWERS AND DUTIES OF THE COMMISSION.

The Commission shall have the authority to undertake activities to expand public awareness of dispute resolution procedures, to foster

growth of dispute resolution services in this state and to ensure the availability of high quality mediation training programs and the competence of mediators. Specifically, the Commission is authorized and directed to do the following:

A. Review and approve or disapprove applications of (1) persons seeking to have training programs certified; (2) persons seeking certification as qualified to provide mediation training; (3) attorneys and non-attorneys seeking certification as qualified to conduct mediated settlement conferences and mediations; and (4) persons or organizations seeking reinstatement following a prior suspension or decertification.

B. Review applications as against criteria for certification set forth in rules adopted by the Supreme Court for mediated settlement conference/mediation programs operating under the Commission's jurisdiction and as against such other requirements of the Commission which amplify and clarify those rules. The Commission may adopt application forms and require their completion for approval.

C. Compile and maintain lists of certified trainers and training programs along with the names of contact persons, addresses and telephone numbers and make those lists available on-line or upon request.

D. Institute periodic review of training programs and trainer qualifications and re-certify trainers and training programs that continue to meet criteria for certification. Trainers and training programs that are not re-certified, shall be removed from the lists of certified trainers and certified training programs.

E. Compile, keep current, and make available on-line lists of certified mediators, which specify the judicial districts in which each mediator wishes to practice.

F. Prepare, keep current and make available on-line biographical information submitted to the Commission by certified mediators in order to make such information accessible to court staff, lawyers, and the wider public.

G. Make reasonable efforts on a continuing basis to ensure that the judiciary; clerks of court; court administration personnel; attorneys; and to the extent feasible, parties to mediation; are aware of the Commission and its office and the Commission's duty to receive and hear com-

plaints against mediators and mediation trainers and training programs.

VII. MEDIATOR CONDUCT.

The conduct of all mediators, mediation trainers and managers of mediation training programs must conform to the Standards of Professional Conduct for Mediators (Standards) adopted by the Supreme Court and enforceable by the Commission and the standards of any professional organization of which such person is a member that are not in conflict nor inconsistent with the Standards. A certified mediator shall inform the Commission of any criminal convictions, disbarments or other revocations or suspensions of a professional license, complaints filed against the mediator or disciplinary actions imposed upon the mediator by any professional organization, judicial sanctions, civil judgments, tax liens or filings for bankruptcy. Failure to do so is a violation of these Rules. Violations of the Standards or other professional standards or any conduct otherwise discovered reflecting a lack of moral character or fitness to conduct mediations or which discredits the Commission, the courts or the mediation process may subject a mediator to disciplinary proceedings by the Commission.

VIII. INVESTIGATION AND REVIEW OF MATTERS OF ETHICAL CONDUCT, CHARACTER, AND FITNESS TO PRACTICE; CONDUCT OF HEARINGS; SANCTIONS.

A. Establishment of the Committee on Standards, Discipline, and Advisory Opinions. The chair of the Commission shall appoint a standing Committee on Standards, Discipline, and Advisory Opinions (SDAO Committee) to review the matters set forth in Section B. below. Members of the Committee shall recuse themselves from deliberating on any matter in which they cannot act impartially or about which they have a conflict of interest. The Commission's executive secretary shall serve as staff to the SDAO Committee.

B. Matters to Be Considered by SDAO Committee. The SDAO Committee shall review and consider the following matters:

(1) Matters relating to the moral character of an applicant for mediator certification or certification renewal or of a certified mediator and appeals of staff decisions to deny an application for mediator

certification or certification renewal on the basis of the applicant's character;

(2) Matters relating to the moral character of any trainer or manager affiliated with a certified mediator trainining program or one that is an applicant for certification or certification renewal and appeals of staff decisions to deny an application for mediator training program certification or certification renewal on the basis of the character of any trainer or manager affiliated with the program;

(3) Complaints by a member of the Commission, its staff, a judge, court staff or any member of the public regarding the character, conduct or fitness to practice of a mediator or a trainer or manager affiliated with a certified mediator training program or that allege a violation of the program rules or the Standards; and

(4) The drafting of advisory opinions pursuant to the Commission's Advisory Opinion Policy.

C. Initial Staff Review and Determination.

(1) Review and Referral Of Matters Relating to Moral Character. The executive secretary shall review information relating to the moral character of applicants for mediator or mediator training program certification or certification renewal, mediators and mediator training program managers and administrators (applicants) including matters which applicants are required to report under program rules.

The executive secretary may contact applicants to discuss matters reported and conduct background checks on applicants. Any third party with knowledge of the above matters or any other information relating to the moral character of an applicant may notify the Commission. Commission staff shall seek to verify any such third party reports and may disregard those that cannot be verified. Commission staff may contact any agency where complaints about an applicant have been filed or any agency or judge that has imposed discipline.

All such reported matters or any other information gathered by Commission staff and bearing on moral

character shall be forwarded directly to the SDAO Committee for its review, except those matters expressly exempted from review by the Guidelines for Reviewing Pending Grievances/Complaints, Disciplinary Actions Taken and Convictions (Guidelines). Matters that are exempted by the *Guidelines* may be processed by Commission staff and will not act as a bar to certification or certification renewal.

The executive secretary or the SDAO Committee may elect to take any matter relating to an applicant's moral character, including matters reported by third parties or revealed by background check, and process it as a complaint pursuant to Rule VIII.C.3.below. The executive secretary may consult with the chair prior to making such election.

(2) Executive Secretary Review of Oral or Written Complaints. The executive secretary shall review oral and written complaints made to the Commission regarding the conduct, character or fitness to practice of a mediator or a trainer or manager affiliated with a certified mediator training program (respondent), except that the executive secretary shall not act on anonymous complaints unless staff can independently verify the allegations made.

(a) Oral complaints. If after reviewing an oral complaint, the executive secretary determines it is necessary to contact third party witnesses about the matter or to refer it to the SDAO Committee, the executive secretary shall first make a summary of the complaint and forward it to the complaining party who shall be asked to sign the summary along with a release and to return it to the Commission's office, except that complaints initiated by a member of the Commission, SDAO Committee or Commission staff or by judges, other court officials~~,~~ or court staff need not be in writing and, upon request, the identity of the complaining party may be withheld from the respondent. The executive secretary shall not contact any third parties in the course of investigating a matter until such

time as ~~the~~ a signed summary and release have been returned to the Commission.

(b) Written complaints. Commission staff shall acknowledge all written complaints within ~~twenty (20)~~ 30 days of receipt. Written complaints may be made by letter or email or filed on the Commission's approved complaint form. If a complaint is not made on the approved form, Commission staff shall require the complaining party to sign a release before contacting any third parties in the course of an investigation.

(c) If a complaining party refuses to sign a complaint summary prepared by the executive secretary or to sign a release or otherwise seeks to withdraw a complaint after filing it with the Commission, the executive secretary or a SDAO Committee member may pursue the complaint. In determining whether to pursue a complaint independently, the executive secretary or a SDAO Committee member shall consider why the complaining party is unwilling to pursue the matter further, whether the complaining party is willing to testify if a hearing is necessary, whether the complaining party has specifically asked to withdraw the complaint, the seriousness of the allegations made in the complaint, whether the circumstances complained of may be independently verified without the complaining party's participation and whether there have been previous complaints filed regarding the respondent's conduct.

(d) If the executive secretary asks a respondent to respond in writing to a complaint, the respondent shall be provided with a copy of the complaint and any supporting evidence provided by the complaining party. The respondent shall have 30 days from the date of the executive secretary's letter transmitting the complaint to respond. Upon request, the respondent may be afforded 10 additional days to respond to the complaint.

~~d~~ (e) There shall be no statute of limitations on the filing of complaints.

(3) Initial Determination on Oral and Written Complaints.

After reviewing a Rule VIII.B.3. complaint and any additional information gathered, including information supplied by the respondent and any witnesses contacted, the executive secretary shall determine whether to:

(a) Recommend Dismissal. The executive secretary shall make a recommendation to dismiss a complaint if s/he concludes that the complaint does not warrant further action. Such recommendation shall be made to the chair of the SDAO Committee. If after giving the complaint due consideration, the SDAO chair disagrees with the executive secretary's ~~, the complaint shall be dismissed with notification to the complaining party, the respondent, and any witnesses contacted~~ recommendation to dismiss, s/he may direct staff to refer the matter for conciliation or to the full SDAO Committee for review. ~~The Executive Secretary shall note for the file why a determination was made to dismiss the complaint.~~ If the chair agrees with the executive secretary, the complaint shall be dismissed with notification to the complaining party, the respondent and any witnesses contacted. The executive secretary shall note for the file why a determination was made to dismiss the complaint. Dismissed complaints shall remain on file with the Commission for at least five years and the SDAO Committee may take such complaints into consideration if additional complaints are later made against the same respondent.

The complaining party shall have 30 days from the date of ~~notification to appeal the Chair's determination~~ the letter sent by certified U.S. mail, return receipt requested, notifying him or her that the complaint has been dismissed to appeal the determination to the full SDAO Committee. ~~on Standards,~~

~~Discipline, and Advisory Opinions. If after giving the complaint due consideration, the Chair disagrees with the Executive Secretary's recommendation to dismiss, s/he may direct staff to refer the matter for conciliation or to the full Committee for review.~~

(b) Refer to Conciliation. If the executive secretary determines that the complaint appears to be largely the result of a misunderstanding between the respondent and complainant or raises a best practices concern(s) or technical or relatively minor rule violation(s) resulting in minimal harm to the complainant, the matter may be referred for conciliation after speaking with the parties and concluding that they are willing to discuss the matter and explore the complainant's concerns. Once a matter is referred for conciliation, the executive secretary may serve as a resource to the parties, but shall not act as their mediator. Prior to or at the time a matter is referred for conciliation, Commission staff shall provide written information to the complainant explaining the conciliation process and advising him/her that the complaint will be deemed to be resolved and the file closed if the complainant does not notify the Commission within 90 days of the referral that conciliation either failed to occur or did not resolve the matter. If either the complaining party or the respondent refuses conciliation or the complaining party notifies Commission staff that conciliation failed, the executive secretary may refer the matter to the SDAO Committee for review or to the SDAO chair with a recommendation for dismissal.

(c) Refer to SDAO Committee. Following initial investigation, including contacting the respondent and any witnesses, if necessary, the executive secretary shall refer all Rule VIII.B.3. matters to the full SDAO Committee when such matters raise concerns about possible significant program rule or Standards violations or raise a significant question about a respondent's character, conduct or fitness to practice. No matter shall be referred to the SDAO Committee

until the respondent has been forwarded a copy of the complaint and a copy of these Rules and allowed a 30 day period in which to respond. Upon request, the respondent may be afforded 10 additional days to respond.

The respondent's response to the complaint and the responses of any witnesses or others contacted during the investigation shall not be forwarded to the complainant, except as provided for in N.C.G.S. § 7A-38.2(h) and there shall be no opportunity for rebuttal. The response shall be included in the materials forwarded to the SDAO Committee. ~~In addition, i~~If any witnesses were contacted, any written responses or any notes from conversations with those witnesses shall also be included in the materials forwarded to the SDAO Committee.

(4) Confidentiality. Commission staff will create and maintain files for all matters considered pursuant to Rule VIII.B. Those files shall contain information submitted by or about applicants and respondents including any notes taken by the executive secretary or Commission staff relative to reports regarding moral character of applicants or complaints about mediators, trainers or managers. All information in those files shall remain confidential until such time as the SDAO Committee completes its preliminary investigation and finds probable cause following deliberation pursuant to Rule VIII.D.2.

The executive secretary shall reveal the names of respondents to the SDAO Committee and the SDAO Committee shall keep the names of respondents and other identifying information confidential except as provided for in N.C.G.S. § 7A-38.2(h).

D. SDAO Committee Review and Determination on Matters Referred by Staff.

(1) SDAO Committee Review of Applicant Moral Character Issues and Complaints.

The SDAO Committee shall review all matters brought before it by the executive secretary pursuant to the provisions of Rule VIII.B. above and may contact any other persons or entities for additional information. The chair or his/her designee

may issue subpoenas for the attendance of witnesses and for the production of books, papers or other documentary evidence deemed necessary or material to the SDAO Committee's investigation and review of the matter.

(2) SDAO Committee Deliberation.

The SDAO Committee shall deliberate to determine whether probable cause exists to believe that an applicant or respondent's conduct:

(a) is a violation of the Standards of Professional Conduct for Mediators or any other standards of professional conduct that are not in conflict with nor inconsistent with the Standards and to which the mediator, trainer or manager is subject;

(b) is a violation of Supreme Court program rules or any other program rules for mediated settlement conference/mediation programs;

(c) **i**s inconsistent with good moral character (Mediated Settlement Conference Program Rule 8.E., Family Financial Settlement Conference Rule 8.F. and District Criminal Court Rule 7.E.);

(d) reflects a lack of fitness to conduct mediated settlement conferences/mediations or to serve as a trainer or training program manager (Rule VII above); and/or

(e) discredits the Commission, the courts or the mediation process (Rule VII above).

(3) SDAO Committee Determination.

Following deliberation, the SDAO Committee shall determine whether to dismiss a matter, ~~or to~~ make a referral or ~~to~~ impose sanctions.

(a) **To Dismiss.** If a majority of SDAO Committee members reviewing an issue of moral character or a complaint finds no probable cause, the SDAO Committee shall dismiss the matter and instruct the executive secretary:

(i) to certify or recertify the applicant, if an application is pending, or to notify the

mediator, trainer or manager by certified U.S. mail, return receipt requested, that no further action will be taken in the matter; or

(ii) to notify the complaining party and the respondent by certified U.S. mail, return receipt requested, that no further action will be taken and that the matter is dismissed. The complaining party shall have no right of appeal from the SDAO Committee's decision to dismiss the complaint. All witnesses contacted shall also be notified that the complaint has been dismissed.

(b) To Refer. If a majority of SDAO Committee members determines that:

(i) any violation of the program rules or Standards that occurred was technical or relatively minor in nature, caused minimal harm to a complainant~~t~~, and did not discredit the program, courts~~,~~ or Commission, the SDAO Committee may:

(1) dismiss the complaint with a letter to the respondent citing the violation and advising him or her to avoid such conduct in the future, or

(2) refer the respondent to one or more members of the SDA Committee to discuss the matter and explore ways that the respondent may avoid similar complaints in the future.

(ii) the applicant or respondent's conduct has raised best practices or professionalism concerns, the SDAO Committee may:

(1) direct staff to dismiss the complaint with a letter to the respondent advising him/her of the SDAO Committee's concerns and providing guidance, or

(2) direct the respondent to meet with one or more members of the SDAO Committee who will informally dis-

cuss the SDAO Committee's concerns and provide counsel, or

(3) refer the respondent to the Chief Justice's Commission on Professionalism for counseling and guidance; or

(iii) the applicant or respondent's conduct raises significant concerns about his/her mental stability, mental health, lack of mental acuity or possible dementia, or concerns about possible alcohol or substance abuse, the SDAO Committee may, in lieu of or in addition to imposing sanctions, refer the applicant or respondent to the North Carolina State Bar's Lawyer Assistance Program (LAP) for evaluation or, if the applicant or respondent is not a lawyer, to a physician or other licensed mental health professional or to a substance abuse counselor or organization.

Neither letters nor referrals are viewed as sanctions under Rule VIII.E.10. below. Rather, both are intended as opportunities to address concerns and to help applicants or respondents perform more effectively as mediators. There may, however, be instances that are more serious in nature where the SDAO Committee may both make a referral and impose sanctions under Rule VIII. E.10.

In the event that an applicant or respondent is referred to one or more members of the SDAO Committee for counsel, to LAP or some other professional or entity and fails to cooperate regarding the referral; refuses to sign releases or to provide any resulting evaluations to the SDAO Committee; or any resulting discussions or evaluation(s) suggest that the applicant or respondent is notcurrently capable of serving as a mediator, trainer or manager, the SDAO Committee reserves the right to make further determinations in the matter, including decertification. During a

referral under (iii) above, the SDAO Committee may require the applicant or respondent to cease practicing as a mediator, trainer or manager during the referral period and until such time as the SDAO Committee has authorized his/her return to active practice. The SDAO Committee may condition a certification or renewal of recertification on the applicant's successful completion of the referral process.

Any costs associated with a referral, *e.g.*, costs of evaluation or treatment, shall be borne entirely by the applicant or respondent.

(c) To Propose Sanctions. If a majority of SDAO Committee members find probable cause pursuant to Rule VIII.D.2. above, the SDAO Committee shall propose sanctions on the applicant or respondent, except as provided for in Rule VIII.D.3.(b)(i).

Within the 30 day period set forth in Rule VIII.D.~~3.(d)~~ 4. below, an applicant or respondent may contact the SDAO Committee and object to any referral made or sanction imposed on the applicant or respondent, including objecting to any public posting of a sanction, and seek to negotiate some other outcome with the SDAO Committee. The SDAO Committee shall have the authority to engage in such negotiations with the applicant or respondent. During the negotiation period, the respondent may request an extension of the time in which to request an appeal under Rule VIII.~~E~~. D.4. below. The executive secretary, in consultation with the SDAO Committee chair, may extend the appeal period up to an additional 30 days in order to allow more time to complete negotiations.

(4) Right of Appeal. If a referral is made or sanctions are imposed, the applicant or respondent shall have 30 days from the date of the letter sent by U.S. certified mail, return receipt requested, transmitting the SDAO Committee's findings and action to appeal.

Notification of appeal must be made to the Commission's office in writing. If no appeal is received within 30 days, the complainant, applicant or respondent shall be deemed to have accepted the SDAO Committee's findings and proposed sanctions.

E. Appeal to the Commission.

(1) The Commission Shall Meet to Consider Appeals. An appeal of the SDAO Committee's determination pursuant to Rule VIII.~~E.~~ D.4. above shall be heard by the members of the Commission, except that all members of the SDAO Committee who participated in issuing the determination on appeal shall be recused and shall not participate in the Commission's deliberations. No matter shall be heard and decided by less than three Commission members. Members of the Commission shall recuse themselves when they cannot act impartially. Any challenges raised by the appealing party or any other party questioning the neutrality of a member shall be decided by the Commission's chair.

(2) Conduct of the Hearing.

(a) At least 30 days prior to the hearing before the Commission, Commission staff shall forward to all parties, special counsel to the Commission and members of the Commission who will hear the matter, copies of all documents considered by the SDAO Committee and summaries of witness interviews and/or character recommendations.

(b) Hearings conducted by the Commission pursuant to this rule shall be *de novo*.

(c) Applicants, complainants, respondents and any witnesses or others identified as having relevant information about the matter may appear at the hearing with or without counsel.

(d) All hearings will be open to the public except that for good cause shown the presiding officer may exclude from the hearing room all persons except the parties, counsel and those engaged in the hearing. No hearing will be closed to the public over the objection of an applicant or respondent.

(e) In the event that the applicant, complainant~~,~~ or respondent fails to appear without good cause, the Commission shall proceed to hear from those parties and witnesses who are present and make a determination based on the evidence presented at the proceeding.

(f) Proceedings before the Commission shall be conducted informally, but with decorum.

(g) The Commission, through its counsel, and the applicant or respondent may present evidence in the form of sworn testimony and/or written documents. The Commission, through its counsel, and the applicant or respondent may cross-examine any witness called to testify by the other. Commission members may question any witness called to testify at the hearing. The Rules of Evidence shall not apply, except as to privilege, but shall be considered as a guide toward full and fair development of the facts. The Commission shall consider all evidence presented and give it appropriate weight and effect.

(h) The Commission's chair or designee shall serve as the presiding officer. The presiding officer shall have such jurisdiction and powers as are necessary to conduct a proper and speedy investigation and disposition of the matter on appeal. The presiding officer may administer oaths and may issue subpoenas for the attendance of witnesses and the production of books, papers or other documentary evidence.

(3) Date of Hearing. An appeal of any sanction proposed by the SDAO Committee shall be heard by the Commission within ~~ninety (90)~~ 120 days of the date ~~the sanction is proposed~~ the notice of appeal is filed with the Commission.

(4) Notice of Hearing. The Commission's office shall serve on all parties by certified U.S. mail, return receipt requested, notice of the date, time and place of the hearing no later than 60 days prior to the hearing.

(5) ***Ex Parte* Communications.** No person shall have any *ex parte* communication with members of the Commission concerning the subject matter of the appeal. Communications regarding scheduling matters shall be directed to Commission staff.

(6) **Attendance.** All parties, including applicants, complainants and respondents, shall attend in person. The presiding officer may, in his or her discretion, permit an attorney to represent a party by telephone or through video conference or to allow witnesses to testify by telephone or through video conference with such limitations and conditions as are just and reasonable. If an attorney or witness appears by telephone or video conference, the Commission's staff must be notified at least 20 days prior to the proceeding. At least five days prior to the proceeding, the Commission's staff must be provided with contact information for those who will participate by telephone or video conference.

(7) **Witnesses.** The presiding officer shall exercise discretion with respect to the attendance and number of witnesses who appear, voluntarily or involuntarily, for the purpose of ensuring the orderly conduct of the proceeding. Each party shall forward to the Commission's office and to all other parties at least 10 days prior to the hearing, the names of all witnesses who will be called to testify.

(8) **Transcript.** The Commission shall retain a court reporter to keep a record of the proceeding. Any party who wishes to obtain a transcript of the record may do so at his/her own expense by contacting the court reporter directly. The only official record of the proceeding shall be the one made by the court reporter retained by the Commission. Copies of tapes alone, non-certified transcripts therefrom, or a record made by a court reporter retained by a party are not part of the official record.

(9) **Commission Decision.** After the hearing, a majority of the Commission members hearing the appeal may: (i) find that there is not clear and convincing evidence to support the imposition of sanctions and, therefore, dismiss the complaint or direct the Commission staff to certify or recertify the mediator

or mediator training program, or (ii) find that there is clear and convincing evidence that grounds exist to impose sanctions and impose sanctions. The Commission may impose the same or different sanctions than imposed by the SDAO Committee. The Commission shall set forth its findings, conclusions and sanctions, or other action, in writing and serve its decision on the parties within 60 days of the date of the hearing.

(10) Sanctions. The sanctions that may be proposed by the SDAO Committee or imposed by the Commission include, but are not limited to, the following:

(a) Private, written admonishment;

(b) Public, written admonishment;

(c) Completion of additional training;

(d) Restriction on types of cases to be mediated in the future;

(e) Reimbursement of fees paid to the mediator or training program;

(f) Suspension for a specified term;

(g) Probation for a specified term;

(h) Certification or renewal of certification upon conditions;

(i) Denial of certification or certification renewal;

(j) Decertification;

(k) Prohibition on participation as a trainer or manager of a certified mediator training program either indefinitely or for a period of time; and

(l) Any other sanction deemed appropriate by the Commission.

(11) Publication of SDAO Committee/Commission Decisions.

(a) Names of respondents who have been reprimanded privately or applicants who have never been certified and have been denied certification shall not be published in the Commission's newsletter ~~and~~ nor on its web site.

(b) Names of respondents or applicants who are sanctioned under any other provision of Section ~~B~~E.10. above and who have been denied reinstatement under Section ~~B~~E.13. below shall be published in the Commission's newsletter and on its web site along with a short summary of the facts involved and the discipline imposed. For good cause shown, the Commission may waive this requirement.

(c) Chief district court judges and/or senior resident superior court judges in judicial districts in which a mediator serves**,** the NC State Bar and any other professional licensing/certification bodies to which a mediator is subject, and other trial forums or agencies having mandatory programs and using mediators certified by the Commission shall be notified of any sanction imposed upon a mediator except those named in Subsection a. above.

(d) If the Commission imposes sanctions as a result of a complaint filed by a third party, the Commission's office shall, on request, release copies of the complaint, response, counter response and Commission/Committee decision.

(12) Appeal. The General Court of Justice, Superior Court Division in Wake County shall have jurisdiction over appeals of Commission decisions imposing sanctions or denying applications for mediator or mediator training program certification**.** An order imposing sanctions or denying applications for mediator or mediator training program certification shall be reviewable upon appeal ~~where~~ and the entire record as submitted shall be reviewed to determine whether the order is supported by substantial evidence. Notice of appeal shall be filed in the Superior Court in Wake County within 30 days of the date of the Commission's decision.

(13) Reinstatement. An applicant, mediator, trainer~~,~~ or manager who has been sanctioned under this rule may be reinstated as a certified mediator or as an active trainer or manager pursuant to Section ~~B~~E.13.~~g~~h. below. Except as otherwise provided by

the SDAO Committee or Commission, no application for reinstatement may be tendered within two years of the date of the sanction or denial.

(a) A petition for reinstatement shall be made in writing, verified by the petitioner~~,~~ and filed with the Commission's office.

(b) The petition for reinstatement shall contain:

(i) the name and address of the petitioner;

(ii) the offense or misconduct upon which the suspension or decertification or the bar to training or program management was based; and

(iii) a concise statement of facts claimed to justify reinstatement as a certified mediator or a trainer or program manager.

(c) The petition for reinstatement may also contain a request for a hearing on the matter to consider any additional evidence which the petitioner wishes to put forth, including any third party testimony regarding his or her character, competency or fitness to practice as a mediator, trainer or manager.

(d) The Commission's staff shall refer the petition to the Commission for review.

(e) If the petitioner does not request a hearing, the Commission shall review the petition and shall make a decision within 60 days of the filing of the petition. That decision shall be final. If the petitioner requests a hearing, it shall be held within ~~ninety (90)~~ 120 days of the filing of the petition. The Commission shall conduct the hearing consistent with Section ~~B~~E. above. At the hearing, the petitioner may:

(i) appear personally and be heard;

(ii) be represented by counsel;

(iii) call and examine witnesses;

(iv) offer exhibits; and

(v) cross-examine witnesses.

(f) At the hearing, the Commission may call witnesses, offer exhibits~~,~~ and examine the petitioner and witnesses.

(g) The burden of proof shall be upon the petitioner to establish by clear and convincing evidence:

(i) that the petitioner has rehabilitated his/her character; addressed and resolved any conditions which led to his/her suspension or decertification; completed additional training in mediation theory and practice to ensure his/her competency as a mediator, trainer or manager; and/or taken steps to address and resolve any other matter(s) which led to the petitioner's suspension, decertification or prohibition from serving as a trainer or manager; and

(ii) the petitioner's certification will not be detrimental to the Mediated Settlement Conference, Family Financial Settlement, Clerk Mediation ~~or~~ District Criminal Court Mediation Program, or other program rules, or to the Commission, ~~the~~ courts or ~~the~~ public ~~interest;~~ and

(iii) that the petitioner has completed any paperwork required for reinstatement and paid any required reinstatement and/or certification fees.

(h) If the petitioner is found to have rehabilitated him or herself and is fit to serve as a mediator, trainer or manager, the Commission shall reinstate the petitioner as a certified mediator or as an active trainer or manager. However, if the suspension or decertification or the bar to training or management has continued for more than two years, the reinstatement may be conditioned upon the completion of addi-

tional training and observations as needed to refresh skills and awareness of program rules and requirements.

(i) The Commission shall set forth its decision to reinstate a petitioner or to deny reinstatement in writing, making findings of fact and conclusions of law, and serve the decision on the petitioner by U.S. certified mail, return receipt requested, within 30 days of the date of the hearing.

(j) If a petition for reinstatement is denied, the petitioner may not apply again pursuant to this section until two years have lapsed from the date the denial was issued.

(k) The General Court of Justice, Superior Court Division in Wake County, shall have jurisdiction over appeals of Commission decisions to deny reinstatement. An order denying reinstatement shall be reviewable upon appeal, ~~where~~ and the entire record as submitted shall be reviewed to determine whether the order is supported by substantial evidence. Notice of appeal shall be filed in the Superior Court in Wake County within 30 days of the date of the Commission's decision.

RULE IX. INVESTIGATION AND REVIEW OF APPLICATIONS FOR CERTIFICATION DENIED OR REVOKED FOR REASONS OTHER THAN THOSE PERTAINING TO ETHICS AND CONDUCT.

A. Establishment of the Standing Committee on Certification of Mediators and Mediator Training Programs.

(1) Establishment of Certification Committee. The chair of the Commission shall appoint a standing Committee on Certification of Mediators and Mediator Training Programs (Certification Committee) to review the matters set forth in Section 2 below. Members of the Certification Committee shall recuse themselves from deliberating on any matter in which they cannot act impartially or about which they have a conflict of interest.

(2) Matters to Be Considered by Certification Committee. The Certification Committee shall review and consider the following matters:

(a) Appeals of staff decisions to deny an application filed by a person seeking mediator certification or recertification or by a mediator training program seeking certification or recertification, because of deficiencies that do not relate to conduct or ethics. The latter deficiencies shall be considered pursuant to Rule VIII.

(b) Complaints which are filed by a member of the Commission, its staff, or any member of the public about a certified mediator or certified mediator training program or an applicant for certification or certification renewal; except that, complaints relating to applicant, mediator, trainer or manager conduct or ethics shall be considered only pursuant to Rule VIII.

(3) The Investigation of Qualifications.

(a) Information obtained during the process of certification or renewal. Commission staff shall review all pending applications for certification and recertification to determine whether the applicant meets the non-ethics related qualifications set out in program rules adopted by the Supreme Court for mediated settlement conference/mediation programs under the jurisdiction of the Commission and any guidelines or other policies adopted by the Commission amplifying those rules. Commission staff may contact those reporting to request additional information and may consider any other information acquired during the investigation process that bears on the applicant's eligibility for certification or certification renewal.

(b) Complaints about mediator or mediator training program qualifications filed with the Commission. The staff of the Commission shall forward written complaints about the qualifications of a certified mediator or certified mediator training program or any trainer or manager affiliated with such program (affected person/program) that do not pertain to ethics or conduct filed by any

member of the general public, the Commission, or its staff to the Certification Committee for investigation. Copies of such complaints shall be forwarded by certified U.S. mail, return receipt requested, to the affected person.

However, in instances where Commission staff believes a complaint to be wholly without merit, the executive secretary shall refer the matter to the Certification Committee's chair rather than to the Certification Committee as set forth above. If after giving the complaint due consideration, the chair also believes that the complaint is wholly without merit, the complaint shall be dismissed with notification to the complaining party. The complaining party shall have 30 days from the date of notification to appeal the chair's determination to the full Certification Committee. The appeal shall be in writing and directed to the Commission's office.

(c) Investigation by the Certification Committee. The Certification Committee shall investigate all matters brought before it by staff pursuant to the provisions of Sections a. or b**.** The chair or designee may issue subpoenas for the attendance of witnesses and for the production of books, papers or other documentary evidence deemed necessary or material to any such investigation. The chair or designee may contact the following persons and entities for information concerning such application or complaint:

(i) all references, employers, colleges and other individuals and entities cited in applications for mediator certification, including any and all other professional licensing or certification bodies to which the applicant is subject;

(ii) all proposed trainers cited in training program applications and in the case of applications for certification renewal, participants who have completed the training program; and

(iii) all parties bringing complaints about a mediator or a mediator training program's qualifi-

cations for certification or certification renewal and any other person or entity with information about the subject of the complaint.

All information in Commission files pertaining to the initial certification of a mediator or mediation training program or to renewals of such certifications shall be confidential.

(d) Probable Cause Determination. The Certification Committee shall deliberate to determine whether probable cause exists to believe that the affected person/program or the applicant:

(i) does not meet the qualifications for mediator certification set out in program rules adopted by the Supreme Court for mediated settlement conference/mediation programs under the jurisdiction of the Commission or guidelines and other policies adopted by the Commission that amplify those rules; or

(ii) does not meet the qualifications for mediator training program certification as set out in program rules adopted by the Supreme Court for mediated settlement conference/mediation programs under the jurisdiction of the Commission or guidelines and other policies adopted by the Commission that amplify those rules.

If probable cause is found, that the application for certification or re-certification should be denied or the affected person/program's certification should be revoked.

4. Authority of Certification Committee to Deny Certification or Certification Renewal or to Revoke Certification.

(a) If a majority of Certification Committee members reviewing a matter finds no probable cause pursuant to Section A.3.d. above, Commission staff shall certify or recertify the affected person/program or applicant. If the investigation were initiated by the filing of a written complaint, the Certification Committee shall dismiss the complaint and notify the complaining party and the affected person/program or appli-

cant in writing by certified U.S. mail, return receipt requested, that the complaint has been dismissed and that the affected person/program or applicant will be certified or re-certified. There shall be no right of appeal from the Certification Committee's decision to dismiss a complaint or to certify or re-certify an affected person/program or applicant.

(b) If a majority of Certification Committee members reviewing a matter finds probable cause pursuant to Section A.3.d. above, the Certification Committee shall deny certification or re-certification or revoke certification. The Certification Committee's findings, conclusions, and denial shall be in writing and forwarded to the affected person/program or applicant by certified U.S. mail, return receipt requested.

(c) If the Certification Committee denies certification or re-certification or revokes certification, the affected person/program or applicant may appeal the denial or revocation to the Commission within 30 days from the date of the letter transmitting the Certification Committee's findings, conclusions and denial. Notification of appeal must be in writing and directed to the Commission's office. If no appeal is filed within 30 days, the affected person/program or applicant shall be deemed to have accepted the Certification Committee's findings and denial or revocation.

B. Appeal of the Denial to the Commission.

(1) The Commission Shall Meet. An appeal of a denial or revocation by the Certfication Committee pursuant to Section A.3.d. above shall be heard by the members of the Commission, except that all members of the Certification Committee who participated in issuing the determination that is on appeal shall recuse themselves from participating. No matter shall be heard and decided by less than three Commission members. Members of the Commission shall recuse themselves when they cannot act impartially. Any challenges raised by the appealing party or any other party questioning the neutrality of a member shall be decided by the Commission's chair.

(2) Conduct of the Hearing.

(a) At least 30 days prior to the hearing before the Commission, Commission staff shall forward

to all parties; special counsel to the Commission, if appointed; and members of the Commission who will hear the matter, copies of all documents considered by the Committee and summaries of witness interviews and/or character recommendations.

(b) Hearings conducted by the Commission will be a *de novo* review of the Certification Committee's decision.

(c) The Commission's chair or his/her designee shall serve as the presiding officer. The presiding officer shall have such jurisdiction and powers as are necessary to conduct a proper and speedy investigation and disposition of the matter on appeal. The presiding officer may administer oaths and may issue subpoenas for the attendance of witnesses and the production of books, papers or other documentary evidence.

(d) Special counsel supplied either by the North Carolina Attorney General at the request of the Commission or employed by the Commission may present the evidence in support of the denial or revocation of certification. Commission members may question any witnesses called to testify at the hearing.

(e) The Commission, through its counsel, and the applicant or affected person/program may present evidence in the form of sworn testimony and/or written documents. The Commission, through its counsel, and the applicant or affected person/program, may cross-examine any witness called to testify at the hearing. The Rules of Evidence shall not apply, except as to privilege, but shall be considered as a guide toward full and fair development of the facts. The Commission shall consider all evidence presented and give it appropriate weight and effect.

(f) All hearings shall be conducted in private, unless the applicant or affected person/program requests a public hearing.

(g) In the event that the complainant, affected person/program, or applicant fails to appear without

good cause, the Commission shall proceed to hear from those parties and witnesses who are present and make a determination based on the evidence presented at the proceeding.

(h) Proceedings before the Commission shall be conducted informally but with decorum.

(3) Date of Hearing. An appeal of any denial by the Certification Committee shall be heard by the Commission within ~~ninety (90)~~ 120 days of the date of the letter transmitting the Certification Committee's findings, conclusions and denial or revocation.

(4) Notice of Hearing. The Commission's office shall serve on all parties by certified U.S. mail, return receipt requested, notice of the date, time, and place of the hearing no later than 60 days prior to the hearing.

(5) *Ex Parte* Communications. No person shall have any *ex parte* communication with members of the Commission concerning the subject matter of the appeal. Communications regarding scheduling matters shall be directed to Commission staff.

(6) Attendance. All parties, including complaining parties and applicants, or their representatives in the case of a training program, shall attend in person. The presiding officer may, in his or her discretion, permit an attorney to represent a party by telephone or through video conference or to allow witnesses to testify by telephone or through video conference with such limitations and conditions as are just and reasonable. If an attorney or witness appears by telephone or video conference, the Commission's staff must be notified at least 20 days prior to the proceeding. At least five days prior to the proceeding, the Commission's staff must be provided with contact information for those who will participate by telephone or video conference.

(7) Witnesses. The presiding officer shall exercise his/her discretion with respect to the attendance and number of witnesses who appear, voluntarily or involuntarily, for the purpose of ensuring the orderly conduct of the proceeding. Each party shall forward to the Commission's office at least 10 days prior to the hearing the names of all witness who will testify for them.

(8) Transcript. The Commission shall retain a court reporter to keep a record of the proceeding. Any party who wishes to obtain a transcript of the record may do so at his or her own expense by contacting the court reporter directly. The only official record of the proceeding shall be the one made by the court reporter retained by the Commission. Copies of tapes alone, non-certified transcripts therefrom, or a record made by a court reporter retained by a party are not part of the official record.

(9) Commission Decision. After the hearing, a majority of the Commission members hearing the appeal may: (i) find that there is not clear and convincing evidence to support the denial or revocation and, therefore dismiss the complaint or direct the Commission staff to certify or recertify the mediator or mediator training program; or (ii) find that there is clear and convincing evidence to affirm the committee's findings and denial or revocation. The Commission shall set forth its findings, conclusions and denial in writing and serve it on the parties within 60 days of the date of the hearing.

(10) Publication of Committee/Commission Decisions.

(a) Names of applicants for mediator certification or names of mediator training programs that are denied certification or recertification or who have had their certification revoked pursuant to this rule shall not be published in the Commission's newsletter or on its web site and the fact of that denial or revocation shall not be generally publicized.

(b) Chief district court judges and/or senior resident superior court judges in districts which the mediator serves, the NC State Bar and any other professional licensing/certification bodies to which the mediator is subject, and other trial forums or agencies having mandatory programs and using mediators certified by the Commission shall be notified of any denial or revocation of certification.

(11) Appeals. The General Court of Justice, Superior Court Division in Wake County shall have jurisdiction over appeals of Commission decisions denying an applica-

tion or revoking a certification**.** An order denying or revoking certification pursuant to this rule shall be reviewable upon appeal where the entire record as submitted shall be reviewed to determine whether the order is supported by substantial evidence. Notice of appeal shall be filed within 30 days of the date of the Commission's decision.

(12) Reinstatement of Certification. A mediator or training program whose certification renewal has been denied or whose certification has been revoked under this rule may be re-certified or reinstated as a certified mediator or mediation training program pursuant to Section B.12.g. below. An application for reinstatement may be tendered at any time the applicant believes that he/she/it is qualified to be reinstated.

(a) A petition for reinstatement shall be made in writing, verified by the petitioner and filed with the Commission's office.

(b) The petition for reinstatement shall contain:

(i) the name and address of the petitioner;

(ii) the qualification upon which the denial or revocation was based; and

(iii) a concise statement of facts claimed to justify certification or recertification as a certified mediator or mediator training program.

(c) The petition for reinstatement or certification may also contain a request for a hearing on the matter to consider any additional evidence that the petitioner wishes to put forth.

(d) The Commission's staff shall refer the petition to the Commission for review.

(e) If the petitioner does not request a hearing, the Commission shall reviewthe petition and shall make a decision within 60 days of the filing of the petition. That decision shall be final. If the petitioner requests a hearing, it shall be held within 90 days of the filing of the petition. The Commission shall conduct the hearing consistent with Section B. above. At the hearing, the petitioner may:

(i) appear personally and be heard;

(ii) be represented by counsel;

(iii) call and examine witnesses;

(iv) offer exhibits; and

(v) cross-examine witnesses.

(f) At the hearing, the Commission may call witnesses, offer exhibits and examine the petitioner and witnesses.

(g) The burden of proof shall be upon the petitioner to establish by clear and convincing evidence:

(i) that the petitioner has satisfied the qualifications that led to the denial or revocation; and

(ii) that the petitioner has completed any paperwork required for reinstatement and paid any required reinstatement and/or certification fees.

(h) If the petitioner is found to have met the qualifications and is entitled to be certified as a mediator or mediator training program, the Commission shall so certify.

(i) If a petition for reinstatement is denied, the petitioner may apply again pursuant to this section at any time after the qualifications are met.

(j) The Commission shall set forth its decision to certify a mediator or mediator training program or to deny certification in writing, making findings of fact and conclusions of law, and serve the decision on the petitioner by certified U.S. mail, return receipt requested, within 60 days of the date of the hearing.

(k) The General Court of Justice, Superior Court Division in Wake County shall have jurisdiction over appeals of Commission decisions to deny reinstatement. An order denying reinstatement shall be reviewable upon appeal where the entire record as submitted shall be reviewed to determine whether the order is supported by substantial evidence. Notice of review shall be filed with

the Superior Court in Wake County within 30 days of the date of the Commission's decision.

X. INTERNAL OPERATING PROCEDURES.

The Commission may adopt and publish internal operating procedures and policies for the conduct of Commission business.

B. The Commission's procedures and policies may be changed as needed on the basis of experience.

In the Supreme Court of North Carolina
Order Adopting Amendments to the Rules of the North Carolina Supreme Court for the Dispute Resolution Commission

WHEREAS, section 7A-38.2 of the North Carolina General Statutes establishes the Dispute Resolution Commission to provide for the certification and qualification of mediators, other neutrals, and mediation and other neutral training programs, the regulation of mediators, other neutrals, and trainers and managers affiliated with certified or qualified programs, and

WHEREAS, N.C.G.S. § 7A-38.2(a) provides for this Court to implement section 7A-38.2 by adopting rules,

NOW, THEREFORE, pursuant to N.C.G.S. § 7A-38.2(a), the Supreme Court's Rules for the Dispute Resolution Commission are hereby amended to read as in the following pages. These amended Rules shall be effective on the 1st day of January, 2012.

Adopted by the Court in conference the 6th day of October, 2011. The Appellate Division Reporter shall promulgate by publication as soon as practicable the portions of the Supreme Court's Rules for the Dispute Resolution Commission amended through this action in the advance sheets of the Supreme Court and the Court of Appeals.

s/Timmons-Goodson, J.
For the Court

AMENDMENTS TO THE STANDARDS OF PROFESSIONAL CONDUCT FOR MEDIATORS

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PREAMBLE

These Standards of Professional Conduct for Mediators (Standards) shall apply to all mediators who are certified by the North Carolina Dispute Resolution Commission (Commission) or who are not certified, but are conducting court-ordered mediations in the context of a program or process that is governed by statutes, as amended from time to time, which provide for the Commission to regulate the conduct of mediators participating in the program or process. Provided, however, that if there is a specific statutory provision that conflicts with these Standards, then the statute shall control.

These Standards are intended to instill and promote public confidence in the mediation process and to provide minimum standards for mediator conduct. As with other forms of dispute resolution, mediation must be built upon public understanding and confidence. Persons serving as mediators are responsible to the parties, the public and the courts to conduct themselves in a manner that will merit that confidence. (See Rule VII of the Rules of the North Carolina Supreme Court for the Dispute Resolution Commission.)

It is the mediator's role to facilitate communication and understanding among the parties and to assist them in reaching an agreement. The mediator should aid the parties in identifying and discussing issues and in exploring options for settlement. The mediator should not, however, render a decision on the issues in dispute. In mediation, the ultimate decision whether and on what terms to resolve the dispute belongs to the parties and the parties alone.

I. Competency: A mediator shall maintain professional competency in mediation skills and, where the mediator lacks the skills necessary for a particular case, shall decline to serve or withdraw from serving.

A. A mediator's most important qualification is the mediator's competence in procedural aspects of facilitating the resolution of disputes rather than the mediator's familiarity with technical knowledge relating to the subject of the dispute. Therefore, a mediator shall obtain necessary skills and substantive training appropriate to the mediator's areas of practice and upgrade those skills on an ongoing basis.

B. If a mediator determines that a lack of technical knowledge impairs or is likely to impair the mediator's effectiveness, the mediator shall notify the parties and withdraw if requested by any party.

C. Beyond disclosure under the preceding paragraph, a mediator is obligated to exercise his/her judgment as to whether his/her skills or expertise are sufficient to the demands of the case and, if they are not, to decline from serving or to withdraw.

II. Impartiality: A mediator shall, in word and action, maintain impartiality toward the parties and on the issues in dispute.

A. Impartiality means absence of prejudice or bias in word and action. In addition, it means a commitment to aid all parties, as opposed to a single party, in exploring the possibilities for resolution.

B. As early as practical and no later than the beginning of the first session, the mediator shall make full disclosure of any known relationships with the parties or their counsel that may affect or give the appearance of affecting the mediator's impartiality.

C. The mediator shall decline to serve or shall withdraw from serving if:

(1) a party objects to his/her serving on grounds of lack of impartiality, and after discussion, the party continues to object; or

(2) the mediator determines he/she cannot serve impartially.

III. Confidentiality: A mediator shall, subject to exceptions set forth below, maintain the confidentiality of all information obtained within the mediation process.

A. A mediator shall not disclose, directly or indirectly, to any non-participant, any information communicated to the mediator by a participant within the mediation process. A mediator's tendering a copy of an agreement reached in mediation pursuant to a statute that mandates such a tender shall not be considered to be a violation of this paragraph.

B. A mediator shall not disclose, directly or indirectly, to any participant, information communicated to the mediator in confidence by any other participant in the mediation process, unless that participant gives permission to do so. A mediator may encourage a participant to permit disclosure, but absent such permission, the mediator shall not disclose.

C. The confidentiality provisions set forth in A. and B. above notwithstanding, a mediator ~~has discretion to~~ may report otherwise confidential conduct or statements made in preparation for, during or as a follow-up to mediation ~~to a participant, non-participant, law enforcement personnel, or other officials or to give an affidavit, or to testify about such conduct or statements in the following circumstances~~ in the circumstances set forth in sections (1) and (2) below:

(1) A statute requires or permits a mediator to testify or to give an affidavit or to tender a copy of any agreement reached in mediation to the official designated by the statute.

If, pursuant to Family Financial Settlement (FFS) and Mediated Settlement Conference (MSC) Rule 5, a mediator has been subpoenaed by a party to testify about who attended or failed to attend a mediated settlement conference/mediation, the mediator shall limit his/her testimony to providing the names of those who were physically present or who attended by electronic means.

If, pursuant to FFS and MSC Rule 5, a mediator has been subpoenaed by a party to testify about a party's failure to pay the mediator's fee, the mediator's testimony shall be limited to information about the amount of the fee and who had or had not paid it and shall not include statements made by any participant about the merits of the case.

(2) ~~Where public safety is an issue~~: To a participant, non-participant, law enforcement personnel or other persons

affected by the harm intended where public safety is an issue, in the following circumstances:

(i) a party or other participant in ~~to~~ the mediation has communicated to the mediator a threat of serious bodily harm or death to be inflicted on any person, and the mediator has reason to believe the party has the intent and ability to act on the threat; or

(ii) a party or other participant in ~~to~~ the mediation has communicated to the mediator a threat of significant damage to real or personal property and the mediator has reason to believe the party has the intent and ability to act on the threat; or

(iii) a party's or other participant's conduct during the mediation results in direct bodily injury or death to a person.

If the mediator is a North Carolina lawyer and a lawyer made the statements or committed the conduct reportable under subsection C.(2) above, then the mediator shall report the statements or conduct to the North Carolina State Bar (State Bar) or the court having jurisdiction over the matter in accordance with North Carolina State Bar Rule of Professional Conduct 8.3(e).

D. Nothing in this Standard prohibits the use of information obtained in a mediation for instructional purposes or for the purpose of evaluating or monitoring the performance of a mediator, mediation organization or dispute resolution program, so long as the parties or the specific circumstances of the parties' controversy are not identified or identifiable.

E. Nothing in this Standard shall prohibit a mediator from revealing communications or conduct occurring prior to, during or after a mediation in the event that a party to or a participant in a mediation has filed a complaint regarding the mediator's professional conduct, moral character or fitness to practice as a mediator and the mediator reveals the communication or conduct for the purpose of defending him/herself against the complaint. In making any such disclosures, the mediator should make every effort to protect the confidentiality of non-complaining parties to or participants in the mediation and avoid disclosing the specific circumstances of the parties' controversy. The mediator may consult with non-complaining parties or witnesses to consider their input regarding disclosures.

IV. Consent: A mediator shall make reasonable efforts to ensure that each party understands the mediation process, the role of the mediator and the party's options within the process.

A. A mediator shall discuss with the participants the rules and procedures pertaining to the mediation process and shall inform the parties of such matters as applicable rules require.

B. A mediator shall not exert undue pressure on a participant, whether to participate in mediation or to accept a settlement; nevertheless, a mediator shall encourage parties to consider both the benefits of participation and settlement and the costs of withdrawal and impasse.

C. If a party appears to have difficulty comprehending the process, issues or settlement options or difficulty participating in a mediation, the mediator shall explore the circumstances and potential accommodations, modifications or adjustments that would facilitate the party's capacity to comprehend, participate and exercise self-determination. If the mediator then determines that the party cannot meaningfully participate in the mediation, the mediator shall recess or discontinue the mediation. Before discontinuing the mediation, the mediator shall consider the context and circumstance of the mediation, including subject matter of the dispute, availability of support persons for the party and whether the party is represented by counsel.

D. In appropriate circumstances, a mediator shall inform the parties of the importance of seeking legal, financial, tax or other professional advice before, during or after the mediation process.

V. Self Determination: A mediator shall respect and encourage self-determination by the parties in their decision whether, and on what terms, to resolve their dispute and shall refrain from being directive and judgmental regarding the issues in dispute and options for settlement.

A. A mediator is obligated to leave to the parties full responsibility for deciding whether and on what terms to resolve their dispute. He/She may assist them in making informed and thoughtful decisions, but shall not impose his/her judgment or opinions for those of the parties concerning any aspect of the mediation.

B. A mediator may raise questions for the participants to consider regarding their perceptions of the dispute as well as the acceptability of proposed options for settlement and their impact on

third parties. Furthermore, a mediator may suggest for consideration options for settlement in addition to those conceived of by the parties themselves.

C. A mediator shall not impose his/her opinion about the merits of the dispute or about the acceptability of any proposed option for settlement. A mediator should resist giving his/her opinions about the dispute and options for settlement even when he/she is requested to do so by a party or attorney. Instead, a mediator should help that party utilize his/her own resources to evaluate the dispute and the options for settlement.

This section prohibits imposing one's opinions, advice and/or counsel upon a party or attorney. It does not prohibit the mediator's expression of an opinion as a last resort to a party or attorney who requests it and the mediator has already helped that party utilize his/her own resources to evaluate the dispute and options.

D. Subject to Standard IV.D above, if a party to a mediation declines to consult an independent counsel or expert after the mediator has raised this option, the mediator shall permit the mediation to go forward according to the parties' wishes.

E. If, in the mediator's judgment, the integrity of the process has been compromised by, for example, inability or unwillingness of a party to participate meaningfully, inequality of bargaining power or ability, unfairness resulting from non-disclosure or fraud by a participant or other circumstance likely to lead to a grossly unjust result, the mediator shall inform the parties of the mediator's concern. Consistent with the confidentiality required in Standard III, the mediator may discuss with the parties the source of the concern. The mediator may choose to discontinue the mediation in such circumstances but shall not violate the obligation of confidentiality.

VI. Separation of Mediation from Legal and Other Professional Advice: A mediator shall limit himself or herself solely to the role of mediator, and shall not give legal or other professional advice during the mediation.

A mediator may provide information that the mediator is qualified by training or experience to provide only if the mediator can do so consistent with these Standards. Mediators may respond to a party's request for an opinion on the merits of the case or suitability of settlement proposals only in accordance with Section V.C above.

OFFICIAL COMMENT

Although mediators shall not provide legal or other professional advice, mediators may respond to a party's request for an opinion on the merits of the case or the suitability of settlement proposals only in accordance with Section V.C above, and mediators may provide information that they are qualified by training or experience to provide only if it can be done consistent with these Standards.

VII. Conflicts of Interest: A mediator shall not allow any personal interest to interfere with the primary obligation to impartially serve the parties to the dispute.

A. The mediator shall place the interests of the parties above the interests of any court or agency which has referred the case, if such interests are in conflict.

B. Where a party is represented or advised by a professional advocate or counselor, the mediator shall place the interests of the party over his/her own interest in maintaining cordial relations with the professional, if such interests are in conflict.

C. A mediator who is a lawyer, therapist or other professional and the mediator's professional partners or co-shareholders shall not advise, counsel or represent any of the parties in future matters concerning the subject of the dispute, an action closely related to the dispute or an out growth of the dispute when the mediator or his/her staff has engaged in substantive conversations with any party to the dispute. Substantive conversations are those that go beyond discussion of the general issues in dispute, the identity of parties or participants and scheduling or administrative issues. Any disclosure that a party might expect the mediator to hold confidential pursuant to Standard III is a substantive conversation.

A mediator who is a lawyer, therapist or other professional may not mediate the dispute when the mediator or the mediator's professional partners or co-shareholders has advised, counseled or represented any of the parties in any matter concerning the subject of the dispute, an action closely related to the dispute, a preceding issue in the dispute or an out growth of the dispute.

D. A mediator shall not charge a contingent fee or a fee based on the outcome of the mediation.

E. A mediator shall not use information obtained or relationships formed during a mediation for personal gain or advantage.

F. A mediator shall not knowingly contract for mediation services which cannot be delivered or completed as directed by a court or in a timely manner.

G. A mediator shall not prolong a mediation for the purpose of charging a higher fee.

H. A mediator shall not give or receive any commission, rebate or other monetary or non-monetary form of consideration from a party or representative of a party in return for referral or expectation of referral of clients for mediation services.

VIII. Protecting the Integrity of the Mediation Process. A mediator shall encourage mutual respect between the parties and shall take reasonable steps, subject to the principle of self-determination, to limit abuses of the mediation process.

A. A mediator shall make reasonable efforts to ensure a balanced discussion and to prevent manipulation or intimidation by either party and to ensure that each party understands and respects the concerns and position of the other even if they cannot agree.

B. If a mediator believes that the statements or actions of ~~a~~ any participant, ~~including those of the mediator~~, including those of a lawyer who the mediator believes is engaging in or has engaged in professional misconduct, jeopardize ~~conducting a mediation consist with these Standards, a mediator shall take appropriate steps including, if necessary, postponing, withdrawing from, or terminating the mediation.~~ or will jeopardize the integrity of the mediation process, the mediator shall attempt to persuade the participant to cease his/her behavior and take remedial action. If the mediator is unsuccessful in this effort, s/he shall take appropriate steps including, but not limited to, postponing, withdrawing from or terminating the mediation. If a lawyer's statements or conduct are reportable under Standard III.C.(2), the mediator shall report the lawyer to the State Bar or the court having jurisdiction over the matter in accordance with North Carolina State Bar Rule of Professional Conduct 8.3.

In the Supreme Court of North Carolina
Order Adopting Amendments to the Standards of Professional Conduct for Mediators

WHEREAS, section 7A-38.2 of the North Carolina General Statutes establishes the Dispute Resolution Commission under the Judicial Department and charges it with the administration of mediator certification and regulation of mediator conduct and decertification, and

WHEREAS, N.C.G.S. § 7A-38.2(a) provides for this Court to adopt standards for the conduct of mediators and of mediator training programs participating in the proceedings conducted pursuant to N.C.G.S. § 7A-38.1, 7A-38.3, 7A-38.4A, 7A-38.3B, and 7A-38.3C.

NOW, THEREFORE, pursuant to N.C.G.S. § 7A-38.2(a), the Standards of Professional Conduct for Mediators are hereby amended to read as in the following pages. These amended Standards shall be effective on the 1st of January, 2012.

Adopted by the Court in conference the 6th day of October, 2011. The Appellate Division Reporter shall promulgate by publication as soon as practicable the portions of the Standards of Professional Conduct for Mediators amended through this action in the advance sheets of the Supreme Court and the Court of Appeals.

s/Timmons-Goodson, J.
For the Court

AMENDMENTS TO THE RULES GOVERNING THE ADMISSION TO PRACTICE LAW IN NORTH CAROLINA

The following amendments to the Rules Governing the Admission to Practice Law in North Carolina were duly adopted by the North Carolina Board of Law Examiners on October 24, 2012, and approved by the Council of the North Carolina State Bar at its quarterly meeting on January 25, 2013.

BE IT RESOLVED by the North Carolina Board of Law Examiners that the Rules Governing the Admission to Practice Law in North Carolina, particularly Section .0500, be amended by adding Rule .0503 regarding requirements for military spouse comity applicants.

.0503 REQUIREMENTS FOR MILITARY SPOUSE COMITY APPLICANTS

A Military Spouse Comity Applicant, upon written application may, in the discretion of the Board, be granted a license to practice law in the State of North Carolina without written examination provided that:

(1) The Applicant fulfills all of the requirements of Rule .0502, except that:

(a) in lieu of the requirements of paragraph (3) of Rule .0502, a Military Spouse Comity Applicant shall prove to the satisfaction of the Board that the Military Spouse Comity Applicant is duly licensed to practice law in a state or territory of the United States, or the District of Columbia, and that the Military Spouse Comity Applicant has been for at least four out of the last eight years immediately preceding the filing of this application with the Secretary, actively and substantially engaged in the full-time practice of law. Practice of law for the purposes of this rule shall be defined as it would be defined for any other comity applicant; and

(b) Paragraph (4) of Rule .0502 shall not apply to a Military Spouse Comity Applicant.

(2) Military Spouse Comity Applicant defined. A Military Spouse Comity Applicant is any person who is:

(a) An attorney at law duly admitted to practice in another state or territory of the United States, or the District of Columbia; and

(b) Identified by the Department of Defense (or, for the Coast Guard when it is not operating as a service in the Navy, by the Department of Homeland Security) as the spouse of a service member of the United States Uniformed Services; and

(c) Is residing, or intends within the next six months to be residing, in North Carolina due to the service member's orders for a permanent change of station to the State of North Carolina.

(3) Procedure. In addition to the documentation required by paragraph (1) of Rule .0502, a Military Spouse Comity Applicant must file with the Board the following:

(a) A copy of the service member's military orders reflecting a permanent change of station to a military installation in North Carolina; and

(b) A military identification card which lists the Military Spouse Comity Applicant as the spouse of the service member.

(4) Fee. A Military Spouse Comity Applicant shall pay a fee of $1,500 in lieu of the fee required in paragraph (2) of Rule .0502. This fee shall be non-refundable.

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules Governing the Admission to Practice Law in North Carolina were duly approved by the Council of the North Carolina State Bar at a regularly called meeting on January 25, 2013.

Given over my hand and the Seal of the North Carolina State Bar, this the 4th day of February, 2013.

s/L. Thomas Lunsford, II
L. Thomas Lunsford II, Secretary

After examining the foregoing amendments to the Rules Governing the Admission to Practice Law in North Carolina as approved by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 7th day of March, 2013.

s/Sarah Parker
Sarah Parker, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules Governing the Admission to Practice Law in North Carolina be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 8th day of March, 2013.

s/Beasley, J.
For the Court

HEADNOTE INDEX

TOPICS COVERED IN THIS INDEX

WORKERS' COMPENSATION—Continued

trol of the area where defendant testified plaintiff fell, and application of the going and coming rule could not be determined. **Cardwell v. Jenkins Cleaners, Inc., 1.**

ZONING

Sign permit—interpretation of ordinance—unduly restrictive—The Board of Adjustment (BOA) erred in prohibiting plaintiff from relocating a sign as necessary to accommodate a state highway project based on the BOA's determination that a sign permit issued to plaintiff had expired. The BOA's interpretation of the term "work" as used in the sign permit to mean only visible activities related to construction was too narrow and unduly restrictive. Zoning ordinances are strictly construed in favor of the free use of real property and plaintiff's actions were sufficient to constitute "work." **Morris Commc'ns Corp. v. City of Bessemer City Zoning Bd. of Adjust., 152.**

Zoning—amendment—statement of reasonableness—failure to approve——Where defendant failed to approve a statement of reasonableness as required by N.C.G.S. § 160A-383 when adopting a zoning amendment which rezoned rural land to promote commercial development, the amendment was invalid. The unanimous opinion of the Court of Appeals was reversed. **Wally v. City of Kannapolis, 449.**